

23 November 2021

Final report by the Complaints Commissioner**Complaint number FCA001338***The complaint*

1. On 26 July 2021 you asked me to investigate a complaint against the FCA.

What the complaint is about

2. The FCA summarised your complaint as follows:

You are unhappy that the FCA does not hold information in relation to Firm X's - Insurance Broker's Professional Indemnity Insurer (PII).

You made a freedom of information request and you were unhappy with the response received. You are of the view that as a regulator we should have this information and should be able to share it with you. You have said that you feel the data protection issue does not apply here as it's not personal data. You have also explained that you have checked with your own lawyers and they had advised you that the FCA should share this information. In order to resolve your complaint, you would like the PII information for Firm X and the company name. You have explained that you need this information as part of a litigation case you have against the firm and that there is a specific law for liquidation that suggests that this information must be shared.

What the regulator decided

3. The FCA said it would not investigate your complaint as Paragraph 3.5 of the Complaints Scheme explains that "the regulators will not investigate a complaint under the Scheme which they reasonably consider amounts to no more than dissatisfaction with the regulators' general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other

FCA001338

misconduct is alleged". The FCA said your complaint was about dissatisfaction with the FCA's internal policy of how to decide whether a particular firm has met the standard of having PII, including the information it requires firms to provide about their PII.

4. Although it did not investigate your complaint, the FCA explained that the firm you were referring to had been authorised in 2005 and at that time the FSA asked such firms to confirm they had PII in place in compliance with the prudential requirements in relation to PII - without requiring the name of the insurer. This is why the FCA did not hold insurance details about the PII insurer's name.
5. The FCA said that since logging your complaint, some historic information had been found but that it was protected information under s348 of FSMA and as such, without consent, it could not be disclosed to you.
6. The FCA apologised for the delay in investigating your complaint and offered you a £75 ex gratia payment for the distress and inconvenience.

Why you are unhappy with the regulator's decision

7. You have written in detail about your concern at how long the FCA took to review your complaint, and you have made the following points which I summarise below:
8. You feel that the FCA is operating 'an out-of-date regulatory process, predating 2005, is still applicable with regard to the Firm 15 years later. Where more recent regulatory requirements require a broker to renew their registration annually and provide PII details as a part of this process, this would effectively create a two-tier system with different levels of protection for the consumer'. In your response to my preliminary report, you have further clarified that you think there are two aspects to the two tiered system. The first aspect is that firms that were operating prior to 2005 have been allowed to continue under the outdated system and do not have to provide PII information, but firms that commenced operations after the new regulations came in 2005, are required to provide PII information. The second aspect is that under the new Retail Mediation Activities Return system, firms are required to submit PII self-certification form to confirm that they are compliant with the FCA's requirements. However, the system only

has some PII insurers names and it is possible for a firm to select 'other' and not provide the name of the PII insurer. You feel the FCA is being negligent in not having the details of the insurer for Firm X and other firms like it which may have been authorised by the FSA. (Element One)

9. You do not think the FCA should be satisfied with just a confirmation that a firm has PII, without verifying it. (Element Two)
10. You were advised by FCA staff members to submit a Freedom of Information Act (FOIA) request to obtain the name of Firm X's insurer, however, you feel this advice was wrong as the outcome was known to be 'futile'. (Element Three)
11. You were told the FCA complaints team would contact you with a summary of understanding of your complaint: but this did not happen. You were issued a decision letter which you feel did not address the heart of your complaint. (Element Four)
12. You do not understand how it is that the FCA tells you on the one hand that it did not hold the details of the insurer of Firm X as it never asked for this information, yet, on the other hand, this information was suddenly found once you approached the Information Commissioner's Office (ICO). Unfortunately, the information relates to an old insurer and you now doubt whether the FCA can be trusted when it says that it does not hold any more recent information, given its responses to you so far. (Element Five)
13. You do not understand why the FCA did not obtain consent from the official receiver dealing with the liquidation of Firm X in order to disclose this information to you. (Element Six)
14. You feel that under the Third Parties (Rights Against Insurers) Act 2010 (s.11 and Schedule 1), there is no need for the FCA to obtain consent from anyone in order to provide you with the name of Firm X's PII insurer (Element Seven).
15. You were informed by the FCA that they were aware that the Firm X had a CVA against them from 2016 which they had known about for many years. In such circumstances, you would expect that the FCA, 'in the interests of consumer protection, would have attempted to ensure that they had sufficient details of the PII so as to enable any impacted consumer to obtain legal redress if ever required'. (Element Eight)

