The Right Honourable Andrew Tyrie MP
Chairman of the Treasury Select Committee &
Members of the Treasury Select Committee
House of Commons
London SW1A 0AA

18th January 2016

By E-mail: tyriea@parliament.uk; treascom@parliament.uk;

Dear Mr Tyrie and Committee Members,

**Re: The FCA and Section 348 of FSMA 2000**

As you will be interviewing the senior members of the FCA over the next few days regarding their decision to cancel their review into bank culture, we would like to bring to your attention a matter which, we believe, the Treasury Select Committee should be aware of regarding the relationship between the FCA and the banks.

Our very real concerns are that:

1) The FCA is interpreting Section 348 of FSMA 2000 inappropriately and is therefore acting in breach of that Section in order to give banks information that is then used to the detriment of consumers.

2) The FCA is also breaching the Data Protection Act by using or disclosing information given in confidence.

3) The FCA has an unhealthy relationship with the big 'firms' it regulates which compromises its 1st objective to *"secure an appropriate degree of protection for consumers."*

We do not reach these conclusions lightly and, unfortunately, some of our members have been on the receiving end of the consequences of such conduct. Over and above our specific concerns, it is surely increasingly evident some banks, who have already been proven to behave unprofessionally, unethically and/or in breach of regulations or the law, feel they can continue to do so with, at worst, a fine from the Regulator paid for by their shareholders and, at best, no action at all because of time restraints or technicalities. The detriment to consumers and particularly the SME sector, is becoming critical.

**Background.**

SME Alliance is a small, not for profit organisation set up to support SMEs and, in particular, SMEs which have had or are having problems with banks. Many of our members have issues with IRHP, EFGs, GRG or other so called 'Business Support Units'. However, our main goal is not to deal with individual cases but to communicate with regulators, authorities and relevant organisations on the collective issues of our members.

One such issue that is common to most members, is their inability to retrieve information from their central files at the banks – information that would potentially assist in resolving issues via FOS, mediation or the Courts. The inconsistency of the information members have received when submitting a DSAR, is something we are talking to the ICO about and this is ongoing.

As a consequence of trying to help members retrieve their information, we have also become aware over the last few months of cases where much of the information supplied in the DSARs has been manipulated or falsified to the detriment of the client and to the advantage of the banks. In some cases the falsified documents have then been used in Court and with dire consequences. This is not about a few isolated cases with a few minor errors but rather about many cases where bank employees must have spent hours removing words, sentences, paragraphs or even entire pages from clients' documentation or from transcripts of conversations with clients. Similarly, words and punctuation have sometimes been added to alter the meaning of documents. In some cases it is clear clients' signatures have been forged.

These alterations are entirely separate to redactions put in place because of data protection. Many of the documents our members get from their subject access requests are heavily redacted but our concerns are with the actual falsification of data held on central files.

On 3rd November 2015 I, as a Director of SME Alliance (SMEA), together with Serious Banking Complaints Bureau (SBCB) and Modus Mediation (MM), presented 11 such cases at a meeting with the FCA. SBCB was represented by its Director, Andy Keats, who is also a Director of SMEA and MM was represented by Steve Middleton, a member of SMEA and an expert in regulatory issues. Such was the seriousness of our allegations against various banks but in particular RBS, Guto Bebb MP also attended with us as did an experienced barrister, Simon Stafford-Michael of 1 Pump Court.

I should point out this meeting was subsequent to one on 23rd September 2015 we (Nikki Turner and Andy Keats) attended with Karina McTeague (Director of Retail Banking Supervision) and Clare Bolingford (Head of Department - Executive Office), at which Mr Keats attempted to present a number of cases showing the falsification of documents by RBS. Unfortunately Ms McTeague refused to look at any of the evidence and told us *"– It's a criminal matter and we do not have the power from Parliament to deal with criminal matters.*". She was very insistent on this point, which is fully documented and would not proceed with the meeting.

We were extremely confused by this as it has always been our understanding the FCA, as the FSA before it, have always had the power under FSMA 2000 to investigate and then prosecute under Section 401 and 402 the particular allegations that we had brought to their attention. It was only after James Hurley of the Times newspaper had called the FCA and asked if they had refused to see evidence of wrong doing by RBS, the FCA changed their position and agreed to the November 2015 meeting.

Our presentation on 3rd November was exclusively to draw to the attention of the FCA what is potentially another example of systemic misconduct and even dishonest conduct, by banks. It was clearly not about any case on an individual basis, as the FCA say they do not deal with individual cases.

We think it would be fair to say the FCA representatives at the 3rd November meeting (which did include Ms Bolingford but not Ms McTeague) were shocked by the evidence presented and they asked our permission to share it with the police. They also said they would investigate the matter. Ms Bolingford has said we will have the results of that investigation in the near future.

**Our Concerns**

Our major concern and the reason for this letter is that, subsequent to that meeting and contrary to the FCA's hard and fast line they "*do not investigate individual cases*", the FCA have supplied the names of the individual complainants from the cases presented, descriptions of the cases and, in certain instances, some of the documentation we provided, directly to the banks concerned. Additionally, Ross McEwan confirmed on LBC Radio, he had seen all the allegations against RBS and they are "*just not true*." He also confirmed to a third party, he has seen all 8 cases we presented on RBS. In both instances (the radio broadcast and his conversation with a third party) Mr McEwan has been surprisingly outspoken in his condemnation of Mr Keats.

In almost all instances the FCA have said the banks were already aware of these cases and held some information on them via the 'customer complaints departments'. This is both inaccurate and misleading. In almost all cases, the banks had not been informed of the allegations that documentation had been falsified and the documents held in 'complaints departments' related to the original complaints made before these issues were uncovered. The information the banks now appear to have is also telling them these cases are now subject to FCA scrutiny and confidential evidence or knowledge the banks did not previously have, has been shared.

Whether Mr McEwan is right and he has seen all 8 cases we presented against RBS or whether the replies from the FCA are right and it is just a couple of documents, is beside the point – although clearly both parties cannot be right. But most worrying is that, as a direct result of documents shown to RBS and Barclays, two cases have now been badly compromised and, but for the efforts of Mr Middleton and also the interjection of George Osborne's office, both cases risk dire consequences and further loss for the complainants, as both banks in receipt of evidence against them, are now behaving aggressively toward their respective clients.

We have asked the FCA to clarify: What has been sent to the banks; why; who sent it and; under what regulatory basis was it sent? The FCA have replied to say:

*"In terms of the regulatory basis for sharing information, disclosure of the personal information was made under S.348 of the Financial Services & Markets Act (2000) ("FSMA"), for the purposes of enabling us to discharge our public functions – particularly, the protection of consumers. We have therefore not breached data confidentiality, and believe that our actions support the fair investigation of the allegations made by SBCB, SMEA and MM at our 3 November 2015 meeting."*

This reply is not just illogical, it also confirms something we have been concerned about for some time (some of us for many years). S.348 of FSMA 2000 has now become a tool the banks can rely on to stop their misconduct ever being properly scrutinised in the public arena or by those challenging their conduct while, it now appears, it has also become a defence weapon used against the consumer to assist the banks.

Put simply – while banks can receive information and case details regarding individual consumers from the Regulator under S.348, the same Section means consumers are not entitled to any information from the Regulator about bank conduct which may have affected them. This is inequitable and unlawful.

Additionally the FCA have sought to rely on the fact two of the cases presented to them have been reported in the press. However, while some of the evidence supporting those cases (and presented to the FCA) was shown to the journalist in order to verify a story of public interest, the evidential facts were not published and are not in the public domain. Again S.348, when interpreted correctly, would not allow the FCA to share any of this information whatsoever with the banks.

Perhaps the most worrying aspect of all this is that, while Mr McEwan is on the one hand saying the allegations against RBS are "*just not true*", he also said the discrepancies in clients' documents would not, in any event, make any material difference to the outcome of any case. In reply to comments from journalist Ian Fraser on Mr McEwan's LBC interview, he said "*..show me what difference it would of made to the actual case that was held and the outcome of that.*"

In other words, it doesn't actually matter if clients' central files are altered. On Wednesday 13th January 2016, Mr Keats received a letter from the FOS with the same conclusion. Aside from the fact this is blatantly untrue - we have clear examples of exactly how damaging this false information has been when relied on by the Courts - it is an indication of how lax bank regulation has become when the CEO of a major bank and also a representative of FOS, can state this. The implication is banks (or certainly RBS) have no respect for the rules imposed by FSMA 2000 and feel they can act outside of both the Law and the Act with little concern the Regulator will sanction them. In light of such views, it is hardly surprising 'bank culture' remains an anathema to most people and a danger to society.

