

18 July 2018

**Final report by the Complaints Commissioner****Complaint number FCA00437***The complaint*

1. On 21 May 2018 you asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and by the regulator. Both you and the FCA have had the opportunity to comment on my preliminary report. The FCA did not comment. I have taken your comments into account when finalising this report.

*What the complaint is about*

2. On 26 and 28 February 2018 you complained to the FCA about various matters arising from a longstanding complaint you have made about the FCA's Register.

*What the regulator decided*

3. The FCA excluded one element of your complaint from the Complaints Scheme and did not uphold the remainder. The complaint response also said that the FCA would not continue corresponding with you or your wife about matters relating to your core complaint, to which it had already responded.

*Why you are unhappy with the regulator's decision*

4. You consider the FCA's response to be "broadly as unacceptably entrenched" as you expected it to be and have asked for my further consideration.

*Preliminary points*

5. My Office has considered the issues raised in your substantive complaint on two previous occasions. The first report was issued by my predecessor in 2009 (the 2009 report). My report, under reference FCA00190, was published in February 2017 (my 2017 report). I criticised certain aspects of the FCA's approach to its register, the unintended consequences for you, and inappropriate correspondence the FCA sent to your MP. I also criticised some aspects of the handling of your complaint, the way your expectations were managed, and the time it had taken. I made recommendations to address these findings, which the FCA accepted. You have continued to correspond with both me and the FCA about related matters since my 2017 report was issued and you have also raised issues with the Information Commissioner.

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6. In considering the FCA's complaint response of 21 May 2018 I have had regard to these earlier reports and the extent to which the matters you raise are new, have already been dealt with, or cannot be productively considered because they would not change the overall position.

*My analysis*

7. I consider in turn the eight issues you raised, the FCA's complaint response of 21 May 2018, and your response of the same date.

- 1) Part One of your complaint was about the way the FCA dealt with questions you raised in February 2017. The FCA's complaint response (dated 21 May 2018) was that these matters had been dealt with in a letter of 24 August 2017, that they were not new issues and that the FCA was not required to provide the information you were seeking. You say that the FCA's position is not compatible with it having included this matter in its response of 21 May.

The FCA's letter of 24 August 2017 informed you that if you remained dissatisfied you could refer to my Office within three months; however, you did not do so. For that reason, I think that the complaint is out of time. However, even if it were within time, I agree with the FCA's complaint response of 21 May 2018. In response to my preliminary report you have referred me to your FOIA request, which the FCA accepted in principle, and said that you were awaiting the outcome of that before proceeding and kept me informed of this. As you know, the Information Commissioner and I have separate remits which do not overlap. On 8 August 2017 I wrote to you to confirm that I noted your continuing dissatisfaction but would not be re-opening your complaint. You wrote to me again on 30 August to update me on your further correspondence with the FCA about these matters. You also continued to copy me into some of this correspondence. On 20 November 2017 you had a further exchange with my Office when a member of my staff clarified the situation, which you appeared to accept. No new referral to my Office was made. I am satisfied that the FCA's letter of 24 August 2017 informed you what you needed to do next to invoke my jurisdiction and that you did not take that step within the time indicated.

- 2) Part Two of your complaint was that you did not believe the FCA had appropriately calculated the cost of rectifying its Register. The FCA's complaint response said that the correct team had carried out the assessment of likely costs and that my 2017 report had concluded that the options had been looked at in some detail. You say that the Complaints Team should not have accepted the Register Team's findings and that it therefore failed in its duty of care. You also say that the cost of rectifying your own entries would be minimal. In response to my preliminary report you have further explained that it was only after your FOIA request that you received confirmation that the costs related not just to you but to many others, and that this was not known when I issued my 2017 report.

Despite this, I have concluded that these matters have already been considered by me, and that it would not be productive to continue my enquiries. My 2017 report included an assumption that the FCA's costs estimate was reasonable, although I expressed my concern that changes to the register appeared to be so costly. It was clear that the changes related to changing the entire system, not just your entry, and that an alternative cheaper approach had been identified (albeit one that you were not satisfied with – see further below.) The question of redress for your personal situation was also dealt with in that report. I realise that you remain dissatisfied but that is not grounds to reopen or continue my investigation into these matters.

- 3) Part Three of your complaint was that the FCA's 'explanatory text' added to the Register had left things as misleading as ever. The FCA's complaint response was that this matter had been dealt with in the 2009 report. You say that neither the FCA nor the previous Complaints Commissioner have addressed "*the fundamental issue that Register users would understandably misinterpret the meanings of the disputed records*", which is the basis of your substantive complaint. In a recent email you have also said to me that, despite the 2009 report, the FCA cannot show that it took any steps to add an explanatory text before October 2016. You consider this shows that the FCA has acted with bad faith towards you.

I have concluded that these matters have already been considered in detail and that it would not be productive to continue my enquiries. The 2009 report and your correspondence with my predecessor in 2010 and in 2013 made it clear that these matters had already been looked at and would not be reconsidered. My 2017 report acknowledged that the FCA's failures were exacerbated by the temporary removal of the explanatory guidance, which rendered the 2015 position worse than it had been in 2009. The redress I recommended reflected this. However, I concluded that "*the new explanatory text on the register goes some way to address the concerns*". In response to my preliminary report you have made further representations on these points. I am sorry that you continue to disagree; however, that is not a reason for me to reopen your complaint.

