

01 August 2023

**Final report by the Complaints Commissioner****Complaint number 202201760***The complaint*

1. On 16 March 2023, you asked me to review a complaint about the FCA.

*What the complaint is about*

2. You submitted a complaint to the FCA on 22 April 2022, which was summarised into six complaint points by the FCA as follows:

**Part One** - *You consider that the FCA has failed to take action against Firm X, or named individuals, in response to the intelligence you provided.*

**Part Two** - *You consider that the FCA has failed to take action against Firm Y in response to the intelligence you provided.*

**Part Three** - *You believe the FCA has failed to provide you with protection as a whistleblower from your previous employers.*

**Part Four** - *You consider the FCA should assist you with the collection of information from Firm X through a Data Subject Access Request (DSAR).*

**Part Five** - *You are unhappy the FCA allowed an ex-member of its staff to join Firm X as its compliance officer. You consider that this enabled Firm X to avoid scrutiny and punishment for the way it treated you for whistleblowing.*

**Part Six** - *You believe the FCA has failed to interview whistleblowers (including an individual you named) who could provide information on Firm X. You are also unhappy that the FCA has not interviewed you since 2017.*

*What the regulator decided*

3. The FCA did not uphold any of your complaint points, for the following reasons:
4. It did not uphold **Part One** of your complaint because the FCA is unable to share the results or actions arising from whistleblowing reports; the investigator

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had reviewed the actions taken following the receipt of information from you and found the FCA had followed its internal policies. The FCA also made it clear that the Whistleblowing team will be in contact with you in due course to provide you with a more detailed response following your disclosures.

5. The FCA did not uphold **Part Two** of your complaint. It explained that *“this is because although we are unable to share the results or actions we have taken with; I have reviewed the action taken and believe we have followed our policies upon receipt of your information.”* The Whistleblowing team was also expected to be in contact with you in due course in relation to the information you provided concerning Firm Y.
6. **Part Three** of your complaint was not upheld because the FCA found it followed the legislation protecting you as a whistleblower. When your name was disclosed to the firm, it was as a result of you emailing the FCA Whistleblowing team allowing them to disclose your name, identifying you as the source of the information.
7. **Part Four** of your complaint was not upheld because it falls outside the Complaints Scheme and had not been investigated.
8. **Part Five** of your complaint was not upheld because the FCA believed it considered the application for a former employee to join the regulated firm in line with their processes and the investigator considered they had been adhered to appropriately.
9. Finally, **Part Six** of your complaint was deemed to fall outside the Complaints Scheme and had not been investigated. *“The Whistleblowing Team have acted within FCA Policy.”*

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

10. You believe that the FCA’ response to your complaint points was inadequate, not acceptable and amounted to a “cover-up”. I will deal with these points in Elements one to six.
11. In addition to this, you also raised concerns about the fact that the FCA did not acknowledge your disabilities and the severe impact of the situation on your health. I will deal with this in Element seven.

12. Finally, you were also unhappy with the amount of time it had taken for the FCA to respond to your complaint. I will address this in Element eight.

*Preliminary points*

13. You had made whistleblowing disclosures about two firms you had worked for to the FCA (as well as various state agencies in the US, including the SEC) over a number of years, starting in 2017.
14. You explained both to the FCA and to me that the effect of dealing with the firms was severe for your health, resulting in hospitalisation on a number of occasions.
15. Before I proceed with this report, I want to express that I am sorry to hear about the health issues and disabilities you have been dealing with in the last few years and the impact this has had on your family and life generally. I recognise that going through the situation itself, and then the complaints process would have taken significant time and effort with an impact on your health.
16. To address the concerns you raised in some of your responses to my Preliminary Report, I also want to confirm once more that your emails had not been blocked by any staff at this office. The email address with “@frc.org.uk” is one that appears to be linked to the Financial Reporting Council and is not associated with this office.
17. I can also confirm that Parliament had designed, through passing the Financial Services and Markets Act 2000, for the Complaints Commissioner to be appointed by the FCA, although following an amendment of the legislation, this has now become the responsibility of Treasury.
18. Funding of the Financial Regulators Complaints Commissioner (FRCC) is secured the same way it is for the Financial Ombudsman Service and the Financial Services Compensation Scheme – through the levies applied to regulated firms, administered by the FCA.
19. The Complaints Commissioner and the FRCC are completely independent from the Regulators and my decisions are not in any way influenced by anything other than the specific facts of each case and my own professional judgement. There is no conflict of interest in this case.

