

22 September 2023

**Final report by the Complaints Commissioner****Complaint number 202300267***The complaint*

1. On 27 June 2023, you asked me to review a complaint about the FCA. On 30 August 2023, I issued my preliminary report.

*What the complaint is about*

2. In its decision letter the FCA set out that your complaint on behalf of your clients was as follows:

You have explained that you consider the actions taken against your Client, Firm X are outside the express powers set out in FSMA and the FCA Handbook. You claim there are no provisions in DEPP which explain how the FCA should initiate disruption activities, or a process to challenge any decision.

**Part One**

Firm X are unhappy that the FCA has not provided them with an explanation or justification of why it is necessary for the FCA to communicate to the public that Firm X is operating a scam.

**Part Two**

Firm X claim that the wording in the FCA's published statement in respect of the Company and the wording on Firm X's FCA Register entry sends a message that the FCA considers Firm X is operating a scam and is unnecessary. Firm X also claim that the wording pre-judges the outcome of the investigation and in the absence of any judicial finding is prejudicial and defamatory.

**Part Three**

Firm X are unhappy that the FCA has agreed with the wording used by Firm Y. Firm X believe this sends a message that the FCA considers Firm X is operating a scam and is unnecessary.

Firm X also claim that the agreement pre-judges the outcome of the investigation and in the absence of any judicial finding is prejudicial and defamatory.

*What the regulator decided*

3. The FCA's decision informed you that its decision was that it needed to defer your complaint for a period of time. In its decision letter it set out that your case was deferred for the following reasons:

.... because your complaint is connected with, or arises from, ongoing work by the FCA and there is a risk that, if the complaint is investigated at the same time, it could adversely impact that action.

I appreciate that this will be very disappointing for you. It may help if I set out the relevant extract from the Scheme, which explains the circumstances in which complaints investigations can be deferred, and the underlying reasons for this.

Paragraph 3.7 of the Scheme states:

'A complaint which is connected with, or which arises from, any form of continuing action by the regulators will not normally be investigated by either the regulators or the Complaints Commissioner until the complainant has exhausted the procedures and remedies under FSMA (or under other legislation which provides for access to the Scheme) which are relevant to that action. The complainant does not have to be the subject of continuing action by the regulators for this provision to be engaged. An investigation may start before those procedures are completed if, in the exceptional circumstances of the case, it would not be reasonable to expect the complainant to await the conclusion of the regulators' action and that action would not be significantly harmed.'

The reasoning behind paragraph 3.7 is to ensure that a complaints investigation does not have an adverse impact on any ongoing

regulatory work by the FCA. There are two ways in which it might have such an adverse impact, as explained below.

First, it could divert resources away from the FCA's investigation, which may inhibit the FCA from achieving its statutory objectives in a timely manner. This is because the key FCA staff that would be needed to assist the Complaints Team with its investigation will include the same staff who are responsible for bringing the investigation to a timely conclusion. Involving those staff in two processes at the same time would inevitably delay the conclusion of the work which could be detrimental to consumers and, potentially, the firm concerned.

Second, the complaints investigation may prejudice the work being undertaken by the FCA. This might happen if, for example, the complaints investigation findings cut across the likely findings of the work being undertaken by the FCA.

In some cases, where there are 'exceptional circumstances,' the FCA will proceed with a complaint's investigation notwithstanding ongoing work. I have carefully considered, in line with paragraph 3.7 of the Scheme, whether there are 'exceptional circumstances' relating to your case. Unfortunately, I have concluded that your case does not fall into this category, which means that the investigation of your complaint will need to be deferred.

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

4. In your complaint letter to my office on behalf of your clients you have set out that you have complaint about the standard wording used by the FCA uses and or endorses in its public communications when it adds a firm to its warning list of unauthorised firms and that it allows companies to publish on suspended websites about firms who appear on its warning list. You will see that the FCA has sought to defer investigation of the complaint by reference to paragraph 3.7 of the scheme.
5. You have also set out that you disagree with the FCA's decision letter that sets out that paragraph 3.7 of the scheme applies to your client's complaint. You have set out that your clients' complaint relates to FCA's blanket approach of

referring to all firms on the warning list as scams. You believe that whilst your client has locus to complain because it is a victim of the FCA's standard approach, the complaint is not connected to or arises from the FCA's investigation into our clients.

6. You consider that this complaint requires the FCA to justify its blanket approach to communications in connection with the warning list. You do not believe that there is a requirement for anyone connected with the FCA investigation to be involved in the complaint or response. Furthermore, you consider that your clients' complaint is valid – regardless of the subsequent outcome of any investigation. Regardless of any investigation outcome, the FCA is not justified in the language it uses in connection with the warning list.

*My analysis*

7. The FCA has clearly set out in its decision letter the relevant extract from the Scheme, paragraph 3.7, which explains the circumstances in which complaints investigations can be deferred, and the underlying reasons for this. This is set out above in paragraph 3 and I see no benefit to reiterating the same details here in my analysis.
8. The FCA is correct to say that, under paragraph 3.7 of the Complaints Scheme, investigations of complaints can be deferred where there is continuing regulatory action which might be undermined by the consideration of the complaint.
9. I agree with the FCA's decision to defer your client's complaint about this matter for the moment, as it is likely that it would be unhelpful if the FCA Complaints Team were to undertake an investigation into these matters in parallel with the regulatory investigation. I am pleased to note the FCA will be keeping you updated every 6 months.
10. I have reviewed the information you have set out on behalf of your clients, and I have also been able to review the FCA's complaint files in relation to this matter. I am satisfied that the FCA in reviewing your complaint has considered your position that you believe that there is no requirement for anyone connected with the FCA investigation to be involved in the complaint or response and should therefore not be captured by paragraph 3.7 of the scheme. Having reviewed

the FCA's files I consider that its consideration to defer your clients' complaint under paragraph 3.7 is reasonable and that they have sufficient reasoning to do so.

11. Unfortunately, like the FCA, I am required to respect confidentiality. The confidentiality restrictions under Section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds as confidential and restricts how that information is dealt with. In addition to this, any information that is not restricted by s.348 FSMA may also be restricted due to the FCA's policy on sharing information about regulated firms and individuals, who also have legal protections.
12. Like the FCA this means that sometimes I cannot report fully on the confidential 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. Sometimes this means that all I can say to complainants is that having studied the confidential material, and whether I am satisfied (or not) that the FCA has behaved reasonably. As I have set out in paragraph 10 above, I have reviewed the FCA files, and I am satisfied that the FCA has behaved reasonably in this case, unfortunately beyond that I am unable to provide any further details to you.
13. I realise that this continuing delay is likely to be frustrating for you and your clients, but I hope you will understand that, in my view, it is the best means to ensure that your complaint is thoroughly considered at the most appropriate time.

My decision

14. This is my final report ,I realise you may be disappointed with my decision, but for the reasons outlined above, I cannot uphold your complaint.

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Complaints Commissioner

22 September 2023