Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA00504

The complaint

1. On 11 July 2019, you, Mark Bishop, submitted a complaint to the FCA about the actions of its Chair and Chief Executive in relation to the establishment of an independent review into the collapse of the Connaught Fund. Due to the nature of your allegations and the seniority of the individuals involved, all parties agreed that I should do an investigation of your complaint from scratch, rather than the usual approach of waiting for the FCA to do its investigation first. My investigation began on 5 August 2019, and on 12 August I set out to the FCA the type of information I would need to see. This was followed by a meeting with FCA Complaints Team staff at their offices on 9 September to discuss the logistics of document retrieval. However, I did not begin to receive documents from the FCA Complaints Team until 18 October and it took until 15 November for most of the first tranche of documents I had requested to be supplied. Further documents were uploaded between 15 November and 2 December. Although I accept that the FCA had to collate a significant amount of material, this delay has been unfortunate, particularly given the parallel timescale allocated to the Independent Reviewer. I do not, however, have any reason to consider that the delay was a deliberate attempt to stall consideration of the complaint.

2. My first preliminary report was issued on 10 January 2020 and both you and the FCA commented. In the interests of fairness, and given the unusual circumstances of this complaint, I issued a second preliminary report on 6 March 2020 to enable both parties to comment again before I reached a final decision.

What the complaint is about

3. Your complaint is about the FCA's (and its predecessor the FSA's) systemic regulatory role in the collapse of the Connaught Income Fund Series 1 (Connaught) and in particular what you see as the FCA's attempts to close down the full range of options for review of regulatory failure. You have also complained about what you see as the FCA's failure to engage with you to implement changes you believe would have prevented this and other regulatory failings.

4. You have complained specifically about the FCA's Chair, Charles Randell and the former CEO, Andrew Bailey who have (or in Andrew Bailey's case, had) overall responsibility for oversight of the FCA. You say:

> they *have been and are acting in bad faith, doing all they can to prevent the full truth about the regulator's incompetence and dishonest cover-up efforts in the Connaught case from being exposed, endeavouring to evade financial liability to the victims and obstructing efforts to introduce long-overdue reforms based on the problems identified in the case*.

Complaint about the Connaught review and the role of Charles Randell

5. You have complained about:

   a. *A 'very limited remit' set by the board sub-committee Mr Randell chairs, excluding events after 10 March 2015, which excludes subsequent regulatory failings and disregards input from stakeholders as to what they wanted addressed;*

   b. *The suitability of the Independent Reviewer, both as to seniority/skill-set and potential conflict of interest;*

   c. *Failure to include/prejudging the question of redress.*

6. Your specific complaint about Charles Randell is that he has supported the FCA's attempts to 'narrow down' the terms of reference for the FCA's Lessons Learned Review into the handling of Connaught (the Review) and to appoint 'an unsuitable and potentially conflicted Independent Reviewer'. You say that 'it is clear' from my final reports into the complaints made by George Patellis and

Adam Nettleship, issued in November 2016, that redress and compensation issues would be included in the external review and that I have received undertakings to that effect.

7. Following a meeting you had with Andrew Bailey on 31 July and the FCA's publication of its protocol for the Review on 14 August, you raised additional concerns about the restraints of the Review's Terms Of Reference and about the Protocol for its operation.

Complaint about Andrew Bailey

8. Your complaint about Andrew Bailey is that he refused to meet you on proposed changes you presented to his then Private Secretary in 2016/17 and after a further approach to him in April 2019 in relation to the FCA's regulation of London Capital & Finance. You say that Andrew Bailey's 'promise of radical change' has not been implemented and that none of your proposed changes are likely to be taken up as a result of the Review. In your view, the FCA has 'no intention' to implement 'much-needed reform'. You say that 'In wilfully rejecting this course of action over a period of more than two and a half years, Mr Bailey has caused avoidable consumer detriment, in clear breach of the FCA's statutory objectives'.

9. You have also expressed your disagreement with the notes taken at your meeting with Andrew Bailey on 31 July 2019 and your objection to the presence as note-taker of the Assistant Private Secretary to the FCA's Enforcement and Market Oversight Director. You expected 'there to be a firewall between any FCA employees involved in the External Review and those from departments that have been criticised. I would also have expected there to be full disclosure both in advance and subsequently about the intent to involve someone from such a department in the 31 July meeting, and consider that Mr Bailey's failure to disclose to me the identity of the note-taker even when asked to do so is an act of bad faith'.

