

16 May 2019

Final report by the Complaints Commissioner**Complaint number FCA00484***The complaint*

1. On 1 October 2018 you asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and by the regulator. My Preliminary Report was issued on 22 March 2019 and both you and the FCA have provided comments.

What the complaint is about

2. In March 2017 you submitted a formal complaint about the FCA's handling of your concerns about its regulation of an authorised firm [Firm A], its sale to another authorised firm [Firm B] and its association with a non-UK firm [Firm C]. You said that you knew 'many others' had complained/presented information to the FCA but despite this you had been told that the FCA had closed its investigation. You said that you had offered to send proof of wrong-doing but had been told that your emails would no longer be responded to.

What the regulator decided

3. The FCA issued its complaint response on 24 September 2018. Your complaint was partly upheld on the basis that you were told your initial information had been passed onto the relevant supervisory team but the Complaints Team could not find evidence to support this. The rest of your complaint was not upheld.

Why you are unhappy with the regulator's decision

4. You are dissatisfied because the FCA has taken two years to provide a response to your complaint. You believe that instead of investigating Firm A, the FCA has covered up information that shows investor losses were avoidable if the FCA had taken your emails seriously as a whistleblower. Meanwhile Firm A has been found in default by the Financial Services Compensation Scheme.

FCA00484

Preliminary points

5. I note that, as with several cases I have seen recently, the issues you raise in your complaint go to the heart of an understanding of three very important areas of the FCA's work:
 - a. its regulatory approach to firms conducting both regulated and unregulated business, in the UK and overseas;
 - b. how it defines and treats whistleblowers;
 - c. how it responds to allegations of fraud.

6. I have dealt with these matters before, particularly in [my published decision on the Connaught Series 1 Income Fund](#). Although the facts of your complaint differ, I continue to see a number of cases where IFAs, consumers and others report concerns about a firm or a fund to the FCA, sometimes over several years, and where there is a mismatch between stakeholders' expectations and the perceived actions of the regulator. Some of this mismatch arises from the confidential environment in which the FCA operates, both under the Financial Services and Markets Act 2000 and because of its own policy approach, which means that action which the FCA is taking is not apparent to complainants. Some arises due to the passage of time and different approaches taken now and in the past by the FCA and its predecessor organisation, the FSA. However, I continue to have concerns about a lack of effective prompt action by the FCA in some cases. I also consider that the FCA could do more to explain and clarify its approach to these matters. I will return to these matters in my conclusions below.

My analysis

Background

7. In February 2016, you contacted the FCA's Whistleblowing Team to raise concerns about Firm A and its relationship with Firm C. You said that you were an overseas financial adviser aware of significant losses in inappropriate investments made on behalf of UK expatriates. The Whistleblowing Team decided that this was a consumer issue and your email was passed to the Customer Contact Centre (CCC).

8. In April 2016, CCC informed you that your concerns were not in the FCA remit and gave you details of the relevant overseas regulators. You were advised that your concerns about Firm A would be forwarded to the relevant Supervision Team but that was all the FCA could do.
9. Between April and July 2016, you continued to correspond with CCC, providing more detail about your concerns. On 28 July 2016, CCC said that it would not correspond with you further. You tried unsuccessfully to go back to the Whistleblowing Team who told you that anything relevant had been passed to Supervision.
10. On 22 January 2017, you sent CCC an email described as a 'formal complaint' about the mishandling and mis-investment of your own UK pension run by Firm B/Firm C, formerly run by Firm A. On 28 March 2017 CCC confirmed its closure decision of 28 July 2016 on all topics related to: Firm A, the FCA's role and remit, non-UK pension advice, Whistleblowing. You were given information about how to make a complaint about the FCA, which you did on 29 March 2017.
11. The FCA Complaints Team summarised your complaint as follows:
 - a. Part One - You claim that the FCA has not taken seriously the information you sent in. You are unhappy that you were asked to send in further information before being told the case against [Firm A] was closed.
 - b. Part Two - You allege that there has been an unreasonable lack of investigation by the FCA into the sale of [Firm A] to [Firm B].
 - c. Part Three - You are unhappy that you did not retain a single point of contact in the FCA's Customer Contact Centre [CCC].
12. You did not object to this summary, but it is clear from your subsequent correspondence with the FCA and with my office that you were expecting your specific concerns about the FCA's regulation of Firm A to be addressed, as well as how your information was dealt with. I consider that this was a reasonable expectation. Although the FCA's eventual complaint response to you did not focus on its regulation of Firm A, this has been considered in another complaint which has been brought to me. To avoid further delay, I have drawn on the FCA's file in that case to conduct my own investigation into your concerns.

