

14 June 2019

## Final report by the Complaints Commissioner

### Complaint number FCA00502

#### *The complaint*

1. On 5 February 2019 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 13 May 2019 and both you and the FCA have responded. This final report takes account of those comments, and concludes my investigation.

#### *What the complaint is about*

2. During 2017 you raised concerns with the FCA about its authorisation and regulation of three financial services firms and your financial adviser. The FCA summarised its understanding of your complaint in a letter dated 5 September 2017 and again in 12 October 2018. The FCA divided your complaint into the following parts:
  - a. Parts One to Three – a failure to regulate Firm A by the FCA’s predecessor, the FSA. You said that Firm A should not have been authorised because:
    - i. it seemed to exist only to take money from the public to fund a company (Company A) which shared common ownership;
    - ii. the common owners of Firm A and Company A had previously operated similar businesses which failed;
    - iii. the FSA had not appropriately assessed Firm A’s financial position before authorising it.
  - b. Part Four – a failure to supervise Firm A because an adviser there advised you first to make a loan to Company A and subsequently to make further investments in it, even though Firm A and Company A had common

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ownership. You said that the FSA, and subsequently the FCA, should have been aware of this conflict of interest and not allowed Firm A to continue to hold its authorisation.

- c. Part Five – a failure to supervise Firm B, to which your file was novated prior to Firm A entering into liquidation in July 2017. You said that the Director of Firm B was aware of a conflict of interest in the Company A investments and indicated that the advice you had received was unsound. Despite this, he employed the same adviser who had provided you with financial advice at Firm A. In your view Firm B was therefore party to ‘unsavoury’ business practices and should not have been allowed to take on Firm A’s clients.
- d. Part Six - The adviser who failed to follow due process when providing you with advice, and invested your funds into high risk products without your knowledge, now operates as an independent financial adviser (IFA) at his own authorised firm, Firm C. You do not believe it was reasonable for the FCA to authorise this arrangement given the circumstances stated above.

#### *What the regulator decided*

3. The FCA’s complaint response of 30 January 2019 said that the FCA had been unable to locate evidence that would substantiate your allegations in relation to Parts One, Two and Three of your complaint, and that there was ‘insufficient reason’ to uphold these parts of your complaint. Part Four was upheld on the basis that there had been a failure by the FCA’s Supervision Division to correctly review and follow up information received about Firm A regarding conflicts of interest. Parts Five and Six were not upheld, although the Complaints Team made a recommendation to the FCA’s Enforcement Division arising from its investigation of Part Six. You were told that further information could not be provided to you about this due to confidentiality restrictions.

#### *Why you are unhappy with the regulator’s decision*

4. You have told me that ‘If authorisation simply means giving firms permission and then ignoring their conduct thereafter and failing to monitor them, then there really is no public protection whatsoever’. You have provided a detailed commentary on what you consider to be the FCA’s failure to honour its mandate

and protect consumers from mis-selling and fraud. In your view the FCA is doing more harm than good, because you say you would have been considerably more cautious about moving your pension if Firm A had not been authorised by the FCA. You consider that radical changes are required to the regulatory system.

*My analysis*

5. The background to your complaint is advice you received from a financial adviser between 2009 and 2015 to invest the whole of your pension and other savings in unregulated funds in Company A, totalling £77,200. The adviser was not, as you seem to have believed, initially an independent financial adviser (IFA) but was employed at a succession of firms (all authorised by the FCA) before setting up on his own as an IFA, for which he received FCA authorisation in 2016.
6. From 2010, the adviser was employed at Firm A. You have since learned that Firm A had a connection to Company A. No conflict of interest was disclosed to you even when you made further investments in Company A. In 2017 Company A declared insolvency and you lost the whole of your investment. Firm A is also now in voluntary liquidation, as is Firm B, to which your client file was novated.
7. You have recovered around £34,000 from the Financial Services Compensation Scheme (FSCS). A 'direct investment' of £20,000 you made in Company A has been turned down for compensation on evidential grounds. You are aware of many other investors who have been similarly affected.
8. In reviewing the FCA's handling of your complaint, I have had access to all the FCA's papers, including confidential files. 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. I note that the FCA complaint response told you that some of its Enforcement work is continuing. I have requested and received an update on this.

*Parts One, Two and Three – Authorisation of Firm A*

9. The FCA's Complaints Team could not locate the authorisation documents for Firm A, which was originally authorised by the Personal Investment Authority (PIA) in 1999. The complaint response acknowledged that this reflected poor

document retention practices and recommended that the FCA create and maintain a central point of knowledge on legacy systems to improve the process of accessing historic information in the future. I welcome this recommendation.

10. I am satisfied that it was reasonable for the FCA to conclude that there was 'insufficient reason' to uphold your complaint about Firm A's authorisation because:
- a. Company A was not incorporated until 2009 (ten years after authorisation)
  - b. None of the 'failed business' directorships you have identified predate 1999
  - c. The FCA's capital resource rules in place between 1994 and 31 December 2015, required firms only to hold a minimum of £10,000.