16. You have told me the remedy you are seeking is:
- a. A declaration the FCA have failed to address the complaint.
 - b. A declaration that the FCA must disclose the information requested, specifically PII details of the Firm for the years 2014 – 2019 and if this is not available then the last recorded PII details for the Firm.
 - c. An accurate detailed description of the process in place to record the PII details for Firm X from 2014 – 2019 and the information provided by that Firm.
 - d. Failing the provision of such information, because it is not held by the FCA, a declaration that the FCA has been negligent in their duties as regulator of a financial institution in failing to require and record this information.
 - e. A substantially improved compensation from the derisory £75 offered, which in light of the above discussions is wholly inadequate and insulting. Any compensation must reflect the absurdity of FCA's conduct, wanton delays and negligence in relation to my requests since 27th May 2020.

Preliminary points (if any)

17. I am unable to interpret rules and regulations under the Complaints Scheme. You have referred to the Third Parties (Rights Against Insurers) Act 2010 (s.11 and Schedule 1) which you believe trumps the FCA's reliance on s348 of FSMA to withhold the information you require for confidentiality purposes. Only a court of law can determine this. For this reason, I am unable to review Element Seven of your complaint.
18. Under the Complaints Scheme (see <http://frccommissioner.org.uk/complaints-scheme/> for further details), the FCA usually do their own investigation first, as that is usually the best way of resolving matters. You have not complained about Element Three and Element Eight to the FCA. I suggest you approach the FCA for comments on these point first. If you are not satisfied with the outcome, you may refer the matter to me.

My analysis

19. The background to your complaint is that you approached the FCA to obtain the name of Firm X's PII insurer as the firm was in liquidation, the directors of the

firm were uncooperative and would not provide the information, and the official receiver did not have this information either. You were, I understand, hoping to submit a claim to the insurer.

20. After corresponding at first with the FCA Supervision Hub you submitted a FOIA request and were told that the FCA did not hold this information. You complained about this to the FCA.

Element One and Two

21. The FCA's decision letter implied that the FCA asks for the name of the PII insurer of more recently authorised firms, but that there are other firms authorised further back under the FSA's term which have not provided the name of their insurer. It also appeared that in any event the FCA does not verify the self-certification of firms declaring they have PII cover. The matters were further complicated by the fact that in your correspondence with the Supervision hub in 2020 you received emails in which the following statements are found:
'Professional Indemnity Insurance': We would expect for regulated firms to have Professional Indemnity Insurance in place whilst they're conducting regulated activity and this is monitored through periodic returns, however, we do not ask for the name of the insurer that the firm are using.' This would seem to contradict the FCA decision letter in which it is implied that all recently authorised firms are required to provide the name of their insurer.
22. You have commented to the effect this seems disjointed and indicative of a 'two tier system' where the FCA knows the details of some regulated firms' insurers, but not others, and verifies none. In my preliminary report I invited the FCA to comment on the above matters which it has now done.
23. The FCA has provided a detailed overview of how PII forms part of its prudential regulatory scheme, to ensure that firms have enough money to meet their liabilities. When a firm initially applies for authorisation from the FCA as the regulatory body, it requires firms to confirm they have PII cover. They are asked to certify that they have adequate PII cover at the point of authorisation and the FCA rely on that information to be adequate and not misleading (it has confirmed that it does not generally verify this information). It would be a basis for

enforcement action against a firm if it deliberately provided false information to the FCA and did not co-operate with their principle obligations.

