

10 October 2019

Final report by the Complaints Commissioner**Complaint number FCA00619***The complaint*

1. On 5 July 2019 you asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and the FCA, and additional information sent by the FCA in response to questions I asked. My preliminary report was issued on 5 September 2019 and both you and the FCA have had the opportunity to comment. This final report takes account of all comments and concludes my investigation.

What the complaint is about

2. In September 2018 you complained to the FCA about issues related to the calculation of an annuity. You wanted to understand the basis of calculation to satisfy yourself that you had had an appropriate response to a complaint to the firm (Firm A) that sold you the annuity. You also complained about the FCA's appointment of another firm (Firm B) as 'Skilled Person' to review Firm A's historic annuity sales and carry out the calculation.

What the regulator decided

3. The FCA divided your complaint into two parts, the first dealing with your complaint about the FCA's appointment of Firm B, and the second addressing your Freedom of Information (FOI) request to have access to the calculation.
4. The FCA told you on 8 October 2018 that Part Two of your complaint would not be investigated under the Complaints Scheme (the Scheme) because there was an alternative route for FOI matters and you were referred to an internal review.
5. Part One of your complaint was investigated by the FCA's Complaints Team but was not upheld. The FCA's complaint response of 16 April 2019 said that the FCA's Supervision division had followed the FCA's procurement processes for appointing Skilled Persons, conflicts of interest were addressed, and the

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Complaints Team had not seen any information which suggested that it was inappropriate to appoint Firm B. You were offered, and accepted, £75 for the FCA's complaints handling delays.

Why you are unhappy with the regulator's decision

6. You have told me that you are 'dissatisfied' with the FCA's decision and in response to the FCA, when indicating you would approach my office, you said:

I note that you give me no details of why you reached your conclusion and why there is no conflict of interest. To the man in the street there is clear conflict.

Preliminary point

7. It appears that you have accepted that Part Two of your complaint could not be investigated under the Scheme but for the avoidance of doubt, I confirm that I agree with the FCA that this fell within paragraph 3.6 of the Scheme, because there was another route for this aspect of your complaint, namely an internal review of your FOI request and thence to the Information Commissioner's Office.

My analysis

8. Following its thematic review of annuity sales practices in 2016, the FCA appointed Firm B as Skilled Person to devise a methodology to calculate redress for affected customers of a small number of 'Notified Firms', including Firm A.
9. You had taken out an annuity with Firm A in 2008: your complaint about mis-selling was partly upheld but was put on hold pending Firm B's work. In March 2018 Firm A told you that the calculator showed you would not have got a better annuity rate. You therefore received no redress on your annuity policy.
10. Part One of your complaint was that the FCA should not have appointed Firm B as Skilled Person because it had conflicts of interest regarding Firm A. You identified three specific areas that you considered amounted to a conflict, involving prior and ongoing relationships and movement of staff between the two firms.
11. The FCA's file shows that the Complaints Team investigation involved obtaining details of the procurement process, checking that it had been followed, reviewing the tender document submitted by Firm B, and considering how conflicts of

interest were addressed. The investigator told you: *I have not upheld your complaint as I am content with the checks undertaken by the FCA to ensure that there was no conflict of interest when appointing [Firm B] ... [and that] the individuals involved in the review did not show any conflicts of interest which should've [sic] prevented their appointment.*

12. As you say, you were given no details of the basis for this conclusion, and you also had a very long wait for it. Some of the information you seek is confidential for legal, commercial or policy reasons. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on the material to which I have access. However, as part of the Complaints Scheme, I have access to all the FCA's complaints papers, including confidential material. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably.
13. When I reviewed the FCA's file, I was not satisfied that the Complaints Team had made sufficient inquiries to support its conclusion in your case, and I asked them to answer additional questions about how the FCA checked for conflict of interest issues.
14. The FCA's file shows that a competitive tendering exercise was carried out under the FCA's procurement process. Firm B's successful tender included a section on conflict of interest which acknowledged its place in the market and explained how it would avoid conflicts of interest arising. However, at the time of submitting the tender, details of which firms were Notified Firms were not known to the tenderers. Firm B offered to provide further information on the extent of its relationships with specific companies once it knew which firms were involved.
15. It was not clear from the FCA's files whether this offer was taken up, so I asked the FCA to provide me with further information about this. The FCA's response accepts that in the rare cases where the tender process is unable to identify firms, there is no set process for how conflicts of interest checks are covered.
16. The FCA has provided further information about why it considers that sufficient steps were taken for the FCA to have confidence that Firm B was not conflicted. It says that: the tender document listed specific firm conflicts for the individual proposed as the Skilled Person (and that Firm A was not on this list); a

Framework Agreement was in place as part of the contract - this required both parties to notify of any actual or potential conflicts of interest and none were notified by Firm B; it is satisfied that it maintained sufficient oversight of the development and implementation of the calculator to give “*considerable confidence*” that no conflicts could arise. These steps included ensuring a design that favoured the customer and could not be manipulated to favour one firm over another, a ‘hands-on’ approach by the FCA, and the appointment of other Skilled Persons working directly with each firm.