Remedies

10. You initially sought the following remedies for your complaint:

a. *The publication of a new, revised remit for the Review, the content of which is acceptable to* [you] *and other stakeholders, including the Liquidators and the Chair of the APPG;*

b. *The provision of a full conflict check into the proposed Reviewer, signed by him as constituting full disclosure of his links past and present with anyone whose work might be reviewed or whose prospects might be affected by the Review;*

c. *Depending on the extent of any conflicts revealed under point b, above, the appointment of a Joint or Replacement Reviewer acceptable to* [you] *and the stakeholders mentioned at point a, above;*

d. *The agreement of a change programme to begin at the FCA at the earliest reasonable opportunity, together with sufficient involvement for* [you] *in either the delivery of it or the verification of its delivery that* [you] *can be sure that the changes promised are truly applied and embedded;*

e. *A written undertaking from the FCA board to update and extend the programme mentioned at point d, above, to reflect any recommendations made in the Review in due course*

You also requested that the Review be replaced by *a Treasury-commissioned report under Section 73 or Section 77 of the Financial Services Act 2012*. The FCA has pointed out that while Section 73 investigations are statutory they are not required to be directed by HM Treasury.

11. However, since your recent meeting with the Independent Reviewer, you have told me that, although you would not have chosen someone with his background or skill-set, you believe that Raj Parker is undertaking the exercise in good faith and is a capable individual with a good understanding of the issues at hand, so would not argue for replacing him at this stage.

Preliminary points

12. As my investigation under the Complaints Scheme (the Scheme) has been conducted from scratch, I will explain how I have approached it. Section 3 of the Scheme sets out the coverage and scope of the Scheme and states what is excluded. Paragraph 6.14 states that I will not investigate any complaint which is

outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with me.

13. The Scheme includes complaints about the way in which the regulators have acted or omitted to act, including complaints alleging:

    a) mistakes and lack of care;

    b) unreasonable delay;

    c) unprofessional behaviour;

    d) bias; and

    e) lack of integrity.

14. In my view, your complaints fall clearly within these categories. I have not excluded any part of your complaint. Paragraph 7.1 states that I may conduct an investigation in whatever manner I think appropriate. I have asked the FCA to provide a broad range of documents, including confidential information, which I have considered carefully. I have also asked the FCA further questions to clarify some of the issues.

15. Many of the elements of your complaint concern the way in which the FCA has exercised its discretionary powers and made decisions about how to proceed. My role is not to substitute my judgement for the FCA's. This report is not about the decisions I might have made, but is my assessment of whether, in all the circumstances, the FCA's actions or omissions were reasonable.

16. You raised with me your concern that the FCA was proceeding with the Review despite your complaint to me. My view was that the Review needed to get under way because more than enough time has elapsed already. This did not presuppose any particular outcome to your complaint or any response from the FCA to that outcome. However, I should record that in dealing with previous complaints I have commented publicly that the delays in investigating complaints and establishing reviews are unfair to complainants: this is another example of that problem, although it is a systemic one and not specific to your complaints against the Chair and Chief Executive.

Background

17. As mentioned above, I issued substantive reports on complaints about the FSA's and FCA's regulation of the Connaught Fund made by George Patellis and Adam Nettleship in November 2016. I concluded that:

> *The evidence does not suggest that the regulator was simply too slow to reach its conclusions: it suggests that, despite a long build-up of evidence pointing to the risk of serious consumer detriment, it failed to act in a co-ordinated fashion, and failed to involve other agencies when it clearly ought to have done so.*

18. Regarding the commissioning of an independent external review I said:

> *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. However, in my view such an inquiry is needed. I am pleased to say that the FCA has agreed to appoint an external third party to conduct a review into the FSA's regulation of the Connaught Income Series 1 Fund and that it will publish (to the extent that it can) the results. This is a very welcome development. The FCA has said that its review will start once the ongoing enforcement actions would not be put at risk of being prejudiced. This is of course a reasonable approach; however, I consider that the FCA should be able to commence some preparatory work on the review now and do as much work as it can without waiting for the outcome of current proceedings. Although I am unable to impose deadlines, I recommend that the FCA should also make sure that the review and publication of the outcome is not unduly delayed given the long wait that investors have already experienced. I ask that the FCA should keep you and my office informed regularly of progress. In carrying out and publishing the review, the FCA should commit to being open and transparent about what went wrong in the regulation of the Connaught Fund, and what steps have been taken to prevent a recurrence.*

19. I also told the complainants that they could come back to me if they remained dissatisfied after the publication of the external review.

