Complaints Commissioner

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21 March 2019

Final report by the Complaints Commissioner

Complaint number FCA00534

The complaint

1. On 5 December 2018 you asked me to investigate a complaint about the FCA. I accepted your reasons for your complaint being sent to me slightly beyond the usual timescales. I have carefully reviewed the papers sent to me by you and by the regulator.

What the complaint is about

2. On 20 March 2017 you made a formal complaint to the FCA about what you considered to be a lack of regulatory action concerning *one of* [their] *former authorised and regulated firms* [Firm A]. You referred to recently published joint liquidators' reports about the firm, which you said, *support the evidence I have submitted to FSA, FCA, SFO, Metropolitan Police and FOS since 2011*. You said that as an IFA you had recommended investment products promoted by Firm A (and a linked firm, Firm B) as secure, low to medium risk funds suitable for SIPP investments, but that the liquidators' report *confirms that the original facts have turned out to be false, misleading and seriously misrepresented, and that the deceit started at the outset…* You said that this was not foreseeable by you at the time you made recommendations to your clients, and that you have been *investigating the truth behind my investors' losses constantly since August 2012*. You asked the FCA to answer the following six questions:

    a. *Why did the FSA allow an insolvent, FSA regulated and authorised firm* [Firm A] *to design, promote and sell their … funds to UK-based advisers, fund managers and the general public?*

b. *Why did the FSA choose not to take action on the verbal and written whistleblowing on* [Firm A] *from you and others?*

c. *Why did the FSA allow* [Firm A] *to falsify their capital adequacy returns… this failure led to* [Firm A] *obtaining further funds… not used for the purpose promoted…This issue was notified… to FSA in 2011.*

d. *Why has the FCA taken no further action in respect of* [Firms A and B] *since FSA found out about the failure of* [one of these funds] *in the summer of 2012? FSA received numerous emails outlining the issues from you and your investors starting in August/September 2012.*

e. *Why did FSA not take note of the previous charges on* [a named director] *from Companies House for rule breaches*?

f. *Why are the officers of the connected firms still selling their funds to the general public?*

What the regulator decided

3. The FCA Complaints Team summarised your complaint as follows:

> *You allege a lack of care in relation to how the FCA, and previously the FSA, supervised* [Firm A]*. You say you provided the FSA with information on the investments promoted by this firm in 2011. You believe no action was taken by the FSA and this has led to complaints being raised against your firm – which have been upheld by the Financial Ombudsman Service.*
>
> *You have also alleged the specific FSA audit in 2009/2010 failed to identify that* [Firm A] *was manipulating its FSA capital adequacy reports by recharging from one insolvent company to another. You believe that the FSA should not have allowed* [Firm A] *to design and promote* [one of its funds] *to UK based advisers.*

4. On 16 August 2018 the FCA wrote to you saying that it had not upheld your complaint. The Complaints Team said that:

   a. [Firm A] was authorised and regulated by the FSA to carry out designated investment business from 2007 until its authorisation was cancelled in 2013.

b. The arrangements you were concerned about were unregulated collective investment schemes (UCIS) and did not fall within the regulatory perimeter. As such, any material produced and distributed to IFAs did not have to comply with all the regulations which would apply to regulated funds. [Firm A] had to market its products directly to IFAs (rather than directly to consumers) and the responsibility of undertaking due diligence on the products and for ensuring it was only recommended to suitable investors fell to the IFA concerned. [Firm A] was not using its permissions as part of this process, and actions the FSA might have taken were accordingly limited.

c. [Firm A's] capital adequacy returns were reviewed in 2009 and 2010. In general, if a firm's returns did not meet the FSA's capital adequacy requirements an alert would have been generated for this to be reviewed and resolved by the relevant area. The FSA would not have carried out a financial audit upon receiving its capital adequacy submissions as that was not its role.

d. It was not correct to say that the information you provided was not considered but confidentiality restrictions and the FCA's policy approach mean that it will not generally provide feedback on what action has been taken in response to information it receives.

5. The Complaints Team also concluded that the then FSA should have made a note of a call you made to it in November 2011 but that this had not affected regulatory action. It said that a policy has now been implemented for logging calls.

Why you are unhappy with the regulator's decision

6. You have told me that you are dissatisfied with the outcome of your complaint because the firm concerned was regulated and authorised by the FSA and evidence from the firm's liquidators shows that investor losses were caused by the firm's poor management and were not the fault of financial advisers.

