

13 August 2018

Final report by the Complaints Commissioner**Complaint number FCA00474***The complaint*

1. On 18 June 2018 you complained to me about the answers which you had received from the FCA to your correspondence, which related to the actions of staff following the publication of the FCA's policy statement PS17/3 on PPI claims.

What the complaint is about

2. In its decision letter of 18 May 2018, the FCA described its understanding of your complaint as follows:

My understanding of your complaint is that you believe it was inappropriate for a senior person at the FCA to have pin badges produced and then distributed to their staff which bear the motto "Bring it on!" on the day that policy statement (PS17/3) was published. You allege that this is short-hand for "Bring on your challenges!" You explained that this behaviour fosters a culture of institutional defensiveness and is seeking to shut down legitimate debate and challenge.

What the regulator decided

3. The FCA rejected your complaint. It said that the distribution of badges to staff "would not be considered one of the FCA's relevant functions", and therefore fell outside the scope of the Complaints Scheme. It said that, at the time the badges were distributed, "there was no pending judicial review in relation to the matter, so I believe this was purely a matter between the FCA and its employees, as to how the relevant department chose to reward or motivate employees for their work". The FCA said that its relationship with its employees was explicitly excluded from the scope of the Complaints Scheme.

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4. The decision letter of 18 May drew your attention to a letter which you had already received from the FCA's Chief Executive. The FCA said that

Having reviewed the response you received from Andrew Bailey and considered the circumstances in which the event occurred, I do not align with the view that the motto 'Bring it on!' is short-hand for 'Bring on your challenges!'

I believe it is reasonable to accept that the badges were handed out to staff as an acknowledgement of reaching an important milestone in the FCA's work on PPI and that the gesture had no connection with the judicial review process.

5. In response to the decision letter, you raised a further query with the FCA on 18 May. You said

You kindly confirmed that badges stating "bring it on!" were handed out on publication of the PPI policy statement. Please can you also confirm that at the same time a large handmade "bring it on!" calendar that counted down 90 days to the end of the window for bringing a judicial review was produced and prominently displayed within the supervision team's working area.

6. You made it clear that this was a query, not a complaint, and the Complaints Team dealt with it on that basis. In its reply dated 12 June 2018, the FCA said this:

I can confirm a calendar was produced and displayed within the FCA's Supervision department.

However, in addressing your query I believe it would be helpful to comment more substantively on the FCA's actions.

The calendar was originally intended as a countdown to an anticipated judicial review and therefore had 90 days printed on it – the 3 months that followed the publishing of the Policy Statement PS17/3. The relevant team has also advised me that the calendar was also used by the relevant team to plan absences during that 90-day period and for non-PPI related matters.

Unfortunately, due to the length of time that has passed, I cannot confirm whether the calendar had "Bring it on!" printed on it or how long it remained on the wall. Interest in the calendar fell away very quickly and, given that key

members of staff moved departments within the relevant time, it became irrelevant.

You rightly point out that the FCA has an obligation as a public body to give reasonable consideration to comments, feedback and challenges to its consultations. You add that, even if the FCA anticipates challenges by way of judicial review, it cannot pre-determine that it will defend the action before considering first whether the challenge is reasonable.

I reiterate the comments made in our previous correspondence with you, and reassure you that the gesture had no connection with or bearing on the judicial review process.

7. On 13 June, you responded to the FCA, saying you considered that there were inconsistencies between the letters of 18 May and 12 June. The FCA responded on 19 June saying "I believe we have given you appropriate information and our position remains the same".

Why you are unhappy with the regulator's decision

8. In your email to me, you say:

The FCA Complaints team were wrong to exclude my complaint from their scheme as their reasoning did not stand up to basic scrutiny. The FCA has confirmed that to coincide with the FCA's PPI policy statement (arguably the most important in the regulator's history), an FCA Senior Manager produced "Bring it on!" pin badges for staff to wear and a "Bring it on!" judicial review countdown calendar which was prominently displayed for staff to see. The FCA's actions were obviously connected to the FCA's performance of its statutory functions (i.e. the policy statement) and "Bring it on!" was clearly a reference to a potential judicial review of the policy statement.

Even more concerning is the Complaints Team's apparent willingness accept the "Bring it on!" badges and countdown calendars as if they are the most normal thing in the world. Our FCA source has confirmed there have been no other instances of badges being produced to reward staff, or of calendars being prominently displayed counting down the 90 days until a judicial review can no longer be brought. Why Mr Bailey and the Complaints Team is choosing defending [sic] these actions is difficult to understand.

A separate but equally troubling aspect of the FCA's correspondence with me has been the interaction between Andrew Bailey and the Complaints Team. It appears that Mr Bailey is able to avoid answering a contentious question simply by saying it should more appropriately be dealt with by the Complaints Team, and the Complaints Team can then avoid answering it by saying it falls outside the scheme. This is a perfect system - nobody has to answer the question!