- 4) Part Four of your complaint was about the application of and impact on you of the FCA/FSA's Approved Persons Scheme. The FCA's complaint response said that your complaint - that the FCA considers the Director of an authorised firm, or the Director of an appointed representative of an authorised firm, as an FCA Controlled Function requiring FCA approval - was a complaint about an FCA Rule (SUP 10A.4) and therefore excluded from the Scheme under paragraph 3.4. c, performance of the regulators' legislative functions. The FCA also said that its Customer Contact Centre (CCC) was right to tell you that it could not provide you with legal advice about the status and obligations of a "CF1 Director". You say that if this is correct you should have been advised of this previously, although you were not seeking legal advice. You say that the FCA

has discretion about how it classifies individuals on its Register, that it had no powers to 'approve' you as a director and has ignored "the fact that the Approved Persons' Scheme states that approved persons must work for their firms" which you never did.

I am satisfied that the FCA was correct to exclude your complaint about a rule from investigation under the Scheme and to say that CCC does not offer legal advice. Although I note that you continue to disagree with the way the FCA has applied its Approved Persons' Scheme to your situation, I have concluded that these matters have already been commented on in both the 2009 report and my 2017 report and that it would not be productive to continue my enquiries.

- 5) Part Five of your complaint was about the impact of a change in your wife's legal status (from sole trader to company director) on her Register records. The FCA's complaints response said that this matter was addressed in the 2009 report. You say that this is incorrect and that "no account was ever taken by FSA, the previous Complaints Commissioner or FCA of the fact that the advisorship status as displayed on the Register would not be correctly understood by its users".

I have concluded that this matter has already been considered and addressed. In the 2009 report my predecessor concluded that your wife was 'in general terms' an investment adviser for (Firm B), although he noted that you disagreed with this. In my 2017 report I said that I understood your concern about your wife's Register entry but would not deal with it further since it related to an obsolete function. In response to my preliminary report you have made further representations on these points. I note that you remain dissatisfied and consider that some aspects of your concerns have not been addressed; however, I am not persuaded that there are good reasons to consider this matter further.

- 6) Part Six of your complaint was about other aspects of the Register that you consider to be misleading. The FCA's complaint response said that the explanatory text added to your register entries clarifies the position; although you remain dissatisfied with this there is nothing further that the FCA is prepared to do about this and it has explained to you why this is. You say that this is a failure to provide a response, that the explanatory text is wholly inadequate and that the FCA has greatly overestimated the cost of rectifying your entries on the Register.

I note your continuing concerns raised in your response to my preliminary report. However, I have concluded that these matters have already been extensively considered and were addressed in my 2017 report - see also sub-paragraphs 2) and 3). There is nothing further that I can usefully add.

- 7) Part Seven of your complaint was that the Complaints Team should have dealt with these matters previously or told you why they would not do so sooner. The FCA's complaint response was that it had

nothing to add to the response it gave to Part One of your complaint. You say that this is another 'non-response'.

I consider that the FCA's response on this narrow issue is reasonable. It is arguable that the FCA Complaints Team could have declined to investigate further some of the issues that you raised in February 2018. However, I believe the FCA's approach was reasonable as it set out the FCA's position and gave you another opportunity to bring these matters to me. As explained above, I consider that your complaint about matters you raised in February 2017 is now out of time.

- 8) Part Eight of your complaint was about the information about you on the Register. The FCA's complaint response was that these are matters previously considered since 2009, that the information about you on its Register is correct, and that the additional explanatory text has made it easier to understand for people viewing the Register. You say that the FSA/FCA's position on this has never been made clear and that nowhere on the Register, including in the so-called "explanatory text", is there any reference to the Approved Persons' Scheme and who should be classified under it or the fact that only those who work for their authorised firms are entitled or required to be approved.

I have concluded that these matters have already been extensively considered and were addressed in both the 2009 report and my 2017 report. As explained above, I am unable to offer an interpretation of the Approved Persons' Scheme under the Complaints Scheme. There is nothing further that I can usefully add.

8. Following the issue of my preliminary report you have also had a Decision Notice from the Information Commissioner's Office (ICO) dated 27 June 2018. You have asked me to take note of this document. I note that your engagement with the ICO is continuing, and it would therefore be inappropriate for me to comment. Although your complaints to the respective offices touch on the same subject matter, as already noted the ICO and my Office have quite separate remits.
9. In conclusion, I realise that you want the FCA to amend the Register in the way that you believe is required. I appreciate that this remains of great concern to you, and I have previously expressed my sympathy for the situation you have found yourself in. Nevertheless, I agree with the FCA that there must come a point when further resources should not be devoted to matters arising from this situation. I consider that this point has now been reached. I must consider the resources of my Office and the extent to which further inquiries and responses are justified, given that the substantive matters have already been looked at extensively. I have concluded that it would not be productive to look further into your complaints about these matters.

*My decision*

10. For the reasons stated I do not uphold your complaint. I appreciate that you will be very disappointed by this decision but I hope that you will understand how and why I have reached it.

Antony Townsend

Complaints Commissioner

18 July 2018