20. On 5 December 2016, the FCA Board announced that it '*will appoint an external third party to conduct a review into the regulation of firms connected with the Connaught Series 1 Income Fund. The substantive review will begin once the current enforcement investigation has ended. The FCA intends to publish the outcome of the review, to the extent that we can*'.

21. On 10 November 2017, the FCA announced the end of its enforcement investigation into Capita in relation to the Connaught Series 1 Fund and arrangements for a financial settlement for investors**:** https://www.fca.org.uk/news/press-releases/capita-financial-managers-pay-66-million-benefit-investors-connaught-income-fund-series-1. You have said that this is only partial reimbursement, the FCA says it is significant. Other enforcement action was stated to be continuing. Two years later, I understand

that the enforcement action is still not concluded. You have queried why the FCA has started the review despite the continuation of enforcement proceedings: I infer that the FCA has decided that the review can commence without prejudice to the remaining proceedings, and I see no grounds to criticise the FCA for that.

22. In December 2017, I issued my final report on Mark Learmont's complaint on behalf of 200 Connaught investors who had sought compensation from the FCA based on the findings made in the Patellis and Nettleship cases. I said that the FCA was wrong to investigate and reject the complaints at that stage and that deferral would be more appropriate pending the findings of the independent review. I concluded:

> *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 [not] 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.*

23. I made similar comments in the related cases of FCA00403 and FCA00375. The FCA's reluctance to defer complaints in the light of an impending and clearly highly relevant independent review has inevitably given rise to the suspicion that the organisation has sought to close down complaints, including compensation issues, prematurely. I return to this matter later in this report but note here that in the case of other reviews, such as Dame Elizabeth Gloster's independent investigation into the events and circumstances surrounding the failure of London Capital & Finance (LCF), the FCA has agreed to deferral. I am unclear why they have declined to do so in the case of Connaught, although as noted above, complainants can still approach me if they remain dissatisfied after the Review has been concluded.

24. You first contacted me about your concerns in September 2018. You were concerned that:

    a. The FCA is not willing to cede responsibility for commissioning and overseeing the exercise, despite the seriousness of the concerns about the organisation's and individuals' competence and integrity, which [you] argue

represent a serious conflict of interest that can only be dealt with by the FCA exempting itself from the process;

b. It sees the review principally as a 'lessons learned' exercise, i.e. a tool for improving future regulation. This leads [you] to suspect that the scope will be advantageously narrowed and publication, if any, will be incomplete, since the regulator will argue that the document is principally for internal use;

c. It does not see the establishment or otherwise of civil liability as one of the functions of the report, which seems to [you] to contradict undertakings previously given by the regulator;

d. While [you] recognise that a police investigation is required, the independent reviewer will inevitably be in a position to discover evidence that might be useful to the police and of which the police might be unaware. There would appear to be a lack of willingness to include in the specification of the review a requirement to co-operate with any parallel law enforcement process, for instance by preserving and handing over relevant evidence;

e. The FCA is silent on whether it might use the Limitation Act to reject any claims for compensation should we wait for the outcome of the review before making a claim.

25. On 20 June 2019, the FCA finally published the Terms of Reference for the Review and announced that Raj Parker of Matrix Chambers had been appointed as Independent Reviewer, with nine months to complete the Review. A Protocol for the Review was published on 14 August 2019.

My analysis

Your complaint about the establishment of the Review and Charles Randell's role

26. In considering this aspect of your complaint, I asked the FCA for information about:

a. Regulatory/enforcement action since November 2016

b. Correspondence relating to the setting up of the review and its terms of reference

c. Executive Committee, Board and Sub-Committee minutes relating to Connaught and the setting up of the review

d. Legal advice given about the FCA's potential liability

e. Correspondence relating to the appointment of the Independent Reviewer

27. I also asked the FCA additional questions. From this I have prepared the Chronology that appears at the end of this report and to which I will refer.