### *My analysis*

20. To assess your complaint points and the actions of the FCA over the relevant period of time, I have carried out a thorough analysis of the detailed information provided to me by you, as well as the confidential information provided by the FCA.
21. As you have already been told, both by the Whistleblowing Team and the FCA's Complaints Team, the FCA does not generally say what action has been taken in response to the information that it receives. This is because section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds about firms as confidential and restricts how that information is dealt with.
22. In addition to this, any information that is not restricted by s.348 FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals, who also have legal protections. Under this policy, the FCA will not normally disclose the fact of continuing action without the agreement of the firms concerned. [There is a good explanation of the statutory and FCA policy restrictions on information sharing at <https://www.fca.org.uk/freedom-information/information-we-can-share>.]
23. This means that, as previously stated, there is no general right for members of the public/whistleblowers to know the exact steps the FCA takes, or of the outcome of reports that they make.
24. I note the point you made in your response to my Preliminary Report, where you state that *"As a whistleblower, I deserve to know the consequences of my actions, which the FCA has not disclosed after their seven-year investigation"*. I appreciate it is frustrating to not be told exactly what action was taken by the FCA, but it is not correct that you have a right to be told exactly what action, if any, was taken following your whistleblowing reports.
25. The publicly available information on the FCA's website is clear: *"It's important to understand that what we can share with you will be limited due to the confidential or sensitive nature of the information or legal restrictions"* ([Whistleblowing: How to make a report | FCA](#)).

26. There are also pages with lots of information about where you may seek legal advice about the legal protections available to whistleblowers, including links to charities that can assist, as well as information about how the whistleblowing information is shared etc.
27. More specifically in your case, adhering to its promise to update you, and following my recommendation in the Preliminary Report that it does so, the FCA Whistleblowing Team sent you a “Whistleblowing feedback letter” dated 29 June 2023. You were informed that *“Substantial work has since been carried out over several years to explore the issues you raised. We have now completed this work and taken a number of actions as a result.*
28. *Our Supervision Division, who are responsible for the day-to-day supervision of firms, including Firm X, explored the concerns you raised in detail. They carried out an assessment to ensure they had all the relevant information and then reviewed your concerns to identify potential harm, working with FCA subject matter experts and drawing on other information available to us... **they were able to use a range of regulatory tools to explore the issues you raised,** including visiting the firm and carrying out testing to determine whether the firm met relevant legal and regulatory obligations.*
29. *While we cannot go into detail on these matters, I would like to reassure you that, as a direct result of the information you provided, we are confident that Firm X has made material positive changes to the way it operates. In addition to the work we carried out, we contacted – and shared relevant information with - other regulators or agencies in the UK and overseas.*
30. *This was because your disclosures raised questions about Firm X’s operations in overseas jurisdictions, or in areas which fall outside the scope of our regulatory responsibilities. As I hope you can see, your disclosures have had a significant impact on the FCA’s approach to supervising the firm.”*
31. It is important to note that FCA reaching out to and working with other agencies in other jurisdictions is relevant because many of the issues you raised took place outside of the UK, for example at the firm’s US branch, and therefore, fall outside of the remit of the FCA.

