Complaints Commissioner

Office of the Complaints Commissioner
23 Austin Friars
London EC2N 2QP

Tel: 020 7562 5530
E-mail: complaints@frccommissioner.org.uk
www.frccommissioner.org.uk

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Our Ref: FCA00261

Dear Complainant,

Your complaint about the Financial Conduct Authority (FCA)

Thank you for your correspondence about your complaint against the Financial Conduct Authority (FCA).

I have now considered your complaint and I am writing to you with my final decision, taking into account your comments on my preliminary decision. The concerns raised in your complaint span a long period and cover complex matters; I needed to make extensive inquiries of the FCA to be able to uncover all the relevant information and understand the events that took place leading up to your complaint.

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.

As you can find full details of how I deal with complaints at www.frccommissioner.org.uk I have not set them out here. If you need further information, or information in a special format, please contact my office at complaints@frccommissioner.org.uk, or telephone 020 7562 5530, and we will do our best to help.

Your complaint

You are concerned that the FCA concluded their investigation into the complaint of Mr H (your client) without considering the whistleblowing emails you sent to them over a number of years and before any problems actually materialised, warning them of your concerns about SM and the group companies. The FCA went as far as to say that your emails were not relevant to Mr H's complaint. You also believe that the FCA did not take action in relation to those emails or act appropriately when they "became aware that the firms within the group of companies were not dealing with their regulator in an open and cooperative way, as required by the Principles of Business", set out in the FCA Handbook (element one).

In your complaint you also allege that the FCA failed to supervise and investigate SM, later HG, adequately as they did not act on whistleblowing reports over a number of years and did not ensure that the firm had PII cover in place or that the complaints logged against the firm were reported to the insurer in line with the requirements of the policy. This resulted in customers of the firm not being able to claim on the PII and losing significant proportions of their investments over the FSCS limit of £50,000 (element two).

The background to your complaint

You worked as a financial adviser at SM for years and later held controlled functions. The firm was taken over by firm P in September 2009. You resigned in May 2010. You were later contacted by a number of former clients and colleagues at the firm who advised you of their concerns in relation to the way the firm was being operated and the way client monies were invested and used.

You started reporting your concerns to the FCA in December 2011 through the Whistleblowing line and to Supervision directly, and continued to notify them of each issue as you became aware of them.

You became directly involved in supporting a complaint against the FCA by one of your clients, Mr H, in relation to SM and the FCA's apparent lack of action, and submitted a supporting statement. The information in that statement was backed up with a printout of emails between you and the FCA (titles and dates only, not their content). You were, however, advised by the FCA Complaint Investigator dealing with Mr H's complaint that your statement and the evidence provided were not relevant to Mr H's complaint. This is when you submitted your own complaint about the FCA's actions in relation to the information you had provided over the years, and their conduct in relation to SM and the group of companies involved.

My findings

Element one

I reviewed element one of your complaint using, amongst other things, the results of the work carried out by a specialist supervision team of the regulator at my request in relation to your client's complaint. As part of that review I requested that you provide a copy of all the emails you sent to the regulator over the years, as the regulator did not appear to have a copy of all your correspondence on file.

Having seen your emails and a detailed chronology and report about the work undertaken by the regulator, I believe the best way to address the concerns you raised would be to explain to you what work was undertaken by the regulator. Below is a summary of the evidence I have reviewed. I go into as much detail as I am able, bearing in mind the restrictions placed upon what the regulator and I are permitted to disclose under section 348 of the Financial Services and Markets Act 2000.

Date	Event	Notes
August 2009	Treating Customers Fairly verification visit to SM	Satisfactory outcome – firm able to demonstrate good practices
September 2009	P takes over SM	
April 2010	Managing Investments (discretionary service) added to SM permissions.	
May 2010	Mr A resigns from SM.	
May 2011	First whistleblowing report received by the regulator.	

June 2011	Second whistleblowing report received by the regulator.	
June 2011	Supervision begins work in relation to the allegations made in the whistleblowing reports.	Supervision sought input from various internal departments, such as Enforcement and the General Counsel Division (GCD), as well as externally from the City of London Police (CoLP). A significant amount of work was undertaken to verify the information provided and to identify the best way forward to protect consumers and maintain the integrity of the market.
October 2011	The regulator conducted a firm visit and set out their findings and concerns in a letter to SM.	
November 2011	The regulator requests details of the firm's PII cover.	
December 2011	Mr A contacts the FCA with information.	
December 2011	Continuing work undertaken by the regulator to establish the firm's financial standing, how it would cover liabilities and what steps are available to the regulator under their powers (in relation to all the firms within the group).	
February 2012	Regulator requires SM and other group companies not to place further business in the UCISs.	
March 2012	Mr A talks to the regulator to aid their ongoing work.	At the same time, the firms are challenging the regulator's actions and plans for dealing with the issues identified, leading to distractions and delays.

March 2012	Mr and Mrs H become aware of the high-risk investments of their SIPPs, complain to SM and request that their investments are made moderate risk again, in line with their risk tolerance.	
April 2012	Further reports from individuals and other firms raising concerns about the group of firms already under investigation.	
May 2012	Work is continuing to be undertaken to establish the firms' ability to cover all liabilities and pay compensation on complaints; contact is made with HMRC; assessment of the connections between the various firms within the group and the investment funds are being undertaken. Concerns about the lack of assets / funds within the UK firms for covering liabilities to consumers, should this become necessary.	
July 2012	Further contact with CoLP regarding the concerns about the group of firms.	
August 2012	SM applies to have all their permissions cancelled. Continuing work undertaken to establish the firms' plans, using statutory powers due to non-compliance. The aim is to ensure consumers are protected and past liabilities are met but serious concerns regarding their ability to meet their obligations.	