24. As previously established, Firm X was not authorised by the FCA and its authorisation from the previous system was carried over, also referred to as grandfathered. This means that the FCA itself has never required Firm X to go through its authorisation process and to certify that it has adequate PII cover. I agree that this could seem to create a two tier system of those authorised under the old scheme and those authorised by the FCA and two tiers of information that the FCA holds.
25. However, the FCA have confirmed that it requires all firms carrying out insurance intermediary activities, both those authorised under the new and old regulations (including Firm X), are required to complete regular returns on its Retail Mediation Activities Return (RMAR) system. As part of this return, firms are asked the name of their PI insurer by selecting a name from a drop down box on the system. The FCA have explained that, if the Firm has more than one PI Insurer or the name of its insurer is not listed the firm should select 'other' in the drop down list. The FCA confirmed that there is no space on the form for the firm to record an alternative name. The FCA has advised that when Firm X has completed its return on the RMAR system it selected the 'other' option. This indicates to me that whilst Firm X was originally authorised under the old system, it did have to comply with the new requirements and complete its annual returns the RMAR system which brought it into line with the firms authorised under the FCA regulations.
26. The FCA has set out that obtaining the specific name of PI insurers name is not considered essential information in regulating these firms. The information collected from RMAR is collected by the FCA for 'baseline monitoring' to check that firms are complying with their prudential requirements, this along with other numerical and financial data provided, may at times act as flags for further investigations to be made at an individual firm level or on a thematic level. The FCA has explained that baseline monitoring is used because it was identified in consultations (CP197 and PS04/09 in 2003/2004), before bringing in the RMAR in July 2005, that it would not be proportionate to expect the FCA to manually review all of the information provided by the 'large population of small firms'.

27. I do find it confusing that the FCA obtain the PI insurers name for some firms but not for others. But given the information is not used for verification purposes, it appears to me, that on this basis the question could be a simple 'yes' or 'no' question as to whether a firm has PI Insurance. However, I consider that this does relate to the general policies of the FCA on what information it requires to regulate these firms and this is not within the remit of the complaints scheme to consider, as per paragraph 3.5 of the complaints scheme.
28. I do feel that the FCA have now provided a reasonable explanation to me about the information it obtains in relation to PI Insurance held by firms and that it does not require the name of each insurer and that it does not verify the PI Insurance details for each firm. I do not consider that the FCA was negligent in not having the PI insurance details for Firm X and I believe that it is reasonable that the FCA does not verify to PI Insurance details for every firm. On this basis I do not uphold elements one and two of your complaint.
29. I do feel that from the information I have reviewed and from the information you have provided in relation to your complaint that there does appear to be some difference in the information that the FCA holds on the firms that were authorised under the old FSA regulations and carried over and the firms authorised by the FCA since July 2005. I do think where potential deficiencies in the information held have been identified, it might be appropriate for the FCA to consider a review of the information it holds on the firms that were carried over from the old system (over 15 years ago) and ensure that the FCA holds sufficient records to satisfy itself that the firms do in fact have the relevant coverage in place.
30. In its response to my preliminary report, the FCA has set out that it has not investigated the adequacy of the correspondence you had with its Supervision hub as this did not form part of your original complaint but in its response it has tried to address the confusion that had been identified between the Supervision hub's statement that the FCA 'do not ask' for the PI Insurers name and explanations provided in the Complaint teams decision letter to you. It has acknowledged that the wording used by the Supervision hub could have been phrased more accurately to say that 'firms may not always provide us with the name of their PI insurer as part of the reporting requirements'. It has set out that it will follow up with the Supervision hub to ensure that it is clearer with any

future correspondence relating to this issue. I feel that this has clarified the confusion that existed between the correspondence you had originally received, and the information set out in the FCA's decision letter to you.

Element Three – Not investigated – See preliminary points above.

