

26 January 2022

Final report by the Complaints Commissioner**Complaint number FCA001413***The complaint*

1. On 2 September 2021, you complained to me about the FCA's investigation of your complaint. My preliminary report was issued on 9 December 2021.

What the complaint is about

2. The FCA issued its decision letter to you on 12 March 2021, and then sent a further response to you dated 29 July 2021. Your complaint relates to the FCA's oversight of Firm X.

What the regulator decided

3. The FCA explained that it regretted that it would be unable to investigate your complaint under the Scheme because paragraph 3.3 of the Scheme states complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. The FCA considered that you should have become aware of the circumstances relating to your complaint over 12 months before you brought your complaint to it.
4. In its letter dated 29 July 2021 it re-stated that its decision remained that your complaint was made out of time and that there were no reasonable grounds for a delay in making your complaint.

Why you are unhappy with the regulator's decision

5. In your email to me on 2 September 2021, you set out that you profoundly disagree with the FCA's decision letter in which it said your complaint was 'out of time', and that it had based its decision solely on assumptions they have made about when you might have known that you had cause for complaint. You have set out that the FCA should have accepted that you simply only became aware

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of the cause for your complaint following the findings of the investigation into a similar case involving Firm Y.

6. From your complaint to me and the correspondence you have had with the FCA, I have identified the following reasons that you disagree with the FCA's decision to not investigate your complaint under paragraph 3.3 of the Scheme:
 - a. The FCA in its decision letter referenced the liquidation of Firm X in 2013 and it referenced that it took action against two regulated financial advisor firms who the FCA say were responsible for selling Firm X's schemes to UK consumers. You said that you were completely unaware of them and had no interaction with those intermediaries at any time. In your response to my preliminary report on 20 December 2021, you set out that you never received formal notification of Firm X's liquidation.
 - b. You have advised that the evidence for your complaint against the FCA for serious regulatory failure relates to information that came from your recent sight of a letter sent to Martin Wheatley (former CEO of FCA) in 2014 that infers that the FCA was warned on numerous occasions from 2010 onwards that Firm X's activities was putting retail consumers at risk, yet again no action was taken.
 - c. You further set out that you were aware of the publicity surrounding the independent investigation into the FCA's regulation of Firm Y and the subsequent publication of the report, which you have set out says, that the FCA has a potential liability in the event that it fails to take appropriate action to protect consumers against the fraudulent activities of a non-regulated company. You have explained that the publication of the independent investigations report strengthened your belief that you have a valid claim against the FCA.

Preliminary points

7. As you have identified, an independent investigation report has recently been published that identified a number of failures by the FCA in its regulation of Firm Y, an FCA authorised organisation, who it was found offered both regulated and unregulated products, including Unregulated Collective Investment Schemes (UCIS), to its clients.

8. Whilst there is a temptation to compare other cases, including yours, with the independent investigation report into Firm Y, it is not appropriate to do so. I must emphasise that every case has its own unique circumstances and it is important that I assess each case looking at its own specific details and circumstances.
9. Firm X whose products you invested in, was not regulated by the FCA at any time and the products that you invested in were unregulated products.

My analysis

10. Firstly, I want to say that I am very sorry to hear about the financial losses you have suffered as a result of your investment with Firm X.
11. Secondly, I want to note that your complaint is not the only complaint that has been received about the FCA's handling of matters involving Firm X. The issues that you have raised in your complaint about the FCA investigation of your complaint appear to closely mirror those raised by other complainants recently received by my office and that I have previously reviewed.
12. I have considered your position set out in your email of 2 September 2021, and in your correspondence with the FCA. I understand that some of the evidence that you have outlined has been collated and shared by an investor group seeking to find answers and redress for investors of Firm X's products, through different avenues including through complaints like yours to the FCA. I do not consider that the information that has been brought to your attention in the past 12 months provides new grounds for you to lodge a complaint that would otherwise be out of time.
13. I accept the FCA's position that there were already numerous pieces of information publicly available before you brought your complaint to the FCA that would have made you aware of the circumstances around your complaint. These include but are not limited to the Jersey Financial Services Commission press releases, the Final Notices issued on the two regulated financial adviser firms and Firm X going into liquidation.
14. I know that you disagree with these points. You have set out in your correspondence you were unaware of the action taken against two regulated financial advisor firms who the FCA say were responsible for selling Firm X's schemes to UK consumers. In your response to my preliminary report received

on 20 December 2021, you set out that you never received formal notification of Firm X's liquidation and until recently you had no reason to think you had grounds to submit a complaint to the FCA. You set out that you only became aware of the cause of your complaint following the publicity around the independent investigation into Firm Y.

15. Whilst I acknowledge these points, I consider that it is implausible that the lack of updates and/or returns on your substantial investment for a significant period should not have prompted you to look into what was happening in relation to your investment, much earlier than at the time of your complaint to the FCA. I believe that any investigations from 2014 would have alerted you to the fact that Firm X was going into (or already was in) liquidation. It is my position that this was a significant event that would have put you on notice of the circumstances and issues in relation to Firm X and that there were serious concerns about your investment.
16. I can accept complaints which are out of time if I feel there is good justification. I have considered the circumstances of this case and I do not think it is either practical or justified to investigate this case. It is not practical for the Complaints Scheme to have an indefinite open time frame for lodging complaints. That is why the Scheme requires complainants to lodge a complaint within twelve months of becoming aware of the circumstances giving rise to their complaint. This ensures that an investigation into the complaint can be conducted at the time of, or close to the originating events of a complaint, and people within the organisation can be located to provide first hand knowledge about the matters and locate and obtain relevant documentation. It also ensures that steps can be taken to address current issues and steps can be taken to resolve and improve issues at that point in time, rather than historical issues where the regulator may have already introduced changes to regulation and processes that are at question in the complaint. The Complaints Scheme does not have unlimited resources and whilst it is important to understand where there have potentially been historical issues and take lessons from them, this must be balanced with the available resources. However, I can assure you that I always carefully consider cases where Paragraph 3.3 has been used to ensure that it has been used appropriately and not being used to avoid addressing complaints, and I have done so in your case.