7. You also consider that the FCA's complaint response is too critical of your attempt to 'whistleblow' in 2011 and that the FSA should have reacted to your concerns, which subsequently proved correct. You consider that you did

everything you could to alert both the regulator and your clients to the issues, but have still been forced out of business, which has destroyed your job prospects and taken a severe toll on your health and you and your family's well-being.

Preliminary points

8. I note at the outset that the issues you raise in your complaint go to the heart of an understanding of three very important areas of the FCA's work:

   a. its regulatory approach to firms conducting both regulated and unregulated business;

   b. how it defines and treats whistleblowers;

   c. how it responds to allegations of fraud.

9. I have dealt with these matters before, particularly in my published decision on the Connaught Series 1 Income Fund. Although the facts of your complaint differ, I continue to see a number of cases where IFAs, consumers and others report concerns about a firm or a fund to the FCA, sometimes over several years, and where there is a mismatch between stakeholders' expectations and the perceived actions of the regulator. Some of this mismatch arises from the confidential environment in which the FCA operates, both under the Financial Services and Markets Act 2000 and because of its own policy approach. Some arises due to the passage of time and different approaches taken now and in the past by the FCA and its predecessor organisation, the FSA. However, I consider that the FCA could do more to explain and clarify its approach to these matters and I will return to this in my conclusions below.

My analysis

Substantive complaint

10. I have read the papers supplied to me by you and the FCA, which include confidential material about its regulatory actions concerning Firm A. I have also reviewed the phone conversation you had with the FSA in 2011.

The phone call

11. I begin with this phone call, on 4 November 2011, as I believe it was the first contact you had with the then FSA on the issues that give rise to your complaint.

12. The FCA's complaint response said that *It seems the main purpose of the call was to discuss your concerns about the performance of an unregulated… fund and the options available to your clients. You had general concerns about the fund itself rather than the company that marketed and promoted it. You did not provide, or suggest that you had, any evidence of your allegations and you did not name [Firm A]*. The complaint response concluded that the call *was handled reasonably as the Associate explained the FSA's remit and tried to provide information to assist you*.

13. I note the following points about the phone call:

    a. You called the Whistleblowing department and said you had concerns about an overseas fund some of your clients had invested in about two and a half years before. You asked if this was the correct procedure for whistleblowing or whether you should be talking to a different department. The staff member suggested that you give an overview of the nature of your concerns, which you did. You said that investors had experienced losses of two thirds, that you were concerned about dilution of their capital through rights issues, and that you were unsure if funds raised were being used properly. You also mentioned that other local advisers had reported their concerns to the FSA.

    b. Although the FCA is correct in saying that you did not name Firm A, you referred several times to the way the fund had been marketed and promoted. You said it had been marketed as having a steady, secure income stream, and that the figures had 'stacked up'. You asked whether there could be court action against 'the company marketing the firm' or a claim for misrepresentation.

    c. You said that you 'supposed' the fund was 'one of these unregulated collective investment schemes', and that you knew it did not fall under FSA jurisdiction. However, you expressed your concern that similar

funds had gone to the wall and the FSA had got SIPP providers to compensate people who had invested in them via pensions. You said you did not know what you should be doing.

d. The staff member said that there were several problems in this scenario that would have to be pulled apart and looked at carefully. Among these were the fact that the fund was not FSA-regulated, that even a UK-based fund of that sort might not be regulated, and that there was no guarantee that it would be regulated in another jurisdiction. However, he did not ask you any questions to elicit further details. Instead, he said that there was *not a lot of guidance I could put up for you to use to advantage* and that, although he was not allowed to advise you, the best solution might be to extricate your clients from the fund. He also said that there would be *no compensation element available and no Financial Service Ombudsman* [FOS] *arrangements*. Later in the call you asked specifically if your clients could make a complaint against you. The staff member replied that it was *difficult to say how they could do that* as *obviously you're acting in good faith… presented with a product and represent it on the terms you're aware of*…. He said that you were *caught in the middle*. He also said that the offshore scenario rang alarm bells and that you would have *to be a very astute investor who knows exactly what they're doing*. He referred to what had happened with 'boiler room' scenarios and you replied saying you thought the way the fund was operating was *almost like a Ponzi arrangement, awful really*.

14. My view is that the staff member could and arguably should have done more to ascertain the facts of the underlying situation here, particularly given the nature of your concerns and the recent high-profile work the FSA had done on UCIS, of which he must have been aware. That work made it clear that aspects of UCIS were firmly within the FSA's 'regulatory perimeter' - see for example this report and the Good and Poor Practice report, published in July 2010. I am surprised that the staff member did not point you to this material or discuss with you your obligations as an IFA.