Element Four

31. The FCA promised to write to you and set out its understanding of your complaint, but it failed to do so. I recommend the FCA apologise for this and look at its internal processes to ensure that this administrative oversight is not repeated in future.
32. In its response to my preliminary report the FCA has acknowledged that there were service failings in its handling of your complaint and that it is willing to apologise for these as it is aware that it only apologised for the delays in its original decision letter. However, the FCA have disagreed that there was an administrative oversight in terms of its process, because it considers that the complaint was not investigated under the scheme, and as such it would not have to send a scope letter.

Whilst I am pleased that the FCA has acknowledged its service failings in addressing your complaint, I do still feel that the wording used in its four weekly update email to you created an incorrect impression about how your complaint would be progressed and that it should apologise to you for any confusion that this caused to you. I also feel that moving forwards the FCA should consider reviewing the wording of its update emails to better communicate that its next correspondence will confirm whether the complaint can be investigated under the complaints scheme and if it can that it will provide the complainant with its understanding of their complaint at that time.

Element Five

33. I can understand that you feel doubtful and confused about the FCA's changing position about the information it does hold about the insurers of Firm X. From the files I have reviewed, I can confirm that the FCA's search for the insurer of Firm X did not find the information, and the reason has been explained to you: this information was not asked of the firm when it became authorised in 2005. The reason some information about an insurer's name (no longer valid) came to light

was in connection to a different matter: whilst the FSA was discussing something unrelated with Firm X in 2005, Firm X referred in passing to the name of its then insurer. This information came to light after you had already received a response from the FCA FOIA Team that it did not have the information. You now feel that perhaps further searches may shed light on who the insurer was during the period 2014-2019. As this information would not be held in an easily accessible format, it is unclear the time and effort required to undertake this search, or the results it would yield. It is up to the FCA FOIA team to decide if such a search is proportionate. As to the matter that the FCA does not require all firms it regulates to provide the name of their PII insurer, this was covered in relation to Elements One and Two above.

Element Six

34. The FCA's decision letter did not disclose the Firm's historic Insurer's name to you due to confidentiality reasons. It said that consent had not been obtained but if it had been, it would have told you. After the decision letter was issued, and during the ICO's investigation of your complaint, the FCA did obtain consent (although from the files I don't know who from: presumably from the official receiver) to disclose the name of the insurer to you, and it did so. Unfortunately, that insurer had ceased insuring Firm X some time ago.
35. You feel the FCA Complaints Team should have obtained the consent before issuing you with the decision letter, and I have sympathy with this view. It would have been more helpful if the FCA Complaints Team had done so. The crux of your query then turned complaint was that you wanted the name of the insurer. Seeking consent and providing you with the name of the insurer would have resolved that query and gone on some way towards mitigating the excessively long time the FCA took to review your complaint.
36. The FCA's response to my preliminary report explained that this information was obtained by its Information Disclosure team who were continuing its work and correspondence with the ICO in relation to your FOIA request. The FCA has set out that it felt that the Complaint's team was trying to provide you with a useful update but confirmed that it did not consider it incumbent for it commence its own enquiries over and above the Information Disclosure team were already

carrying out. I appreciate the Complaints team was trying to be transparent with the information that had recently been located, but I do feel that the inclusion of the information about the ongoing work of the other FCA team in the decision letter was confusing rather than helpful.

37. I am inclined to accept that it was a reasonable approach to allow the Information Disclosure team to continue its ongoing work, rather than having the Complaints team trying to step in and take over at that point in time. There was no benefit to a further FCA team getting involved when the enquiries were already under way by the Information Disclosure team. Realistically your complaint would have been further delayed if the Complaint's team had waited for the relevant information to become available to include in the decision letter. For these reasons I do not uphold this aspect of your complaint.
38. The FCA took an excessively long time to review your complaint and I welcome the fact it offered you an ex-gratia payment in lieu of this. The FCA has recently put in more resources and renewed its internal processes and procedures to ensure such delays, of which yours was not the only one, do not happen again. I continue to monitor the situation.

Element Seven – Not investigated – See preliminary points above.

Element Eight - Not investigated – See preliminary points above.

My decision

39. I know that this will disappoint you but for the above reasons I have not upheld your complaints.

Amerdeep Somal
Complaints Commissioner
23 November 2021