Substantive complaint

13. I have had access to all the FCA's papers and I have asked detailed further questions. I appreciate the considered answers I have received from both the Complaints Team and the Supervision Team. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on all the material I have seen. However, it is important that under the Complaints Scheme, as an independent person, I can assess whether I consider that the FCA has behaved reasonably.
14. The FCA's complaint response focussed on your interactions with CCC and concluded that:
 - a. There had been a misunderstanding about some of the information you supplied and that CCC could have made it clearer what information was useful to the FCA rather than focusing on the origin of the pension advice. You were told that CCC had acknowledged that they could have handled their contact with you more appropriately and were offered an apology.
 - b. Information you provided between 21 and 31 March 2016 had not been passed on to relevant supervision teams, even though you were told it had. Because of this, Part One of your complaint was partially upheld. Having made the relevant supervisor aware of this information, the Complaints Team was satisfied that they were already aware of the concerns.
 - c. There was no evidence to uphold Part Two of your complaint because the FCA does not have the authority to prevent the sale of assets of a company in insolvency administration and complaints about these matters should be directed to the insolvency administrators. Although this was not the focus of the Complaints Team's investigation, it had not come across evidence to indicate that the FCA was negligent in its duty to raise concerns with the purchasing firm if the purchase would have an impact on that firm's ability to meet its regulatory requirements and obligations.
 - d. It was reasonable on grounds of efficiency for CCC not to offer a single point of contact. Notes are made to ensure any staff member can respond to follow-up enquiries and information. Part Three of your complaint was not upheld.

15. Although this response goes some way towards addressing some of the failings that occurred when you contacted CCC, in my view the complaint response does not go far enough, nor does it respond substantively to the underlying concerns that you raised. As noted above, you reasonably believed the FCA was conducting a full investigation into its supervisory oversight of Firm A and its interactions with Firms B and C. In my view the complaint investigation focused too narrowly on your interactions with CCC rather than on the issues you were primarily concerned about. I consider that this narrow focus also led the Complaints Team to underplay the effect of the CCC failings it had identified.

The FCA's Supervision of Firm A

16. The confidential material I have seen shows that the FSA/FCA did not ignore information it was receiving, and took active steps to supervise Firm A. However, I have concluded that this supervision was inadequate because:

- i. Multiple concerns about Firm A from reputable sources, including the FOS, resulted in little effective action;
- ii. Supervision of Firm A was initially treated as general and thematic rather than focussed, and key concerns were not followed up;
- iii. Information and intelligence received about Firm A's activities, with different companies and in several jurisdictions, was not co-ordinated. In some instances, internal teams did not pass on relevant information;
- iv. There are no records to show why some regulatory actions, including supervisory visits, were not taken or were not followed up;
- v. In particular, there was a failure to follow-up with Firm A on issues affecting potential consumer detriment.

17. In response to my further enquires on these matters, the FCA's current Supervision Team accepts that the supervision could have been better. It says that the failure to follow up on item (v) above is regrettable. It also says that it has recently changed the way in which it carries out supervisory activities:

Where we become aware of problems at firms, we expect them to rectify the issue to prevent future occurrences and will, where appropriate, proactively require them to demonstrate that they have done so satisfactorily.

18. This is of course to be welcomed, but it does not address the question about the consequences for consumers of the FCA's accepted omissions between 2014 and 2016 when critical decisions were being taken about whether there was sufficient evidence to support stronger regulatory action against Firm A.
19. Eventually, the FCA agreed to an ordinary insolvency administration for Firm A on certain terms. I appreciate that you consider this enabled Firm A to avoid its responsibilities while one of its directors continued to be involved in Firms B and C. As you know, the FCA is continuing to look at certain matters regarding Firms B and C and I cannot comment further on this at this stage. I will be asking the FCA to keep me informed of the outcome of its investigation into these matters.
20. However, I can comment to the extent that you were told that the FCA did not have scope to get involved in the administration process. The evidence shows that this was not correct: the FCA obtained and considered details of the pre-pack arrangements and gave its consent to the administration proceeding. In response to my additional questions on this matter, the Supervision Team accepts the information you were given was not correct, although it says that this does not have a bearing on its regulatory decisions in respect of Firm A. I am concerned that, despite having taken an interest in and given its consent to the administration – thereby acknowledging its regulatory interest in the matter – the FCA told you that it was not involved. The impression given was that the insolvency was 'nothing to do with us' and might be seen as an attempt to deflect attention from the FCA's involvement in this matter, especially since members of the Supervision Team providing information to the Complaints Team had been involved in the consent process.

Whistle-blowing and allegations of fraud

21. It is clear that you believed you were a whistleblower when you contacted the FCA and wished to be treated as such. I asked the FCA why you were not, given that its [website](#) guidance (first published 9 May 2016) says: *If you think a firm or individual is involved in wrongdoing within an area we regulate, and you want to report it confidentially, contact our whistleblowing team.* The FCA says that you were *a financial advisor reporting on behalf of mutual clients who had been impacted by concerns and issues at [Firm A]. It therefore appeared [you were]*

acting on behalf of consumers and in Whistleblowing Team's view this would not have been as a whistleblower (but rather a consumer representative etc). In addition, you had not requested anonymity or confidentiality but wanted action for your clients. The FCA has drawn my attention to telephone conversations and email exchanges it had with you between February 2016 and July 2017 which gave you information about the FCA's approach to whistle-blowing. These exchanges show that you were told on several occasions that your concerns were 'nothing to do with whistle-blowing', which only applied to employees or former employees of an authorised firm.