Preliminary points

9. Before considering the merits of your complaint, I need to set out the limits of the Complaints Scheme. You can find further details at <http://frccommissioner.org.uk/complaints-scheme/>, but the key points are these.
10. First, the FCA's "legislative functions" are explicitly excluded from the Scheme. These include the making of rules, codes, statements and general guidance (see section 85 of the Financial Services Act 2012).
11. Second, the FCA's relationship with its employees is also excluded from the Scheme (see paragraph 3.4 of the Scheme).
12. Third, "Complaints can be made by anyone who is directly affected by the way in which the regulators have carried out their functions", and who is seeking some form of remedy.

My analysis

Jurisdiction

13. I start by considering the jurisdictional points. It is clear that the issuing of the Policy Statement, as a "legislative function", falls outside the Complaints Scheme, but that is not what your complaint is about. Your complaint is about staff behaviour. The FCA has cited the exclusion of the FCA's relationship with its employees as a reason for excluding your complaint, but I do not accept that. In my view, that exclusion provision is designed to deal with employment issues, which are unsuited to this Scheme. Your complaint is about the appropriateness of staff actions, not with employment issues.
14. The FCA's decision letter said "When the relevant policy statement had been published, there was no pending judicial review in relation to the matter, so I

believe this was purely a matter between the FCA and its employees”. The clear implication of this statement is that, had there been a pending judicial review at the time the badges and calendar were issued, it would not be “purely an employment matter between the FCA and its employees”.

15. That argument makes little sense. The records show that the “bring it on!” initiative related to the anticipation of judicial review proceedings, even if at the time it started no proceedings had actually been issued. In my view, it is clear that you were alleging that the FCA had acted unprofessionally – a matter which falls within the Complaints Scheme. In your own words, sent to the FCA on 23 April, “Such behaviour has the POTENTIAL to [have a tangible impact on the FCA’s decision making around PPI]. It sets a tone from top and fosters a culture of institutional defensiveness.”
16. I conclude that the FCA was wrong to exclude your complaint on the grounds which it cited. There might have been an argument that you were not directly affected by the matter about which you complained, but the FCA did not advance this.
17. There is a second reason why, in my view, the exclusion of your complaint was wrong. By the time that the matter reached the FCA’s Complaints Team, you had received a reply from the Chief Executive. In that reply, Andrew Bailey had explained to you in some detail the processes by which decisions in response to judicial review proceedings had been made, and why he considered that they were separate from the “gesture” of issuing the badges. Your complaint was that the Chief Executive’s reply had missed your point that the behaviour had “the potential” to influence decision making. An important element of your complaint, therefore, was (and remains) that the replies you had received were inadequate to the allegation which you had made. That is a matter for the Complaints Scheme.

The merits of the complaint

18. My consideration of your complaint therefore deals with a single question: did you, or did you not, receive adequate responses from the Complaints Team?
19. Even though the Complaints Team excluded your complaint, they did provide you with an explanation in the decision letter of 18 May (quoted in paragraph 4

above), which was supplemented by the further letter of 12 June. In my view, neither of these letters really addressed your complaint. Furthermore, the statement in the first letter – “I do not align with the view that the motto ‘Bring it on!’ is short-hand for ‘Bring on your challenges!’” – seems to me very hard to understand, or to reconcile with the admission that the 90-day countdown calendar (which may or may not have had “Bring it on!” written on it) was connected with an anticipated judicial review.

20. I have asked the FCA to explain the meaning of the repeated statement that the “gesture” (i.e. the handling out of the badges) had no bearing on or connection with the judicial review proceedings. The FCA’s explanation is that, although it cannot say that the issuing of the badges and calendar were “completely disconnected” from a potential judicial review challenge, they were not connected to “the” judicial review proceedings because at the time those proceedings had not been issued.
21. Given that your complaint was about the potential effect of the “bring it on!” initiative on the FCA’s handling of potential challenges, it seems to me that the FCA’s explanations were unconvincing. While they described the lengths to which the FCA went to ensure that its decision making was well informed, they did not address the question of whether or not the initiative was misguided, and they excluded your complaint on mistaken grounds.
22. Finally, I deal with your complaint that it was wrong for the Chief Executive’s office to refer your inquiry to the Complaints Team, only for you to have the complaint excluded. I do not uphold that complaint. Where someone is dissatisfied with the FCA’s responses, a referral to the Complaints Team may be the best means of resolving the issue, and enables the matter to be escalated – if necessary – to me. It is for the Complaints Team to consider, in the first instance, whether or not a complaint should be excluded or investigated.

My decision

23. I consider that the FCA’s responses to your complaint did not address your key concern, and sought to make a fine distinction between potential and actual judicial review proceedings which was irrelevant to your concern.

24. I **recommend** that the FCA write to you again with an explanation which addresses the concerns set out above. I am pleased to say that, in response to my preliminary report, the FCA has undertaken to do so. I ask the FCA to copy that response to me.

Antony Townsend
Complaints Commissioner
13 August 2018