28. Although Charles Randell was not appointed as FCA Chair until January 2018, and did not take up his post until 1 April 2018, I have referred to decisions made by the FCA before this because they are relevant to the FCA's approach to the type of review and its Terms of Reference, and because they form the background against which the FCA as a whole and Charles Randell as Chair made decisions. However, clearly Mr Randell cannot be held personally responsible for decisions made prior to his appointment.

Type of Review

29. The internal documents I have seen show that decisions made about Connaught were made in the context of calls for investigation or review into other high-profile events, and the wider need for the FCA to consider its approach to regulatory failure. Staff teams provided decision makers with advice on the legislative framework, with options and risk assessments for different types of investigation. These considerations included the relative advantages of internal and external reviews, taking account of legal and resource considerations.

30. In June 2014, the FCA's Executive Committee (ExCo) deferred any decision on whether the Connaught collapse met the test for a regulatory failure until all ongoing supervisory or enforcement action had concluded. Further discussions took place in September and November 2014. In November 2014 ExCo discussed the possibility that HM Treasury might direct a public interest investigation into Connaught and considered whether to investigate on its own initiative 'as if' the Financial Services Act 2012 applied (see paragraph 33 below). ExCo decided not to commence any investigation at that stage.

31. Between February and December 2016 ExCo and the FCA Board made decisions about how to approach a review of the events surrounding the collapse

of the Connaught Fund, culminating in the public announcement on 5 December that it would appoint *an external third party to conduct a review…to begin once the current enforcement investigation has ended* (see paragraph 20 above).

32. In June and July of 2016, ExCo and the Board discussed the options. Some members of the executive queried whether any review was necessary, given that an initial internal review had already been undertaken. In July, the Board was asked to provide *an initial steer … on its preferred response to the calls for investigations or reviews*, including timing and next steps. The proposal for Connaught was for the FCA not to take any active steps at that stage, and to keep a watching brief pending the outcome of the complaints I was then considering. Although no formal assessment had been made about whether Connaught met the criteria for a 'regulatory failure', the view seems to have been that because the relevant events occurred in 2012 or earlier, the test was unlikely to be met. This appears to be a change of position from that taken in 2014 (paragraph 30),

33. The FCA says that it reached that conclusion because Section 73 of the Financial Services Act 2012, which imposed a duty on the FCA to investigate and report on possible regulatory failure in 'the system established by FSMA 2000', only applies to events occurring after the Act came into force (1 April 2013). It says that this view is supported both by HM Treasury and by the drafting of Section 77, which gives HM Treasury power to direct the FCA to undertake an investigation where *it does not appear to the Treasury that the regulator has undertaken or is undertaking an investigation*, and which could be used for events predating 1 April 2013.

34. You have told me that you disagree with this and that any legal advice the FCA or HM Treasury have relied on about this is wrong. However, it is not the role of this Scheme to interpret the law and this is ultimately a matter that would have to be tested by the courts. The evidence I have seen shows that HM Treasury indeed confirmed that neither the Section 73 nor the Section 77 conditions for a statutory review were met for Connaught, and that in the case of Section 73, the reason was stated to be because, in the main, the relevant events occurred before 1 April 2013.

35. In any event, the published Board minutes record only that the Board: *considered the approach that should be taken in response to the calls for investigation of the FSA/FCA's supervision work in relation [to] the collapse of Connaught* (Board Minutes 27/28 July 2016: 7.6 Regulatory failure reporting). The FCA has confirmed to me that there are no confidential minutes. It is therefore not clear to me that the Board provided the requested steer at that time and indeed it seems that there is no record of the Board's actual decision, if there was one.

36. Further ExCo meetings were held on 26 September and 11 October 2016, after I had expressed my concerns to the FCA about its handling of the Nettleship and Patellis complaints (paragraph 6 above). Although it was now agreed that an independent review should be conducted by an external third party, decisions on the scope and timing of the review were again deferred until enforcement action had ended.

37. A paper taken to the FCA Board meeting on 3 November 2016 said that over the course of these two meetings ExCo had *concluded that an independent review, focusing on lessons learned, should be conducted*. The published minutes of that Board meeting are as follows:

> **8 Review of the Connaught Income Series 1 Fund**
>
> *The Board considered the proposals presented in the paper for the review of the FSA's involvement in the Connaught Income Series 1 Fund. After considering the options, the Board agreed that the review should be conducted by an external third party appointed and overseen by the FCA Board. The FCA Chair agreed to establish a board committee to oversee the review and agree initial Terms of Reference. The Board considered the operational support required for the review and also the potential impact this review, and other reviews underway, may have on staff. The Board noted the proposed approach to communicating the review, internally and externally*

38. It is clear that increased Parliamentary pressure, as well as my conclusions on the Nettleship and Patellis complaints, were determining factors in the FCA's decision to undertake a review of Connaught.