32. I also note that it is not the role of the FCA to intervene in your individual case. It is my understanding that you can enforce your rights as a whistleblower who was not treated appropriately in the Employment Tribunal. But you may wish to seek independent legal advice on the legal options open to you.
33. Furthermore, it is clear from your correspondence with your MP, dated 30 June 2023, that you had been provided with this information by the FCA to confirm that your reports were taken seriously and action was taken, as you wrote *“They have confirmed that they will take Supervision action, which means the company has breached the SMCR”*. It appears that it is not the fact that the regulator did not take action that you are unhappy with, but the fact that it had not taken the action **you** want it to take. This is supported by your wording in the same email, where you state *“but they won’t take Enforcement action or make a public announcement.”* You go on to state that in your opinion, *“This conduct is inconsistent, inappropriate and contradictory, which neglects their statutory duties.”*
34. I note, however, that it is open to the FCA to decide what action to take in relation to information it receives about firms, ranging from no action, to supervisory action and enforcement proceedings, and it is not my role as the Commissioner to retrospectively substitute my judgement for the FCA’s professional judgement, but to investigate the allegations made and assess whether what the FCA had done (or not done) is a reasonable course of action to have taken in the circumstances.
35. I also note from this email that you explain that as a certified senior manager under the SMCR, *“you are obligated to report wrongdoing and breaches in regulations.”* You go on to state that, *“If you do not, SMCR penalties **range from fines and financial restrictions to custodial sentences** for individuals **and vary depending on the seriousness of the breach.**”* It is clear to me that you appreciate that in any given regulatory scenario there is a range of responses available to the regulators such as the FCA.
36. You state that you believe the FCA is not upholding SYSC 18.3.9 because it is not taking the steps you expect it to take. However, it is appropriate for them to assess all the circumstances of a case, including the nature of the concerns

raised, the significance of the impact on those affected and the response or lack thereof of the firms in question, and take regulatory action it deems appropriate accordingly. The fact that the action is not what you expect it to be does not mean it is unreasonable or inappropriate.

37. Whilst it is clearly frustrating for whistleblowers, the information the FCA can disclose to them about these assessments and the resulting action is limited by legislation and policy.
38. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on the confidential material to which I have access. However, under the Complaints Scheme, I have access to all the FCA's records which are relevant to the complaint, including confidential material. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably.
39. Having studied the FCA's records I can say that I am satisfied that the FCA has not ignored the information which you have provided but it had given it proper consideration and, as stated in the letter dated 29 June 2023, it took action based on it. Unfortunately, I cannot provide details or say any more than that, and I recognise that this will be frustrating for you.

### **Elements one to three**

40. You were told that the Whistleblowing Team had correctly provided you with all the relevant information about how your reports and personal information would be handled, in addition to this information being available on the [FCA' website](#).
41. However, it appears that as you requested for your anonymity to be removed with the firms in question in November 2020, *"you were no longer entitled to the protections offered under the Public Interest Disclosure Act 1998."*
42. Having reviewed the correspondence and documentation available to me in relation to these points, I agree with the FCA that sufficient information was available on its website and was provided by its Whistleblowing Team about the whistleblowing process.
43. Further information is available about how you may enforce your rights if you are penalised by the firm you are blowing the whistle about, as linked above.

The relevant extract from the FCA's website is *"Whistleblowers are protected by the Public Interest Disclosure Act 1998 (PIDA), which means that you may obtain a remedy if you are hurt, suffer detriment or are dismissed because you have blown the whistle in the public interest. This is enforceable through an Employment Tribunal."*

44. Whilst the FCA explained that there is no set time-frame for providing feedback to whistleblowers, and that not all relevant information can be shared with you due to confidentiality restrictions imposed by section 348 of the Financial Services and Markets Act 2001, someone from the Whistleblowing team was expected to be in touch with you in due course.
45. Whilst I did not uphold these elements of your complaint, as it was not clear whether anyone had contacted you following the Final Decision by the FCA, I **recommended** that the Whistleblowing Team contacts you as soon as reasonably practicable, to provide you with as much information as possible in relation to your reports. I stated that whilst I appreciate that there are significant restrictions around what information can be shared with you, but considering the impact of the ongoing situation on your health, it was important that you are provided with an update as a matter of some urgency.
46. The FCA accepted this recommendation and it provided with the update on 29 June 2023.