*Part Four – Supervision of Firm A*

11. The FCA upheld this element of your complaint because the Complaints Team identified a failure by the Supervision Division to correctly review and follow up information received about Firm A in respect of conflicts of interest. I should say that the Complaints Team undertook a thorough review of Supervision's activities, which I commend.
12. The complaint response said that the Complaints Team had recommended that the Supervision Division consider enhancements to its closure process for similar cases but that further information could not be provided to you because section 348 of the Financial Services & Markets Act (FSMA) 2000 classes some information the FCA holds about firms as confidential and places restrictions on how that information is shared.
13. Because I have access to the FCA's files I have been able to review the Supervision of Firm A by the FSA and the FCA. On the one hand, it is correct to say that from time to time there was supervisory activity following authorisation. On the other hand, I note with considerable concern the Supervision failings that the Complaints Team has identified, particularly following substantiated referrals from the Financial Ombudsman Service (FOS). This has clearly hampered regulatory action to some extent.
14. The FCA's role is not primarily to assist individuals but to gather information and intelligence to regulate firms. Its confidentiality restrictions mean that most of its

regulatory activity is not disclosed. This can sometimes mean that any regulatory action the FCA may be taking is not apparent to complainants and others. However, it is important that I, consumers and the public can be satisfied that FCA supervision and regulation is alert to risk and responds promptly and effectively to information that points to potential consumer detriment. This was clearly not the case with the FCA's supervision of Firm A.

15. Although, I note that the Complaints Team satisfied itself that a case would not be closed in similar circumstances today, I am not altogether convinced that the recommendation it made will be sufficient to address these wider concerns. **I therefore recommend** that the FCA takes urgent steps to ensure that all its supervisory staff understand the serious consequences that inadequate investigation and insufficient follow-up can cause to consumers in cases such as this, using this case as an example.
16. In response to my preliminary report, the FCA has told me about steps that have already been taken and that it will continue to make its supervisory staff aware of the risks and implications of inadequate supervision, and will consider what other steps it can take. This is to be welcomed, as are recent significant changes to the way the FCA supervises firms. I will continue to monitor this situation via any complaints referred to me.

#### *Part Five – Supervision of Firm B*

17. The Complaints Team did not uphold this aspect of your complaint on the basis that the FCA was not aware of nor was it required to approve the transfer of your client file from Firm A to Firm B in 2015. Its investigation report notes that advice about your final investment in Company A seems to have been given before this transfer. The complaints response also said that there was no evidence that the FCA had failed to supervise Firm B. Based on the files I have seen, I am satisfied that this was a reasonable response and that the FCA could not have been expected to have known of allegations of unsavoury business practices at the time.

#### *Part Six – Authorisation and Supervision of your financial adviser*

18. As an employee of Firms A and B, your financial adviser was not personally liable to you for the advice that he gave to you. In 2016 he was authorised by the

FCA as an IFA with his own firm, Firm C. I appreciate your understandable concern that the FCA has authorised the individual who gave you such unsuitable advice. The FCA's complaint response on this matter agreed that the failures of Supervision identified in relation to Firm A could have affected the authorisation decision. You were told that regulatory work has been carried out in relation to Firm C and your former adviser and decisions reached. The Complaints Team also told you that it had made a recommendation to the Enforcement Division because of findings during its complaint investigation.

19. Unfortunately, confidentiality restrictions mean that I cannot give you any information about the FCA's continuing supervision of the individual who advised you. However, I have requested and received an update on the FCA's regulatory action. I expect the FCA to take note of your experience and ensure that proper steps are taken to avoid any repetition.

*My decision*

20. Although, I am satisfied that the FCA conducted a thorough investigation and provided a reasonable response to your complaint, I am very concerned about the supervisory failings that have been identified. I am not satisfied that the Complaints Team's recommendations go far enough. It is not just a question of closure decisions but of an ability to clearly identify potential for consumer detriment and act on it. In addition to the recommendations made by the Complaints Team, I have **recommended that** the FCA takes urgent steps to ensure that all its supervisory staff understand the serious consequences that inadequate investigation and insufficient follow-up can cause to consumers in cases such as this, using this case as an example.
21. I appreciate that this is likely to be of little comfort to you following your experience and substantial loss. As you say, you trusted the 'badge' of FCA approval only to be let down by unscrupulous advice, including an unacknowledged conflict of interest, to invest in unregulated products. The evidence shows that the FCA was made aware of the existence of this conflict of interest but took no regulatory action and closed their file. Although you have been able to recover some compensation from the FSCS it does not cover the full extent of your loss. It is not possible for me under the Complaints Scheme to

award you compensation on the scale you have requested to make good the shortfall in funds you have experienced. Parliament has exempted the FCA from liability in legal damages except in cases of bad faith or a breach of human rights, and that would need to be decided by a court.

22. I have raised with the FCA on several occasions my concern that people may be under the false impression that their investment is protected because a firm is regulated. In January 2019, the FCA issued the following Dear CEO letter warning firms about the importance of ensuring that financial promotions make clear where products offered are not regulated. In response to my preliminary report, the FCA has told me about subsequent steps to follow up with firms, which in some cases has led to changed marketing to make the distinction between regulated and unregulated business clearer. The FCA has also told me about actions taken to strengthen its rules and guidance, and that it intends to publish further information regarding regulated firms conducting unregulated business.
23. I very much welcome all of these initiatives. However, I also note that in your response to my preliminary report, you have restated your belief that the FCA is failing in its mission to deliver consumer protection and your view that the public is 'being lied to'. The FCA clearly needs to do further work to reassure consumers and the public that they can have more confidence that it is fulfilling its consumer protection mission. The publicity surrounding recent high-profile cases has exacerbated this, and I am pleased to receive the FCA's assurance that it is not complacent about there being room for improvement.
24. In my view, the FCA also needs to consider what more it, and the regulatory system as a whole, can do to stamp out abuses and the exploitation of investors unfamiliar with financial services products. It should also consider what steps can be taken to mitigate the risk that unscrupulous firms and advisers can escape responsibility in the way that you have experienced, leaving inadequate protection for victims.

Antony Townsend

Complaints Commissioner

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