17. I believe that it is highly likely that you were on notice that there was an issue with your investment and most probably that the firm was in liquidation for some time before you made your complaint. It might be that you felt that you might obtain a financial resolution to your situation through the liquidators or other avenues and that you were waiting to see what would happen, but this did not change the facts or the original actions of Firm X and you could have lodged a complaint at any time if you felt the FCA had failed to protect investors. The possibility of financial rectification is not reasonable grounds to delay making a complaint. There was nothing to prevent you from making a complaint with the FCA, even if you were exploring other avenues. I note that in your response to my preliminary report you questioned this position questioning why you would have waited when there was no gain to be obtained from waiting. Whilst I acknowledge your point, it remains my belief that you were likely on notice about the issues with your investment and in turn that you should have been aware of the circumstances giving rise to your complaint more than 12 months before you lodged your complaint with the FCA.
18. For these reasons I consider that it was reasonable that the FCA set out that it was unable to look at your complaint as it is excluded under paragraph 3.3, because you should have been aware of the circumstances and issues in relation to Firm X at a much earlier point in time.
19. I also note that the Complaint Scheme is not devised to be a final step for complainants when other avenues for redress have been exhausted. It is there to investigate complaints about the actions or inactions of the FCA, including into its regulatory failures. I have noted that you have indicated that it was the recently released report into Firm Y that alerted you to the fact that you could raise a complaint about the FCA's regulatory failures. I am pleased to see that this report has highlighted this option for complainants, but this still needs to be done within relevant time periods.
20. Finally, I want to note that the FCA does have a statutory duty to secure an appropriate degree of protection for consumers. It does so by regulating the financial industry through the setting of standards which firms must meet, and by taking enforcement action where that is justified. It does not investigate individuals' complaints against unregulated firms or the firms it regulates. It is the role of the

Financial Ombudsman Service (FOS) to investigate an individual's complaint about regulated firms.

21. That does not mean that the FCA cannot investigate concerns arising from information about individual complaints, but it investigates those in the context of considering whether or not regulatory action is justified, or in the case of an unregulated firm whether alternative action should be considered through other forums, rather than whether or not the individual requires redress. Any action the FCA may or may not take because of the information you provided could not lead to redress for you personally.
22. In your correspondence to the FCA you set out that it failed to 'uphold the FSMA regulations, and to act on a timely basis to protect consumers and reduce financial crime.'
23. Whilst I have not investigated this complaint, I have reviewed the FCA file in relation to your complaint and other information made available to me relating to Firm X, and I am satisfied that the complaints team have made relevant enquiries about the past information that was received in relation to Firm X and these enquiries show that the information previously sent about Firm X to the FCA was received and was passed onto the relevant departments. In its letter dated 29 July 2021 the FCA did detail the regulatory actions it had taken against the two regulated financial adviser firms that were found to be responsible for promoting and selling Firm X's schemes to UK consumers which resulted in the issuance of final notices to them in 2013 and 2014.
24. However, as you are aware and as I set out in my points above, Firm X itself was not regulated by the FCA and it has not been able to take action against Firm X directly. In its letter the FCA did set out that it had passed information onto other law enforcement agencies who had shown interest and that it had also looked into whether the scheme was a UCIS. However, the standard of information it required to pursue the matter further was not available due to jurisdictional hurdles that were in place due to the operations of the scheme being located overseas.
25. So whilst you have identified that the recently published report highlighted the serious failures of the FCA in relation to a different firm, Firm Y, and that you consider it shared many common characteristics with Firm X where the FCA failed

to consider the holistic business model (i.e. look at the bigger picture), every case must be considered in the context of its own circumstances, in this case the fact that Firm X was not regulated and the products you invested in were not regulated and were overseas products.

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. 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 firm 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>. This means that, as you were told, there is no general right for members of the public to know the outcome of reports that they make.

26. 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, 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, I am satisfied that the FCA has behaved reasonably but I am unable to give further details.
27. This can be frustrating for complainants, but it is better that I am able to see the confidential material. On occasions, I have persuaded the FCA to release further confidential information to help complainants understand what has happened, but this is not always possible. I shall continue to pursue this matter with the FCA.
28. As I have already noted above, I have upheld the FCA's decision that your complaint has been made out of time. For this reason, it was not appropriate for

me to conduct an investigation at this time but following my review of the FCA's information that I have been provided with, I am satisfied that the complaints team have made relevant enquiries about the past information that was received in relation to Firm X and was referred to the relevant FCA departments and to other law enforcement agencies who had shown an interest.

My decision

29. I understand that you have experienced delays with your complaint. In both its decision letters to you the FCA has apologised for the delay and the inconvenience the delays may have caused and offered you an ex gratia payment of £50 in acknowledgement of the delays of both occasions. I am pleased that the FCA has recognised and apologised for the delays you have experienced, and I consider that the ex gratia offer was appropriate.
30. For the reasons set out above I have upheld the FCA's decision that it is unable to investigate your complaint under paragraph 3.3 of the Complaint Scheme.

Amerdeep Somal
Complaints Commissioner
26 January 2022