	Mr and Mrs H complaint to the FOS.	
October 2012	The regulator is exploring various avenues for protecting consumers and preserving what little capital the firms have, including getting individuals within the firms to sign undertakings to cover losses up to a fixed amount, and ensuring that consumers are protected and aware of where they stand in relation to the firms. The firms continue to declare willingness to co-operate with the regulator but they are also creating obstacles. The regulator is in contact with the police again regarding the firms.	
December 2012	Mr and Mrs H's complaints are upheld by the FOS but SM challenges the decision – referral to an Ombudsman.	
January 2013 – June 2013	Further work undertaken by the regulator in an attempt to secure an orderly wind-down of the firms and protect consumers but the firms stopped complying and paying their regulatory fees therefore, as a result, SM's authorisation was withdrawn in June 2013.	

I hope you will see from the above chronology that the regulator received information from several sources, including you, and acted upon this information from mid-2011. The information received was taken seriously and a significant amount of work was undertaken by the regulator to address the concerns raised. I recognise that you consider that the regulator's actions were inadequate, but it is clear to me that they did not ignore your concerns.

The regulator took steps to establish the connection between the various firms and individuals, and the financial standing of the UK authorised entities, and they were working on a plan to use their statutory powers to make the firms put things right for consumers. As you are aware, the FCA must follow their procedures when dealing with firms, and I consider that the steps

they took to address the issues brought to their attention were not unreasonable. The firms appeared to be co-operating with the regulator's efforts, although it now seems that they were stalling proceedings.

It was established by the regulator that the UK firms did not have sufficient capital, if any, which could be used to compensate consumers for their losses. For that reason, revoking SM's and the other firms' authorisation once they stopped paying their regulatory fees was not an unreasonable step to take as once the firms were wound up the FSCS would be able to step in and compensate consumers, albeit only to the maximum compensation limit. While when reviewing Mr H's complaint the regulator did not take into consideration the information supplied by you and others in relation to these firms and said to you that your submissions were not related to his complaint, they clearly reviewed and acted upon the evidence you supplied them with as early as December 2011.

Element two

Following some extensive enquiries with the regulator, I have seen evidence that confirms that SM did have PII in place at the relevant times (while conducting regulated business). The regulator asserted in their response to Mr H's complaint and in their correspondence with my office that there was PII in place, but it was only with great difficulty that they were able to prove this was the case. It took several attempts for my office to obtain the required evidence and there seemed to have been confusion within the Complaints Team about the meaning of the information contained within the GABRIEL reports and whether there were other systems or methods used by firms for reporting on PII to the regulator. This confusion could and should have been avoided by ensuring that the purpose of my questions and the information supplied to my office was understood before issuing a response. However, it is now clear that SM and the other firms within the group did have valid PII at the relevant times, so it is not correct to say that the regulator failed to identify lack of cover.

It is clear from the records that the supervisors and others involved in the work in relation to the firms in question did place emphasis on the protection of consumers and preserving any funds available to compensate those who may have lost a proportion of their investments. They repeatedly asked the firm to ensure that all complaints were dealt with correctly and asked the firm to put run off cover in place – a step the firms purported to comply with but did not actually take. In your response to my preliminary decision you state that *"had the FCA very simply verified that the complaints were being signalled to the PII company, all complainants would have been protected by the PII cover. The FCA did not and you now expect the clients to suffer their losses and the FCA to walk away without consequence"*. I appreciate the concerns you are raising, and the consequence of firms not following the correct process and reporting complaints to their insurance providers. However, it was not part of the process at that time for the regulator to check or ensure that firms were reporting the claims that arose against them to their PII providers: it was assumed that firms would follow the requirements of the insurance policy.

This issue arose in relation to another unrelated complaint I dealt with recently, and one of my recommendations was that the FCA incorporate into their processes a step to check that firms applying to cancel their authorisation report all existing complaints against them to their PII provider to ensure that any losses over the FSCS limit of £50,000 are covered. I appreciate that this will not be of benefit for your clients, but it is hoped that this additional step will provide protection to consumers in future. You can read my decision here:

http://frccommissioner.org.uk/wp-content/uploads/FCA00181-FD-final-05-12-16.pdf

Having stated all of the above, I reviewed the terms of SM's insurance policy and it specifically excluded losses resulting from investments made under discretionary management and all losses related to investments made in the particular funds in question. Had SM complied with the terms of the insurance and reported any claims as they arose to their insurance providers, it appears that losses related to the funds your clients' SIPPs were invested in would still, unfortunately, not have been covered. Had the claimants attempted to claim compensation under a different heading, such as breach of contract or lack of regard for the agreed level of risk, it would have been the role of the insurance provider to assess these claims. But as the terms of the PII policy were not complied with, unfortunately this is probably not an avenue that can be explored further.

Conclusion

Having reviewed your complaint, it is clear to me that the regulator took appropriate action at the time it received information from you and others and it did attempt to protect consumers by using its statutory powers. While it was too late for some consumers, the regulator's actions were not unreasonable or negligent.

It should, however, be noted that your submissions in support of Mr H's complaint as well as your disclosures over the years were relevant to the complaint he raised and you should never have been told by the Complaints Team that they were not. I have commented separately on the poor handling by the FCA of Mr H's complaint, and this has inevitably affected the handling of yours. This should not have occurred.

While I appreciate that the position in relation to the PII will be disappointing for you and your clients, this issue is outside of the remit of this office and I am unable to comment on it further. I will, however, initiate a discussion with the regulator to raise the general concerns identified in the course of investigating your and Mr H's complaint.

I understand this may not have been the outcome you were hoping for but I trust my explanation helps you to understand why I have reached it.

Yours sincerely,

Antony Townsend
Complaints Commissioner