15. I have not seen the FOS reports on your clients' complaints but from what I have seen these were complaints from investors that they were mis-sold the

fund, with advisers and the fund promoters disputing responsibility for the alleged mis-selling. I also understand that at least some of your clients' complaints were upheld and you were ordered to pay compensation that was not covered either by your professional indemnity insurance or the Financial Services Compensation Scheme (FSCS).

16. It follows from this that I do not agree with the FCA complaint response that the 4 November 2011 phone call was handled reasonably. In my view the FSA should have sought further details from you to fully understand the situation, should have pointed you to recent FSA work on UCIS, and should not have given you unsupported assurances about the risk of complaints.

17. It also follows that I consider that the FCA's complaint response, saying that UCIS fell outside the regulatory perimeter at the time you raised your concerns, took too narrow a view of the regulatory issues. Issues around the marketing and promotion of such products were the subject of intense work by the FSA between 2009 and 2010 and this should have been considered.

18. The complaint response went on to say that it was poor practice that a note was not made of this call, that it was not the Whistleblowing Team's policy to do so at the time, but that it has recently introduced a specific policy for recording the details of calls to avoid a repeat of this. I have two comments on this response:

    a. I agree that the failure to make a note was poor practice. Although it cannot be said that this failure affected regulatory action, as Firm A was not named, had such a policy been in place at the time it might have led to structured gathering of relevant information to assist the FSA in its regulatory role.

    b. The complaint file makes it clear that the decision to introduce a policy to note such calls was taken because of your complaint and another recent complaint on the same issue. I consider it would have been helpful to you to tell you specifically that it was <u>because of</u> your complaint and another's that this change has now been made.

Subsequent contact

19. You appear to have next contacted the FSA in August 2012 when you cc'd it in an email to the Guernsey regulator. You named both Firm A and Firm B. You said that *the fund managers intend to sell… at a considerable loss and wind the fund up with little or no return paid to the original investors*. You requested regulatory action. You said that you had previously 'whistle-blown' to the FSA on 21 October 2011 (this was a mistake for 4 November). On 17 August you received a reply from the same staff member you had spoken to before saying that although Firm A was authorised, Firm B and the Fund were not. He said that no doubt the other regulator would contact the FSA if there were any concerns about an authorised firm. You emailed again on 3 September requesting action but received no response. I consider it would have been more helpful if the FSA had thanked you for your email and explained its approach to information it receives and why it would not communicate with you further.

20. In January 2014, following Firm A's liquidation, you contacted the FCA's Whistleblowing team and were told that your concerns related to individual customer complaints and the Financial Ombudsman Service. You asked again why no regulatory action had been taken since 2011. In March 2017 you submitted your formal complaint about the FCA through your MP.

21. I have reviewed the FCA's confidential files on its supervision of Firm A. I agree with the FCA complaint response that it is not correct to say that the information you provided was not considered. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on all the material I have seen. However, it is important that under the Complaints Scheme, as an independent person, I can assess whether I consider that the FCA has behaved reasonably. I cannot comment on the FCA's judgements about whether or what regulatory action was appropriate. The complaint response explained to you the legal and policy restrictions that apply.

Capital Adequacy

22. You also complained that Firm A was manipulating its FSA capital adequacy reports. In response to this aspect of your complaint, the FCA's Complaints

Team reviewed Firm A's reports for 2009 and 2010 and asked detailed questions of relevant internal teams. The confidential information that I have seen supports what was said to you in the complaint response (see paragraph 4 c above). I am satisfied that the Complaints Team probed appropriately to establish that Firm A's returns were dealt with in line with the FSA's approach at the time and that the information provided would have been considered adequate. This information related to the FSA's capital adequacy requirements and not Firm A's trading status (whether insolvent or otherwise).

23. I am not able to comment further on whether Firm A was manipulating its returns: such a judgement does not fall within the scope of the Complaints Scheme. I appreciate that it is your strong view that this is what allowed further funds to be raised before Firm A was placed in liquidation, and that this caused further losses for investors. However, I cannot reach any conclusions about this.

