Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA001467

The complaint

1. On 25 October 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 25 October 2021 you set out you feel that it is 'reprehensible that such a large-scale regulatory and financial scandal has been repeatedly sidestepped by all the authorities who are charged with protecting the public and reducing financial crime.'

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. You had no knowledge of the Jersey Investments or the Jersey Financial Services Commission press releases in August 2007 relating to Firm X's Eastern European funds when you made your investments in Firm X's Argentinian Investments in 2008-2013.

   b. You disagree with the FCA's position that the liquidators report should have alerted you to the circumstances that relate to your complaint. You consider that 'if Firm X has been dissolved, then perhaps the FCA's argument would have a bit more substance, albeit somewhat tenuous.'

   c. You have advised that the evidence for your complaint against the FCA for serious regulatory failure relates to information that came to your attention very recently (within the 12 months prior to lodging your complaint).

      > The evidence came to light while the investor group started to consider a claim in negligence against the banks that operated Firm X's bank accounts. The key pieces of evidence include the FCA's knowledge behind the Jersey Fund Scandal and the serious alleged fraudulent activities involving a director of Firm X and his accomplice as well as a 2014 letter to Martin Wheatley, former FCA CEO (which the investors' committee have only seen in the last few months) that infers the FCA was warned on numerous occasions from 2010 about Firm X's activities that were putting retail consumers at risk. Yet the FCA took no action so that Firm X was able to continue with their deception and regulated activities without FCA authorisation which resulted in further retail consumer loss. More evidence has now come to light, and we believe the evidence of regulatory failure is sufficiently serious that the complaint needs to be properly and fully investigated.

   d. You further set out that yours and the investor groups awareness of potential regulatory failure was 'heightened' by the independent investigation into the

FCA's regulation of Firm Y and the subsequent publication of the independent investigation report. You believe that the 'serious failures' identified in report about Firm Y:

> share many common characteristics with Firm X where the FCA failed to consider the holistic business model (i.e. look at the bigger picture) and took no effective action when warned about serious fraud allegations. The failure to take action makes the FCA indirectly complicit in the alleged fraudulent activities which resulted in retail consumer losses. All these losses could have been avoided had the regulator been complying with its statutory objectives.

7. You have advised that you have suffered significant financial loss, adverse effects to your emotional wellbeing and physical health.

8. You believe that it is critical that the case about Firm X is properly and fully investigated, especially now in the light of the recently published report into the way the FCA regulated Firm Y.

Preliminary points

9. 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. As a result of the report's findings the FCA has reviewed its processes to address the identified failures and continues to do so.

10. 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.

11. 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

12. 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 the Firm and that these have had an adverse effect on your physical and emotional wellbeing.

13. 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 mirror those raised by other complainants recently received by my office and that I have previously reviewed.

14. I have considered your position set out in your email of 25 October 2021, and in your correspondence with the FCA and your responses to my preliminary report received 29 December 2021 and 6 January 2022. 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.

15. I accept the FCA's position that there were already numerous pieces of information publicly available before you brought your complaint to the FCA including the Jersey Financial Services Commission press releases, the Final Notices issued on the two regulated financial adviser firms and Firm X going into liquidation.

16. I know that you disagree with these points, as set out in your correspondence with the FCA in which you set out that, the Jersey Financial Services Commission press releases were not known to you and related to a different scheme marketed by Firm X. You also set out that you considered the liquidation of Firm X was tenuous at best given Firm X had not been dissolved at the time of your complaint. In your response to my preliminary report, you set out that it was nonsense that your awareness of Firm X's fraudulent activities should have triggered a complaint about regulatory failings.

17. 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

would 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 and that this should have put you on notice of the circumstances about your complaint. I also disagree with you that your knowledge of Firm X's fraudulent activities was not a trigger point for your awareness, as I consider that this clearly indicates that you were aware of the circumstances of your complaint at a much earlier date that 12 months before you lodged your complaint.

18. 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. 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, and as such you were aware of the circumstances of 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.

19. On this basis 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.

20. 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 set out 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.

21. 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.

22. 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.

23. In your correspondence to the FCA you set out that it failed to take:

> effective action when warned about serious fraud allegations. The failure to take action makes the FCA indirectly complicit in the alleged fraudulent activities which resulted in retail consumer losses. All these losses could have been avoided had the regulator been complying with its statutory objectives.

24. In your response to my preliminary report, you set out that 'the FCA knew about Firm X' wrongdoing long ago from several sources, but appears not to have referred the matter to the Unauthorised Business Dept'.

25. 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, including the unauthorised Business department. 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.

26. However, as you are aware and as I set out in my preliminary 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 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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 including letter you identified in your complaint and response to my preliminary report and it was passed onto the relevant departments.

32. Finally, I wanted to note that in your response to my preliminary report received on 6 January 2022, you set out that:

> 'It is also very concerning that the FCA was involved in discussions with the R2i liquidators and Insolvency Service which would indicate that there had been attempts to bury the financial crime as the FCA had full knowledge of the financial crime at the time'

This appears to be a new complaint element that was not included in your original complaint to the FCA or to me before now and consequently I have not addressed it in this report. Accordingly, if you would like the FCA to provide a response you should direct this complaint back to the FCA, in the first instance.

My decision

33. 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
27 January 2022