

7 December 2017

Final report by the Complaints Commissioner
Complaint number FCA00383*The complaint*

1. On 15 August 2017 Mr Mark Learmont (you) asked me to investigate a complaint about the FCA on behalf of a group of individual investors who had appointed you to represent them. I have carefully reviewed the papers sent to me by you and by the regulator. I issued a preliminary report on 2 November 2017. Both you and the FCA have had the opportunity to comment and I have carefully considered the points made and, where appropriate, refer to them below. You have agreed to waive your anonymity in view of the public interest in this case.

What the complaint is about

2. The complainants said that the FCA's, and before that the FSA's, actions in its handling of the collapse of the Connaught Income Series 1 Fund (the Fund) make it directly responsible for the losses and costs incurred by investors. As a result, they requested compensation from the FCA based on findings I made on this matter in cases [FCA00084](#) and [FCA00114](#) published in December 2016.

What the regulator decided

3. The FCA decided that it should not pay compensation to the complainants. It said that it considers each request for compensation under the Scheme on its own facts, taking into account a number of factors, particularly the following:
 - (a) [The Commissioner's published policy on remedies](#) which explains that, even if a complaint is well-founded, it does not mean that a compensatory payment will automatically be recommended. The FCA referred to the 'conclusion' section of my earlier decisions, in which I said that "*This Complaints Scheme is not designed to deal with major inquiries into alleged regulatory failure, nor to provide the kinds of remedies which you are seeking on behalf of investors.*"
 - (b) The need for a clear link between the regulator's error and the matter complained about, sometimes called causation. The FCA said that it was 'not persuaded' by the complainants' argument that the evidence shows clearly that their losses are directly attributable to the regulators.
 - (c) The FCA has an immunity from claims for 'damages', which is set out in paragraph 25 of schedule 1ZA to the Financial Services and Markets Act 2000. The FCA said that the effect of the immunity is to protect the FCA from legal claims for compensation, unless the FCA has acted (or failed to act) in bad faith or in breach of a claimant's human rights. The FCA said that it would not make a payment that would undermine the policy intention of Parliament when providing the immunity.

Finally, the FCA said that it is not part of the regulatory regime under which it operates that it should compensate consumers, where a firm may be unable to do so.

Why the complainants are unhappy with the regulator's decision

4. The complainants consider that the FCA has failed in its duty to act in a timely and effective manner, especially in response to information supplied by a senior whistleblower in January 2011. They say in particular that they would not have made further investments in the Fund in October 2011 if they had known there were concerns about it. In view of this they consider that the FCA has acted in bad faith.

My analysis

5. In my two previous decisions about the Fund, I set out my view that “*despite a long build-up of evidence pointing to the risk of serious consumer detriment, [the FSA] failed to act in a co-ordinated fashion, and failed to involve other agencies when it clearly ought to have done so*”. I went on to say that, although I had not seen any evidence of ‘bad faith’, in my view an inquiry into alleged regulatory failure was needed. In the light of my report the FCA agreed to appoint an external third party to conduct a review into the FSA’s regulation of the Connaught Income Series 1 Fund and to publish the outcome (to the extent that it can). The FCA said that its review would start once the enforcement actions would not be put at risk of being prejudiced.
6. Although I accepted that this was a reasonable approach, my view was that the FCA should be able to commence some preparatory work on the review and do as much work as it can without waiting for the outcome of current proceedings. I also recommended that the FCA should make sure that the review and publication of the outcome is not unduly delayed, given the long wait that investors have already experienced.
7. In my preliminary report I expressed my concern that very little progress had been reported either in finalising the enforcement actions or establishing the external review, despite the conclusions and recommendation in my earlier decisions. I also noted the complainants’ concern that one of the Fund’s operators is currently up for sale and asked what steps the FCA has taken to ensure that this will not affect any potential recovery of funds for investors.

My view

8. I am surprised that the FCA accepted the complaint for investigation at this stage, before the findings of the external review. The reasons the FCA has given for not agreeing to compensation may well be valid, but it seems to me that they must be provisional pending the findings of the external review. For that reason, I consider that a deferral under paragraph 3.7 of the Complaints Scheme would have been more appropriate.

Developments since the preliminary report and my recommendations

9. In my preliminary report, I recommended that the FCA:

- a. Undertakes to reconsider its conclusions and determine whether a deferral of the complaints would be more appropriate, pending the findings of the external review it has agreed to commission.
- b. Provides me with an update on progress on the enforcement action against Capita and BlueGate, and in instigating the external review. (I recognised that some or all of this may be confidential.)
- c. Comments on whether it is still seeking to recover funds on behalf of investors from the operators, and on how the recently announced sale of Capita might affect the FCA's attempt to recover such funds.

10. In response to my preliminary report the FCA says that:

- a. It has reconsidered deferral of the complaint and is satisfied that it was right not to defer the complaints. It considers that its task was to consider the complainants' circumstances in light of the Patellis/Nettleship Final Decisions and that because there was no new information from the complainants there was nothing further to investigate. It accepts that the external review may result in new findings being made and says that it will, at that time, consider the question of remedies, including whether any ex gratia payments should be made.
- b. On 10 November 2017 it issued a press release about the outcome of enforcement proceedings against Capita Financial Managers Ltd (CFM). Other enforcement action is continuing and it will not be commencing the external review until this action is no longer at risk of being prejudiced. Nor has it yet decided what precise form this review will take.
- c. The FCA's agreement with CFM for it to pay up to £66 million to investors has not been negatively affected by the recently announced sale of CFM.

11. You have also responded to my preliminary report. While broadly welcoming what I have said, you have reiterated your concerns about the FCA's regulatory approach to both Connaught and Tiuta, including the involvement of CFM and the focus on mis-selling by IFAs. You have also repeated an allegation that Mr Patellis made, that the FCA has acted in bad faith. I recognise the strength of feeling about these matters. Although I consider they were covered extensively in my earlier decisions, I accept your final point that many questions remain to be answered. This is why in my earlier decisions I recommended that the FCA carry out a review.

12. The FCA's response to the preliminary report suggests that it has misunderstood my analysis and reasons for recommending it reconsider deferral of the complaint. I also consider that the FCA has applied the wrong test when deciding to defer the complaint. My view remains that deferral was the appropriate response to the complaint, since it is too soon to say that no compensation should be paid. However, in agreeing that remedies may need to be looked at in the light of any new findings and decisions made by the external review, the FCA has not closed the door on reconsidering the matter.

13. I remain concerned to learn that there appears to have been little progress in relation to establishing the external review, despite the comments in my November 2016 decisions about preparatory work to avoid further unnecessary delay (see paragraph 6 above). While the FCA are right to be careful to ensure that continuing enforcement action is not prejudiced, there is an important issue of public confidence to be addressed. A more open approach by the FCA to these matters would be welcomed by me and the Connaught investors who have been waiting a very long time for some answers. I shall continue to seek confidential updates from the FCA on progress, and urge them to update the investors whenever they can to provide reassurance that progress is being made.

Antony Townsend

7 December 2017