Delay

24. You have told me that the FCA took 16 months to respond to your complaint. I note that some of the delay was caused by trying to locate a recording of the 4 November 2011 phone call (and confusion about its date). However, the FCA's file shows that there were other delays, including long periods of inactivity between June and December 2017. The complaint response acknowledged that there had been delay and offered you an apology and a goodwill payment of £100. In response to the preliminary report, you have told me that you consider this response to be inadequate given the strict timescales for complaint handling imposed by the FCA on regulated firms. I am also concerned by the recurrence of significant delay within the Complaints Team. In addition, on too many occasions you were left to chase for progress after deadlines for providing an update had passed. Taking these matters into account, and given the severity of the delays in the handling of your complaint, I agree that the sum of £100 for distress and inconvenience was inadequate. **I recommend** that it be increased to £250. **I also recommend** that the FCA takes steps to ensure that the Complaints Team is sufficiently resourced and that it has effective systems for keeping complainants informed about the progress of their complaints.

My decision

25. I have **partly upheld** your complaint because, for the reasons stated, I consider that:

    a. The 4 November 2011 phone call was not handled as well as it should have been by the FSA

    b. the FSA, and subsequently the FCA in its decision letter addressed to you, did not take proper account of the broader regulatory implications of what you were reporting, but relied upon the fact that UCIS products were not in themselves regulated.

26. I consider that both the phone call and the failure to make a note of it were missed opportunities to gather relevant information to assist regulatory activity. I am pleased to note that, because of your complaint and another's, a policy of taking notes has now been introduced by the Whistleblowing Team.

27. The main events took place in 2011 and were the responsibility of the FCA's predecessor organisation. The confidentiality regime within which the FCA operates imposes certain constraints. Nonetheless, I think that the FCA needs to do more to show that it understands the importance of demonstrating that it takes prompt action when information is received suggesting a serious risk to consumers, particularly if there is a suggestion of fraud. In other, more recent, cases which I have dealt with, I have seen a similar lack of curiosity.

28. In response to my preliminary report you have said that you would like me to offer greater criticism of the FCA for what you consider to be the lack of regulatory help and support shown to you and your investors in 2012. I have indicated above my view that the FCA could have responded to you more appropriately. I cannot comment on whether it responded to contact from one of your former clients. However, the FCA's role is not primarily to assist individuals but to gather information and intelligence to regulate firms. The confidential material I have seen shows that the information you provided in 2012 was not ignored. Nevertheless, as mentioned above, I consider that the FCA could do more to explain its approach and reassure all those who rely on its regulation.

29. In my preliminary report **I recommended** that the FCA considers what steps it can take to publish information that will reassure stakeholders, consumers, and the public at large about how it approaches the areas of work I have identified in paragraph 8:

    a. its regulatory approach to firms conducting both regulated and unregulated business;

    b. how it defines and treats whistleblowers;

    c. how it responds to allegations of fraud.

30. In response to this recommendation the FCA has replied as follows:

    a. It considers that points a and c are already addressed by its Mission and by publicly available information on its website, for example https://www.fca.org.uk/publication/corporate/our-mission-2017.pdf and https://www.fca.org.uk/firms/financial-crime/fraud.

    b. There is also information about whistleblowing here: https://www.fca.org.uk/firms/whistleblowing, although the FCA agrees that there are steps it can take to publish more helpful information and it will factor this into its approach for a external communications campaign it will be running later this year.

31. While this acknowledgment regarding whistleblowing is to be welcomed, I am concerned that the FCA's response on the other matters is less reflective. As indicated, from the complaints that I am seeing, there is clearly more that the FCA needs to do to explain its approach both to fraud and unregulated business. It needs to remember that any regulatory action it is taking is not apparent to complainants and others, who often do not understand why their concerns are apparently being ignored. In my view there continues to be an inconsistency between external and internal perceptions about the FCA's approach to unregulated business and fraud. There is more to be done so that the FCA can fulfil its Mission to have "…consent, trust and confidence from the public, including consumers and the regulated." **I therefore repeat my recommendation** in paragraph 28 that the FCA should publish further information that will reassure stakeholders, consumers, and the public at large about its approach in these areas.

32. In my preliminary report, **I also recommended**, again, that the FCA takes steps to ensure that the Complaints Team is sufficiently resourced and that it has effective systems for keeping complainants informed about the progress of their complaints. The FCA has now shared with me its plans to address these issues. This is to be welcomed and I will be monitoring progress over the coming year.

33. I have **recommended** that the FCA increases the amount offered to you for distress and inconvenience arising from its complaints handling delays from £100 to £250. I am pleased to say that the FCA will accept this recommendation. I realise that you are likely to feel disappointed by this amount given the personal distress and losses you have experienced since 2011, but my recommendation only covers the question of delays in complaints handling rather than your wider concerns. When the FCA makes the revised offer to you, you can decide whether to accept it.

Antony Townsend
Complaints Commissioner
21 March 2019