17. Regarding the three specific conflict allegations that you made, the FCA says that it was not aware of these concerns at the time of appointing Firm B but does not consider any of them amount to a conflict. It says that building the redress calculator did not rely on Firm A’s data to construct the models and assumptions used; that a financial service provided to Firm B’s staff by Firm A was not a relevant consideration in relation to building the calculator; and that the person you named as potentially conflicted was not involved in carrying out the work. In addition, it says that Firm B’s Skilled Person did not list any of these factors as a personal conflict.
18. I have carefully considered these explanations from the FCA and although the individual points made may be reasonable, it remains the case that the FCA is unable to demonstrate from a contemporaneous record that it took up Firm B’s offer to address conflict of interest issues once the name of the Notified Firms was disclosed. The FCA says that the reality is that it is reliant on the supplier to declare any conflicts of interest: the supplier is the only party with a complete oversight of any relationships that could be perceived as conflicts, both past and present, and is the only one in the position to declare them. However, I consider that the FCA should be able to demonstrate that it did ask and was pro-active in confirming Firm B’s conflict of interest position. It cannot do so.
19. Additionally, the FCA’s Complaints Team failed to probe this point with the relevant teams during its investigation of your concerns, and there was insufficient testing of the points that you had made.

20. For this reason I **uphold** your complaint to me, that the FCA's complaint response gave you *no details* of how and why it had reached the conclusion that there was no conflict of interest.
21. I should make it clear that, although I have upheld your complaint, I have not taken any view on whether the FCA should have appointed Firm B. My investigation has been limited to considering whether or not a proper process was followed and recorded.
22. In your original complaint, you also referred to the FCA's launch of an investigation into investment consultants following concerns about conflicts of interest in the industry, and that this matter had been referred to the Competition and Markets Authority (CMA) for full investigation. This point was overlooked by the Complaints Team when analysing and scoping your complaint, although I consider it should have been included. I note that the FCA issued its [response to the CMA's final report](#) on 12 December 2018. The response notes that CMA's report: *includes a recommendation to HM Treasury to broaden the FCA's regulatory scope to include the activities of investment consultants to ensure greater oversight of this sector in the future*. Given the broader concerns that you raised about lack of market competition, it would have been appropriate for the FCA to have pointed you to this response and to provide you with some information about the current position regarding the CMA's recommendations.

My decision

23. For the reasons stated above, I have **upheld** your complaint to me. Although the FCA has now considered all the conflict of interest points you raised and provided a detailed explanation, the complaint response you received was inadequate. The FCA accepts this and acknowledges that a necessary line of questioning was not followed up. The Complaints Team expresses its regret for this and apologises to you for this failure in its service. It wishes to offer you a payment of £100 in addition to the £75 you have already received for delay.
24. I **recommend** that the FCA offers to pay you this additional sum of £100, which you have told me you would like to accept.
25. In relation to my concern that the FCA cannot demonstrate that it took up Firm B's offer to discuss its conflicts regarding the Notified Firms once their names

were known, my preliminary report recommended that the FCA reviews its processes to ensure that it has clear recording of conflict checks being pursued. In response to this, the FCA has repeated its view that there was no significant impact arising from its failure to take up Firm B's offer to disclose conflict of interest issues once the name of the notified firms was disclosed, for the reasons stated in paragraph 16 above. It has also stated that the circumstances of this tender were highly unusual, have not occurred since and are unlikely to occur again. As a result, its preferred course of action is to ensure that the team which oversees the appointment of S.166s is made aware of this case. The FCA has also told me that, since 2016 it has '*appointed a Chief Procurement Officer and a new target operating model has been rolled out which covers Procurement and Supplier Management team structures, processes and procedures including supplier due diligence (conducted at the point of contract award – with conflicts of interest forming a standard clause in the FCA terms and conditions) and annual ongoing due diligence for its Tier 1 and Tier 2 suppliers. Suppliers are required to comply with FCA policies of which Conflicts of Interest is one. Conflicts of Interest is also covered in section 2.5 of the FCA's Supplier Code of Conduct*'. I am satisfied that this response addresses my concerns.

26. In my preliminary report I also recommended that the FCA provides you with any further information about the current position regarding the CMA's recommendations. In response to this the FCA has provided the following statement:

"The recommendation relevant to the FCA was for HM Treasury to extend the FCA's regulatory perimeter to include all of the main activities of investment consultants. HMT has provided the following response: HM Treasury notes the CMA's recommendation to extend the FCA's regulatory perimeter to cover services provided by investment consultants. In the context of competing priorities for both the government and the financial services sector, HM Treasury will consider this recommendation and consult in due course."

Antony Townsend
Complaints Commissioner
10 October 2019