39. You have told me that the wording I used in the Nettleship and Patellis complaints (see paragraph 18 above) led you and others to think that the review would be a major inquiry into alleged regulatory failure, with redress for victims, and that there is a gap between what I said was needed and the review the FCA has commissioned. However, my final reports on these complaints make clear that the FCA had agreed to an external review into the FSA's regulation of the Connaught Income Series 1 Fund and that I considered that to be a welcome development. I also said *the FCA should commit to being open and transparent about what went wrong in the regulation of the Connaught Fund, and what steps have been taken to prevent a recurrence.* I appreciate that you remain doubtful about the FCA's commitment but this is now a matter for Raj Parker's review, with the option for those affected to invoke the Complaints Scheme if they remain dissatisfied after the review's publication, and in due course to refer the complaint to my office.

40. I also appreciate that you would have preferred there to be a statutory review and that you consider the evidence supports this, particularly given your view that events after 10 March 2015 should also be considered. You would like me to recommend that either HM Treasury triggers Section 77, or the FCA Section 73, on the basis that *events straddle April 2013 and there is a clear public interest*. However, I have not seen anything that suggests it would be appropriate for me to recommend this under the Scheme. The issue I am considering is what kind of non-statutory review was appropriate, given the circumstances.

41. Following the FCA Board meeting on 3 November 2016, further FCA action in relation to the review was deferred until 10 November 2017 when the Final Notice regarding Capita was published. At this point, the FCA seems to have concluded that the Enforcement action was sufficiently progressed to enable work to commence on the Review. In my complaints decisions on Nettleship and Patellis, I had said that the FCA should *do as much work as it can without waiting for the outcome of current proceedings*. I note your view that I should recommend the FCA 'honours the commitment' to commission the Review after all Enforcement work is concluded, particularly since the Review excludes the post-10 March 2015 Enforcement action. The FCA has also confirmed that, more than five years later, there are other outstanding Enforcement investigations. I

return to this in the section on Terms of Reference below, but in my view the settlement with Capita was a sufficient milestone for the FCA to conclude that work on the Review could commence and I had already expressed my view about the very lengthy delays.

42. In January 2018 a briefing on Regulatory Failure Investigations was provided to Charles Randell (as incoming Chair of the FCA Board). The briefing set out the Legislative Framework in the context of '*potential future investigations'* and says: '*The provisions relate to events on or after 1 April 2013'*. It provided a link to published guidance from April 2013 on How the FCA will investigate and report regulatory failure in the context of the two-part test introduced by the Financial Services Act 2012, and notes that H M Treasury can also require this if it would be in the public interest. So far as I am aware, despite the references I have seen to the FCA developing its approach, this guidance remains the FCA's published position. The guidance also states that: *The statement of policy set out at Annex 1 applies from 1 April 2013 for events arising on or after that date*.

43. The briefing to Charles Randell went on to note that the FCA will still seek 'lessons learned' if the statutory test is not met and will publish these in its Annual Report. The information provided to Mr Randell was consistent with papers considered by ExCo and the Board. In relation to Connaught and other cases pending, it noted that there had been a public commitment to carry out a review of the regulators' involvement, that calls for a review had not reduced as had been hoped, and that the precise nature of the review had yet to be determined. There was a suggestion that the review could be 'light touch'; one consideration was the impact on the scope of the review of the findings and recommendations of the internal Lessons Learned Exercise already conducted.

44. Following further discussions at ExCo on 15 October 2018, the Board was asked to approve the creation of a Board Sub-Committee with delegated decision-making powers, and agree draft terms of reference for the review. The supporting paper said that the FCA Board had previously agreed to conduct an Independent Lessons Learned Review into Connaught to be carried out by an external reviewer, and that the Review had been commissioned voluntarily and not under the regulatory failure provisions because the events predated the inception of the regulatory failure regime.

45. The paper before the Board said that staff had been doing preparatory work on the scope of the Independent Review, including looking at Board and ExCo level conflicts, governance arrangements, and potential candidates for the Independent Reviewer. The paper stated that experience of financial services was an important requirement for the independent reviewer for Connaught. A long-list of individuals had been drawn up and staff were producing a short-list. There were key decisions still to be made about agreeing the terms of reference, the extent of any engagement with key stakeholders, and the choice of Independent Reviewer. From the information I have seen it is not clear to me whether and to what extent Charles Randell had been actively involved in this preparatory work.

46. The paper also attached draft Terms of Reference for the proposed Board Sub-Committee. Its role prior to the appointment of the Reviewer was 'to act on behalf of the FCA Board in providing a view on key issues and in relation to decisions on logistical or governance matters relating to the Investigation including the scope, nature and conduct of the investigation and operational matters relating to the FCA'.

47. The Board concluded that the test for a regulatory failure investigation did not apply to Connaught. The Board minutes for 25 October 2018 state:

> *12 - Approach to Independent Lessons Learned Reviews*
>
> *12.1 The FCA Board previously agreed that the FCA should conduct independent lessons-learned reviews of the supervisory intervention on Interest Rate Hedging Products (IRHPs) and the FSA/FCA's involvement in the Connaught Income Series 1 Fund (Connaught). The Board also agreed that these reviews would be carried out by an external reviewer.*
>
> *12.2 These reviews would be voluntarily commissioned by the FCA and not formally under the statutory "regulatory failure" provisions.*
>
> *12.3 The Board:*
>
> *• approved the creation of a board committee to oversee the conduct of independent lessons learned reviews of the supervisory intervention on IRHPs and the FSA/FCA's involvement in Connaught. The Board requested*

that the terms of reference was explicit that the committee was responsible for agreeing its terms of reference and for appointing the Independent Reviewer.

• Considered whether members had relevant interests in order to manage any potential conflict of interest

• agreed the FCA Chair should select members of the committee for approval by the Board.

Conclusions about the Type of Review

48. The evidence I have seen shows that between 2016 and October 2018, the FCA was considering how to develop its approach to the conduct of reviews and investigations into matters of regulatory failure at the same time as it was dealing with several high-profile events, including the collapse of Connaught. The FCA has supplied evidence of discussions in the organisation from 2014, and again in June and July 2016, about the need to develop a framework for regulatory failure investigations, lessons learned reviews and 'other wider reviews'. I have not seen any evidence that work has been concluded on this and the FCA has declined to provide me with further information about the development of its internal policies and approach to regulatory failure assessments and investigations in the context of your complaint. I can only conclude therefore that the FCA's published position remains as set out in its April 2013 guidance.

49. I have seen no formal assessment of whether Connaught met the test for regulatory failure before the announcement of the review in December 2016. The FCA says this is because the relevant events took place after 1 April 2013. Nor have I seen a documented decision by the FCA Board about the type of review that was appropriate, beyond the assertion that it was a 'lessons learned' review. It is unclear to me whether, and if so on what basis, the FCA decided that a 'lessons learned' review, rather than a 'wider review' (even though not statutory) was appropriate for Connaught. Bearing in mind that an internal 'lessons learned' exercise[1] had already been undertaken, that I had published critical reports on complaints about the FCA's supervision of Connaught, and that there

[1] The FCA says that this was not a full internal 'lessons learned' review but a Fact Find Report requested by the Executive. However, it was described as such in internal documents, including the January 2018 briefing to Charles Randell.

were known concerns about the FCA's willingness to consider its possible responsibility for the losses suffered by investors, I am surprised there is no record of any significant discussion of these issues. It may be that the precise title of the review is of less importance than its terms of reference, but I think that – as evidenced by your complaint and on the basis of the internal documents which I have seen – the general description was bound to give the impression that the review was focussed on a forward look, rather than on the impact of any regulatory failings. This seems to arise from the FCA's view that its options for review are 'statutory' or 'lessons learned'. Although it says that wider reviews are also considered, I have not seen evidence of this in relation to Connaught.

Terms of Reference

50. Between October and December 2018, FCA staff worked further on the Terms of Reference (TOR) for the Review, and the Board Sub-Committee had its first meeting on 13 December 2018. Between January and June 2019, FCA staff continued to work on the TOR, including consultation with H M Treasury, the APPG (All Party Parliamentary Group) for Connaught, and other stakeholders.

51. During 2018 and 2019 you also corresponded with Charles Randell about the Review. Among other things you raised the question of redress, assessment of the FCA's civil liability, and the application of the Limitation Act to any claims. You also made Freedom of Information requests about the FCA's relationship arrangements with individual police forces and the National Crime Agency.

52. I have the following observations about the drafting of the TOR:

    a. There were internal discussions about whether the draft TOR should be shared with potential reviewers for their input on the drafting but a decision was made not to do this because of concerns that the detailed 'reading in' required might delay finalising the TOR and the FCA's experience from another review about Independent Reviewers increasing the scope.

    b. There was also agreement that the review should not be a route to re-open the issue of 'redress', which the FCA has clarified meant 'the distribution of monies as a result of the settlement from Capita following enforcement action'.

c. The TOR remained in draft form while internal teams, the Board Sub-Committee, HM Treasury and stakeholders were consulted, and changes were made in response to comments from all of these. These all served to broaden the scope of the TOR, for example to include consideration of:

   i. Individuals who were associated with Tiuta plc, Capita and Blue Gate

   ii. Implementation of supervision decisions and judgements made

   iii. Effective management of potential conflicts of interest

   iv. The approach to whistleblowing

   v. Co-ordination with other organisations

d. Stakeholders' comments in April 2019 led the FCA also to consult CIRAG (Connaught Income fund Regulatory Action Group). As Complaints Commissioner, I was not consulted about the TOR but the FCA had already seen my published decisions. I also provided input on the issue of redress (see paragraphs 56 to 60 below). A map of stakeholders' comments was prepared after they had been consulted, which set out what had been added and what had not been agreed to, with reasons. This was presented to the Sub-Committee of the Board. It was also noted that stakeholders' comments would be passed on to the Independent Reviewer and that there was an expectation of liaison between him and stakeholders.

e. The main thing that all stakeholders wanted included that was not agreed was a wider period for the review to cover the period after 10 March 2015, when the FCA announced its enforcement investigation into the operators, to include the FCA's settlement negotiation with Capita. The decision not to agree to this was stated to be because *the 'point of failure' was around the supervision of the Connaught fund* and not the subsequent enforcement investigation and that most complaints about enforcement had been around delay. The FCA's view was that to include this period would lead to further delays.

Conclusions about Terms of Reference

53. On balance, I consider the FCA's process for drafting and eventual publication of the TOR was reasonable. Any points of concern I have are related to my

previous conclusions about the FCA's terminology for the review and its failure to consider whether a wider review was required.

54. Stakeholders were consulted and the evidence shows that their and others' comments on the draft TOR resulted in additions to the scope of the review. Although your email to Charles Randell of 1 April 2019 referred to a restricted range of stakeholders being contacted and only allowing eight days for comment, none of the responses from stakeholders complained about the timescale. It is clear that they were keen for the review to proceed and got together promptly and effectively to provide a co-ordinated response. Additional time was given to CIRAG for its comments, and the FCA also apologised to this group for not including it in the initial consultation round. I am not aware of any other stakeholders that should have been approached.

55. I have not seen any evidence that Charles Randell sought to 'water down' the TOR at any stage. The consultation with stakeholders led to broader TOR, although not everything requested was included. It is possible that Mr Randell was involved in the decision not to share the draft TOR with potential Independent Reviewers but I have not seen any evidence of this. Although the FCA may have had good reasons for doing this based on previous experience, its reluctance to allow potential reviewers to comment for fear they might seek to widen the scope of a review, combined with its description of 'lessons learned' reviews, could be perceived by stakeholders as a focus on controlling process rather than engaging openly with independent scrutiny.

56. I am satisfied that it was reasonable for the FCA to exclude the settlement made with Capita in November 2017 from the review. I am also satisfied that it was reasonable to exclude any assessment of the FCA's civil liability. Furthermore, and for the record, it has never been the case that I have received undertakings from the FCA that redress and compensation issues would be included.