22. This does not accord with the published information on the FCA's website during the period you were corresponding with CCC. I **recommend** that the FCA considers whether it needs to revise its published guidance for whistleblowers, setting out clearly who meets the standard definition, and in what circumstances other disclosures will be considered.
23. Also implicit in the concerns you raised was an allegation of fraud by one of Firm A's directors. The FCA's complaint response makes no reference to this. I have previously expressed my view that the FCA could do more to explain its approach to allegations of fraud. There is an external perception that the FCA will take action whereas internally there seems to be a view that fraud is 'not for us'. Clearer statements are needed for both staff and the public about the FCA's approach to fraud and its likely actions in the context of risk-based regulation.

My decision

24. I have concluded that:
 - a. Your complaint was scoped too narrowly by the FCA and, although a detailed investigation was conducted at a late stage, opportunities were missed to respond to the underlying issues you had raised. This greatly increased your dissatisfaction with the response you eventually received. In part this was caused by serious delays and poor casework management in the Complaints Team. I note that you were offered a payment of £150 for delay;
 - b. The FSA/FCA's supervision of Firm A was inadequate and lacked strategic oversight. Information and intelligence received about Firm A from

consumers, advisers and the FOS were not co-ordinated in a way that might have supported more robust regulatory action. This led to some matters being overlooked or not followed up when clearly they should have been. It is not possible to say whether consumer detriment has resulted from the failings I have identified;

- c. You were given incorrect information about the FCA's role in approving the insolvency administration process. This was particularly serious because it suggested that this aspect of your complaint was solely a matter for the Insolvency Practitioners and was not a matter for the FCA. The FCA has said to me – correctly – that there is no evidence that Supervision deliberately misled you, but it is a matter of concern that a misleading statement about an important matter was made;
- d. Fraud allegations were once again side-lined on the basis that this was not within the FCA's remit or risk appetite;
- e. The reasons given for you not being regarded as a whistleblower were not in accordance with the FCA's published guidance on its website;
- f. It is not possible to say whether CCC's failure to pass on information you provided in March 2016 affected the FCA's decisions about Firm A. However, it is possible that receiving this information at that time might have re-alerted the Supervision Team to the issues at a point when there had been a failure to follow-up on previous concerns. To that extent I consider it was unsatisfactory for the complaint response to state merely that Supervision were already aware of the concerns. My views on this are affected by the fact that this is by no means the only complaint in which I have found that potentially significant information has not been passed on to the Supervision Team.

25. In approaching this case, while being mindful of the FCA's exercise of discretion in regulatory matters, I have asked myself whether any objective observer reading the FCA's own analysis of events would think that its supervision of Firm A was done well. The Supervision Team itself, in response to my questions, agrees that it was not. I appreciate this candour.

26. However, I have yet to be reassured that the FCA has learned the lessons from earlier cases I have considered on similar matters. The FCA's confidentiality regime must not be used as a screen to avoid proper scrutiny and reflection or, where appropriate, admission of clear failings. Although there has been positive engagement with the further questions I raised, I am concerned that the FCA's complaint response was both badly delayed and did not get to the issues underlying your complaint. The Complaints Team needs more resources – a matter on which I have commented before, and which is now being addressed.
27. As mentioned above, this is not the first time that I have commented on a failure by CCC to pass on information of supervisory interest – and you have queried the CCC's ability to identify key information. In response to my Preliminary Report, the FCA says that it believes these are historical issues and points to improvements already made in this team. The FCA also says that, while it acknowledges that I have identified 'a small number' of other similar cases, these are only a very small proportion of the cases dealt with by the CCC.
28. I accept these points, but the fact that I have identified several cases in a very small number of complaints (in proportion to the FCA's overall work) suggests that this is more than an isolated event; and the fact is that important information was not passed on at a time when critical decisions were being made about Firm A. I do not believe that this necessarily arises from the lack of a single point of contact in the CCC team. Nonetheless, **I recommend** that the FCA continues to work to ensure that CCC has the skills to understand what information needs to be referred as a priority, and takes steps to ensure that people referred to CCC, as well as the wider public and stakeholders, are given clear and accurate information to help them understand the FCA's approach to risk-based regulation, whistleblowing, consumer detriment, and allegations of fraud. This should go beyond referral to relevant parts of the FCA's website.
29. In response to my Preliminary Report, the FCA has confirmed that it is already taking steps towards this recommendation and has recently published its updated [Approach to Supervision](#), and says that it is confident that the supervisory issues seen on older cases such as yours are less likely to be repeated. These steps are welcome and I will be keeping the situation under review and monitoring progress on this over the coming year.

30. In my view a compensatory payment under the Scheme should be made because, after serious delays, the FCA's complaints process failed to provide you with a fully substantiated response to your concerns, and you were misled on one significant point. **I recommend** that the FCA offers to pay you a further £350 to reflect this, in addition to the £150 already offered to you by the FCA for its complaints handling delays (if not already accepted), a total of £500. In response to my Preliminary Report the FCA has indicated that it will make this offer.

Antony Townsend
Complaints Commissioner
16 May 2019