



ADVISORY
Industry Information

Privilege in the context of regulatory investigations in Jersey and Guernsey – what regulated entities need to know

July 2020

Legal privilege protects communications between a client and professional legal advisers and can, when used wisely, be effective in either delaying or preventing the disclosure of some documents.

For that reason, it is a subject that needs to be understood by general counsel, compliance professionals, licensees, individuals and trustees that may find themselves being asked to or where they are required to co-operate with the Regulator in the exercise of its regulatory and supervisory functions.

Some caveats apply. First of all, attempting to assert privilege without external counsel involved is pretty much a non-starter. Lawyers (and specifically external lawyers) must be engaged at an early stage so that any steps, and in particular any investigation, is structured so that information can be protected by privilege from the outset. In particular, failure to consult legal advisors either internally or externally in the face of a regulatory investigation can lead to sub-optimal outcomes for the business. Early legal intervention is key, and if this is not achieved, closing the privilege stable door afterwards is close to impossible. Holding the door closed against the regulator, as many of our clients know, is also hard. Below we give a very high level summary of the issues around voluntary and involuntary disclosures and how privilege (if it is available) can be used in that context.

Can you refuse to disclose to the Regulator¹ in the context of regulatory investigations in Jersey and Guernsey?

Regulatory investigations can take a number of different guises, from relatively soft-touch requests such as being asked to respond to a query from the Regulator, to a formal investigation supported by a 'dawn raid' to secure documentation.

Faced with an investigation, regulated businesses may for example, either voluntarily or in co-operation with the Regulator, need to conduct internal reviews of compliance issues and/or employ external consultants to fulfil that role. They and/or their external consultants may need to prepare confidential, internal documents in the course of co-operating with a regulatory investigation and before enforcement proceedings are reasonably contemplated. As part of an investigation by the Regulator, individuals may be questioned.

Voluntary Disclosure

All regulated businesses should operate their business with integrity and deal with the regulator in an open and co-operative manner which means in reality that sometimes regulated businesses voluntarily provide information to the Regulator. That does not mean that regulated businesses are obliged to simply provide documents when asked to do so. There may be good reasons for withholding information from the Regulator, including privilege and obligations to third parties.

The Regulator will generally start any discussion with a voluntary request for information. Whether or not to comply will always depend on the individual circumstances. We recommend obtaining legal advice prior to voluntarily disclosing any documents to the Regulator, to ensure that in doing so you are not exposing your business to other risks.

¹ Regulator means the Guernsey Financial Services Commission (GFSC) or Jersey Financial Services Commission (JFSC) as appropriate.



Forced Disclosure

Regulators have the power to compel regulated businesses to co-operate during an investigation, or to support an investigation by another supervisory authority in a different jurisdiction. Those formal steps include the following:

- A notice to require a relevant person to provide documents or attend for an interview. Such a notice would override any duty of confidentiality to a third party. Furthermore, any statement provided in response to notice cannot be used in any subsequent criminal prosecution;
- To appoint an independent investigator to report to the Regulator on the nature or conduct of a financial services business, its competence or financial standing and that of its principal persons, and compliance with the regulatory laws and codes of practice ; or
- To obtain a warrant to enter into premises to search for and secure documentation (“dawn raid”, or to compel someone to answer questions from the Regulator. This will also allow the Regulator to take documents/copies of documents.

A regulated business faced with a formal request from the Regulator is likely to have very limited options to withhold any documentation and the entity, and its personnel, run considerable corporate and personal risks if they do. Advice should always be taken in this situation.

Can You Withhold Documents? Yes but only using Legal Privilege

The relevant laws in both Islands are clear that all of the above powers of the Regulator are expressly subject to, and do not override, any legal professional privilege that the regulated entity is entitled to rely upon. If privilege (and only “legal professional privilege”) has been properly obtained and held, the Regulator cannot obtain legally privileged documents through formal action. Unfortunately, holding privilege is usually a tough operational challenge, and cannot usually be achieved without involving external counsel.

No other forms of privilege will be effective and in particular employees cannot assert the right to privilege against self-incrimination. The right not to respond to questions available in civil, criminal or other proceedings is unlikely to be available in responding to the Regulator’s questioning under compulsion² and failure to answer can carry criminal consequences. In this situation, again, we strongly advise taking legal advice particularly before any interview by the Regulator.

Dawn Raids

We cannot emphasise strongly enough the importance of regulated entities having a clear policy in place to handle a dawn raid, which must include seeking assistance from an external lawyer to help supervise the dawn raid, and request that the person executing the warrant allow for time for that lawyer to attend at the premises. Although the person executing the warrant does not need to allow any time for an external lawyer to attend, in our experience they will normally allow a short time for this.

Conclusion

Regulators have wide-reaching powers and you may assume that you cannot resist a disclosure request, but privilege if applied early and correctly (and realistically only when external counsel are instructed) can help businesses delay or prevent the disclosure of documents and buy businesses time to decide what to do. Keeping privilege is difficult and can be expensive. Having a clear internal strategy about when to invoke it with the Regulator and having the right external counsel on your bench for those moments is key.

² See the Privy Council decision in the Jersey case of *Volaw v Comptroller of Taxes* [2019] UKPC 29



Authors

For further information please speak with your usual contact at Walkers or contact:



Sarah Brehaut
Partner, Guernsey
T: +44 (0) 1481 748 930
E: sarah.brehaut@walkersglobal.com



Nigel Sanders
Partner, Jersey
T: +44 (0) 1534 700 862
E: nigel.sanders@walkersglobal.com



Rachel Amos
Senior Counsel, Jersey
T: +44 (0) 1534 700 720
E: rachel.amos@walkersglobal.com



Jamie Bookless
Senior Counsel, Guernsey
T: +44 (0) 1481 748 926
E: jamie.bookless@walkersglobal.com



Daniel Read
Senior Counsel, Jersey
T: +44 (0) 1534 700 764
E: daniel.read@walkersglobal.com



Helena Lavin
Senior Associate, Guernsey
T: +44 (0) 1481 748 948
E: helena.lavin@walkersglobal.com

Disclaimer

The information contained in this advisory is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter.