

6-4-2017

Dear Complainant

**Complaint against the Financial Conduct Authority
Reference Number: FCA00245**

Thank you for your letter dated 25 October 2016, which we received on 2 November. I am sorry that it has taken some time to respond to you. As you know we had to request additional material from the FCA. I have now reviewed the information sent to me by you and the Financial Conduct Authority (FCA), and am able to write to you.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

What we have done since receiving your complaint

I have reviewed all the papers you and the regulator have sent to my office and I have also asked additional questions of the FCA and considered their response. Both you and the FCA have had the opportunity to comment in response to my preliminary decision. I have carefully considered the points that you made but they have not altered my decision on your complaint, which is explained below.

Your complaint

On 14 December 2015 you wrote to the FCA to complain about aspects of the regulatory process being applied to a financial services firm ("the Firm"). You were concerned about your recent removal as non-executive Chair by the Firm's Board and disagreed with the view of others in the Firm that you had an "unconstructive" approach to the FCA's intervention. However, you considered that the FCA's enforcement process was taking too long, had made subjective and potentially vindictive decisions, and was too reliant on what you described as separate 'off the record' meetings with the Chief Executive. You said that the FCA process had created avoidable uncertainty and conflicted with guidance given in recent speeches by high-level FCA staff. You wanted a full internal review of the matter to ensure that the FCA had deployed its powers correctly and responsibly in relation to this case.

On 13 January 2016 the FCA informed you that it had decided to defer investigation of your complaint pending completion of the enforcement process against the Firm in accordance with paragraph 3.7 of the Complaints Scheme ("the Scheme"). You accepted this decision but asked how long the ongoing action would take and posed some further questions about the process so far. The complaint process recommenced in March 2016 and on 14 April the FCA

wrote to you to say that it had categorised your complaint as lack of care and unreasonable delay. The FCA issued its decision about your complaint to you on 17 October 2016. Your complaint was not upheld on the basis that, having reviewed the extensive investigation file provided by the Enforcement team, the Complaints team was satisfied that the FCA did not act unreasonably in the way it conducted its investigation into the Firm and the actions it decided to take. The decision letter summarised the reasons for this conclusion and advised that full details of the investigation could not be supplied to you because of confidentiality restrictions in section 348 of the Financial Services and Markets Act 2000 (FSMA).

You are dissatisfied with this response and have asked me to investigate. You have asked me to look at the following matters in particular:

- (a) The FCA's decision to deal primarily with the Firm's Chief Executive via "narrow 'off the record' briefings" when it was the whole Board's responsibility to ensure good governance. You would like me to scrutinise the minutes of all these meetings, especially in view of the fact that "the Board was unanimous in its response to the draft Warning Notice".
- (b) The FCA's reliance on "just a Skilled Person Report without any contact with the non-executive directors".
- (c) The resulting failure of the FCA to understand the beneficial changes that had taken place in the Firm, which you consider is "an example of bad regulation, executed unaccountably, and resulting in unfair damage to good people's careers".
- (d) The time taken by the FCA to respond to your complaint.

My position

The FCA's decision to bring enforcement proceedings against the Firm and the sanctions that were imposed as a result are not matters for this Complaints Scheme, since that is a statutory process and there are separate formal procedures for challenging enforcement decisions. However, I have been able to review confidential material about the proceedings supplied to me by the FCA, and this has helped me to form my view about the adequacy of the complaint investigation conducted by the FCA.

Conduct of the enforcement proceedings

The first three complaints you have raised with me (a-c above) all relate to the way in which the FCA conducted enforcement proceedings against the Firm. In order to consider these matters, the FCA complaints team reviewed the extensive records of those proceedings and concluded that they had been conducted reasonably and without undue delay. Based on the material I have seen, and having considered your representations in response to my preliminary decision, I still consider that this was a reasonable conclusion. The s166 Skilled Person's report and the FCA's own findings confirm that there were serious and complex issues to address, and that there were extensive investigations to be undertaken. While it is always desirable for investigations of this kind to proceed as swiftly as possible, I have not seen any evidence to suggest that this investigation was unduly delayed.

I am also satisfied that the FCA complaints team was correct to conclude that s348 of FSMA applied to the material it had reviewed. This is the way that Parliament, rather than the FCA, has decided that the regulatory system should operate. For the same reason, I am not able to supply detailed references to the material I have reviewed, although I hope that it will reassure you that I have seen it and been able to form an independent view.

Having said that, part of your complaint was an allegation that the FCA had relied solely on 'off the record' meetings with the Firm's Chief Executive, rather than consulting the Board and non-executive members. This aspect of your complaint was not specifically addressed in the complaint response you received from the FCA. I consider this to be an omission and I have made further enquiries of the FCA as a result. In response, the FCA says that:

- During the investigation no 'off the record' meetings were conducted with the Firm, only open or on a Without Prejudice basis which were duly recorded.
- From the inception of the case the CEO was the point of contact for the Firm. The case team did not specify/restrict who from the Firm could attend the meetings, this was left to the discretion of the Firm. An example being in November 2015; due to (your) strong opinion on the case it was agreed that a meeting with the Chairman should be arranged and duly took place on 25 November 2015.

I consider this to be a satisfactory response. Although I know you disagree, I remain of the view that it was a matter for the Firm to decide who should be its point of contact with the FCA and the FCA is not responsible for the Firm's decision to remove you as Chair. You were involved, through the meeting on 25 November 2015, the FCA's notes of which I have reviewed along with the other material supplied. It is clear from those notes that you were able to put forcefully the points of concern you had, and that the FCA indicated that you and they were far apart on the question of an appropriate penalty. It may be that you would have liked greater involvement but that was essentially a matter for the Firm and not the FCA. It is not clear that this would have materially changed the outcome since ultimately the Firm accepted the outcome of the Enforcement proceedings.

However, as indicated above, in my view the FCA complaint response was lacking to the extent that it did not address this aspect of your complaint. I therefore partly uphold your complaint and I **recommend** that the FCA should apologise to you for this omission. I also **recommend** that the FCA complaints team should review its processes and quality checks to ensure that all aspects of a complaint are identified and addressed.

I also note that the FCA's record of the meeting with you and the CEO on 25 November 2015 was held only in handwritten form in notebooks and was not typed up until requested by me as part of my review – on the grounds that the handwritten notes were hard to decipher. In my view this is poor practice and I am not persuaded by the FCA's explanation that it is justified because it would impede progress if investigators had to type notes of every meeting/call they made. The dangers of not doing so - loss of information due to the passage of time, unclear handwriting, staff turnover and faded memories - are readily apparent. In my view this practice is not acceptable and I **recommend** that the FCA should review its approach and ensure that all significant meetings are adequately recorded in electronic form as soon as possible after they have occurred.

Delay

You first complained to the FCA in December 2015 but your complaint was deferred pending the completion of the enforcement proceedings. There is no dispute that this was a reasonable approach. A Final Notice in respect of the Firm was issued on 22 February 2016 and the FCA complaints team contacted you again on 7 March. You confirmed on 18 March that you wished to proceed and your complaint was summarised to you on 14 April. These actions

were all within a reasonable timescale, although I note that due to a failure to update an earlier draft, the FCA's letter of 14 April only gave you one working day to respond to the accuracy of its complaints summary instead of the intended 5 or 6 working days.

According to the FCA's own internal targets, the final response was due to be sent to you by 14 July. However, there is a gap on the FCA's file between 14 April and 9 June 2016 and I am unable to tell what action, if any, was taken during that time. An update was sent to you on 21 June. On 20 July the Law and Policy team in Enforcement were still requesting sight of your original complaint. The internal report on your complaint was not completed until 15 August. An update was sent to you on 7 September together with notification that the staff member handling your complaint was moving to another team. She drafted her report before leaving but there was then a further month's delay in completing the internal quality checks before the FCA's complaint decision was sent to you on 17 October 2016.

I note that the FCA's complaint response to you apologises for the length of time taken to complete its investigation into your complaint. I have considered whether that is an acceptable response to its delays or whether it would be appropriate for me to recommend that a small payment is made to you. I have concluded that this would be appropriate, since in my view there was avoidable delay in handling your complaint, as set out above, particularly between August and October 2016. I **recommend** that the FCA offers to pay you the sum of £75 in recognition of the distress and inconvenience that has been caused to you by its delay in handling your complaint. I also **recommend** that the FCA reviews its processes and quality checks to ensure that when draft letters are amended, response times are also updated.

Conclusion

In conclusion, for the reasons set out above, I partly uphold your complaint in relation to the way in which it was handled. I recommend that:

- The FCA apologises to you for failing to address one aspect of your complaint and offers to pay you the sum of £75 for distress and inconvenience caused by its complaints handling delays
- The FCA reviews its processes and quality checks to ensure that all aspects of a complaint identified are addressed and that when draft letters are amended, response times are also updated.
- The FCA reviews its practice on the electronic recording of significant meetings.

I am pleased to note that, in response to my preliminary decision, the FCA has agreed to accept and implement all my recommendations. You should shortly hear from them about the apology and offer of payment. I realise that you will be disappointed by my decision overall but I hope you will understand how I have reached it.

Yours sincerely



Antony Townsend
Complaints Commissioner