At every request for information involving the banks, the FCA will tell consumers, IFAs and whistle blowers, no information can be given because of the strict terms of S.348. In this way, for example, the victims of 'HBOS Reading' (which has been, since 2010, the subject of an FSA now FCA Section 168 Investigation) have been unable to find out anything further about the investigation or even ascertain whether or not it has been concluded and despite being advised at the outset that they would be kept informed. Similarly, whistle blowers who might hand over sensitive and critical information to the FCA, have no idea what happens to that information, who will see it or what arrangements (deals) the banks might make in confidence with the Regulator, to mitigate any misbehaviour brought to the FCA's attention (a fact confirmed in Andrew Green QC's report into the conduct of the FSA in relation to HBOS).

Despite our continued determination to collaborate with the FCA, we are well aware we can expect little in the way of information from them regarding complaints from our members about banks because, a) the FCA say they don't deal with individual cases and b) they say S.348 does not allow them to share any information about their investigations or about the 'firms' they regulate.

Consequently we would ask, how can the FCA use the same S.348 to hand over names and information to the banks given to them in confidence specifically to evidence a potentially systemic issue? And this must also be a breach of data protection because the person or persons who gave us permission to share information with the FCA, did not give the FCA permission to share it with others – and neither has the FCA asked those people for permission. In fact, the FCA specifically asked if they could share the information from our presentation on 3rd November with the police, presumably because they thought it evidenced potentially criminal conduct – we suggest Section 17 of the Theft Act 1968 has potentially been broken. We consented. However, no one asked if it could be shared with the banks in question – to which Mr Keats, Mr Middleton and I would have definitely said no and for obvious reasons.

We are yet to receive a final reply from the FCA regarding the allegations we have raised, so this letter does not comment on the possible outcome of our presentation. It may well be the information supplied to the police will result in further action or the FCA may, as a result of their investigation, take enforcement action against the banks in question. We hope so because the 11 cases we presented were just the tip of the iceberg. But whatever the outcome of our allegations against the banks, it doesn't alter our very grave concerns about what can only be perceived as a cosy and protective relationship between banks and the Regulator and to the detriment of consumers.

The media has been full of suggestions the Treasury is ultimately behind the decision to halt the review into bank culture. We have no idea whether or not that is true - although Ms McTeague's comments would suggest it is entirely possible - but in light of all the above, we would ask the Committee to consider whether:

- The FCA is actually fit for purpose and able to impartially regulate the banks
- S.348 of FSMA 2000 should be reviewed to see if it has become a dangerous tool used to the advantage

of the banks and the disadvantage of consumers

- The lack of transparency in the relationship between the Regulator and the big banks it regulates - not the IFAs who feel the full regulatory force of the FCA on a regular basis - has resulted in a real bias towards what Mr Garnier recently referred to as "*its members*."

As directors of SME Alliance, we are very focussed on the wellbeing of our members, as that is our main objective. We would ask if it's actually possible for the FCA to fulfil its objective to "*secure an appropriate level of protection for consumers"* and at the same time *"protect and enhance the integrity of the UK financial system"*? Surely those two objectives conflict the FCA. While the UK financial system repeatedly shows itself to be lacking in integrity, it seems entirely possible the only way the FCA can protect it is by reducing the "*appropriate level*" of consumer protection?

Certainly in the matter we have outlined above the FCA have, perhaps unwittingly, been instrumental in causing detriment to consumers. We would add that, in our opinion and after years of investigating bank misconduct and the role of the Regulator, S.348 has long been a menace and a serious obstacle to getting 'fair and reasonable' treatment from banks, for many, many consumers.

Please note, this letter is about what we believe are misguided or potentially damaging policies within the FCA and not about individuals in the organisation. We still do not know who was responsible for disseminating the evidence or who authorised that action – but we are aware from e-mail correspondence to SMEA, SBCB and MM, that this matter is known about at the highest levels of the FCA including Ms McDermott.

We thank you for taking the time to read this and we hope you will consider the points we have raised – especially with regard to S.348 of FSMA 2000. It was suggested at a Parliamentary Roundtable meeting we attended last November, hosted by Baroness Kramer, we should present to the TSC the substantial evidence we hold showing dishonest conduct in banks. If any committee member would like to see some or all of the evidence we presented to the FCA (for the purpose of looking at clear examples of bank misconduct of this particular nature and separate to our concerns of potential FCA malfeasance), we would be happy to provide the case studies – with the appropriate permission from the persons whose cases are involved..

Yours sincerely

Nikki Turner and Andy Keats
For and on behalf of SME Alliance

Cc: Guto Bebb MP; Nick Gould; Steve Middleton; Simon Stafford Michael