#### **Element four**

This element of your complaint was excluded because it does not relate to a relevant function of the FCA, but rather to your rights as a data subject, which fall within the remit of the Information Commissioner's Office. I agree with this assessment and I do not uphold this element of your complaint.

#### **Element five**

47. In response to this element of your complaint, the FCA explained that its former employees are not prevented from seeking employment with regulated firms and that when *"employees seek alternative employment with a regulated firm in a senior position, the FCA follows processes to assess their application"*. This was deemed to have been followed and found to be robust enough.

48. I have not seen any information that would suggest that there was any impropriety, a lack of curiosity or lack of appropriate response to your whistleblowing reports because a former FCA employee was now employed by the firm you were making reports about. Based on the evidence provided, it seems clear that the FCA responded appropriately and so I do not uphold this element of your complaint.

#### **Element six**

49. In dealing with element six of your complaint the FCA had stated that *“The whistleblowing team explained that they had sufficient information from you and they considered that an interview with you [or the other person you suggested they interview] would not be needed.”* In addition, it also stated *“The decision on whether to connect a group of whistleblowers or not is one for the FCA to make. Any concerns or complaints about this would fall outside the complaints scheme as you are not directly affected from the actions the FCA has taken.”*

50. My reading of this element is that it is broken down to two different parts. One is that you had not been interviewed by the FCA, the other is that others had not been interviewed in relation to the concerns you raised.

51. Whilst I agree that it is for the FCA to decide (following its internal policies and procedures and using professional judgement) whether or not it interviews individuals about matters reported to it, I do not agree that this complaint point falls outside of the Complaint Scheme.

52. You wanted the FCA to interview those individuals who you believe would support your case against Firms X and Y, as well as to interview you. As such, these matters are related to your personal situation and you are affected.

53. However, having reviewed the information related to this case, it does not appear to be unreasonable for the FCA to state that it had sufficient information contained within the documents provided to it and, as a result, it did not need to conduct in person interviews. This assertion is supported by the fact that Supervisory action had been taken. It is up to the FCA how it runs its investigation and what witnesses, if any it speaks to.

54. As such, I do not believe your complaint is excluded from the Complaints Scheme, but I do not uphold it.

### **Element seven**

55. The FCA states in its Final Decision: *“I would like to thank you for taking the time to make the FCA aware of the issues you experienced at Firm X and Firm Y. I would like to acknowledge the impact the circumstances leading to your disclosure have had on your physical and mental health.”*
56. Whilst the FCA was not able to provide you with the outcome you might have been hoping for, the investigator took the time to acknowledge the effort you had made in reporting your concerns to the Whistleblowing Team and the impact the situation as a whole has had on your life and health.
57. It is important for organisations to recognise the efforts of individuals and the burden these stressful situations place on them, when they deal with reports and/or complaints. I believe the FCA had done so on this occasion and so I am not upholding this element of your complaint.

### **Element eight**

58. The FCA had accepted that there was a delay in handling your complaint, apologised for it in the “Conclusion” of the Final Decision letter and offered you £150 as an ex gratia payment in recognition of the fact that this is likely to have caused some inconvenience. Whilst I agree with you that there were delays, I believe that the apology and offer of payment are appropriate steps for the FCA to have taken and are sufficient. I do not uphold this element of your complaint.

### *My decision*

59. This is my Final Report about your complaint. I do not uphold your complaint points. However, having regard to the comments and questions raised in response to my Preliminary Report, I have expanded my analysis in places and provided further explanation of the processes and why I cannot share any more information than what has already been shared, and why it is my view that the FCA acted reasonably within the range of powers available to it.

Amerdeep Somal

Complaints Commissioner

01 August 2023