57. Although the FCA has never committed to paying compensation, it has told me that: 'We accept that the external review may result in new findings being made and we will, at that time, consider the question of remedies, including whether any ex gratia payments should be made.' In my subsequent conversations with the FCA, I have made it clear that I consider it would be very unfortunate if the

FCA made any statements in advance of the findings of the review that suggested that the question of compensation had been excluded. I do not believe it has done so. Correspondence you have had with the Complaints Team and Charles Randell has confirmed that, although the Review's purpose is not to decide civil liability, ex-gratia payments after the review have not been ruled out, although I note that you were told by Charles Randell and FCA staff on several occasions that such compensation was likely to be limited. You have told me that you consider Charles Randell's letter to you saying 'we will not be setting up a compensation fund of £100m or any other amount' to be evidence that the FCA *has* ruled out paying compensation but in my view this mis-states the context of the correspondence you had with Mr Randell in February 2019, which makes clear that he was commenting on your view of the FCA's legal liabilities and not redress under the Complaints Scheme.

58. The question of the circumstances in which ex gratia compensation might be awarded under this Complaints Scheme has been the subject of a long-running debate. When the Financial Services and Markets Bill was being debated in Parliament in 2000, concerns were expressed about the absence of effective powers to compensate people who suffered as the result of regulatory failure. The FCA (and the other financial regulators) have statutory protection from being sued for damages in most circumstances, but there is a provision under this Scheme for the award of ex gratia compensation. The tension between on the one hand statutory immunity and on the other the ability to award ex gratia compensation has never been satisfactorily clarified and resolved.

59. In 2016, I discussed with the FCA Board the need for greater clarity about the circumstances in which such compensation might be awarded, and the limitations on such awards. Four years later, and despite several further discussions, the FCA and the Bank of England have still not issued a consultation on proposals to improve the Complaints Scheme, including clarity on compensation.

60. In my view, your complaint clearly illustrates the need for a wider debate on how and when compensation under this Scheme should be awarded. You have asked me whether I believe the scheme rules as currently published *constrain my ability to recommend the payment of material levels of compensation, or to*

recommend compensation in circumstances that might otherwise give rise to civil litigation (bad faith, human rights breaches) and whether I believe this is a contradiction of the position intended by Parliament, as encapsulated in the 2012 Act. You have also asked whether I agree with your view that in any conflict between the 2012 Act and the Scheme, the Act should prevail. These are important questions and precisely why a wider debate and consultation is needed, one which I have been calling for since 2016, but which the FCA has not responded to. I have on occasion awarded substantial sums for proven financial loss but the current lack of clarity means that individuals have no clear expectations about the compensation they might receive; and there is no clear published set of principles against which the regulators – and I – can consider whether or not an award is justified.

61. I do not consider the FCA was under any obligation to offer you assurances that it would not seek to rely on the Limitation Act in respect of any subsequent civil claims. This would be a matter for the court to rule on if appropriate.

62. I am also satisfied that it was within the FCA's discretion to set a cut off point for the review of 10 March 2015, on the basis that that was when the FCA announced its enforcement investigation and because most of the complaints were about its supervision rather than the enforcement stage. I note that you disagree with the FCA's categorisation of the enforcement complaints as being primarily about delay and I accept that there has been continued delay beyond that. It is of considerable concern that some enforcement action is still not concluded five years later, and I note your concern that the FCA has not provided any recent public information about this. I also accept that this was something all stakeholders asked to have included. However, I consider that it would be difficult to review this stage of the enforcement action before it has been fully concluded.

63. Nevertheless, it is important that the public has confidence that the FCA's enforcement actions are sufficiently prompt and effective, and – fairly or not – there is sometimes criticism of apparent delays. This case might be an example. I assume that following any major enforcement action, the FCA carries out an assessment of the efficiency and effectiveness of its processes and whether there is any need for improvement. In my view the FCA should commit to doing

this for Connaught, taking into account stakeholders' views and concerns, once the enforcement action and the Independent Review are finally concluded. The Independent Reviewer might also have a view, as a result of his conversations with stakeholders, on whether he thinks the FCA should reconsider this matter. There is also still the possibility of complaints to me about this under the Complaints Scheme, once the enforcement action has concluded. In the meantime, the FCA should continue to provide me with updates on the continuing action, with any explanation of the continued delay it can provide.

64. I do not think it was necessary for the FCA to include in the TOR a reference to liaison with the police or other enforcement agencies. That is a matter for the Reviewer to consider. I have already commented, in my final report on the complaint from George Patellis, on the FCA's delay in referring the allegations to the police.

Appointment of the Reviewer

65. During the period in question, the FCA was seeking reviewers for three separate reviews: the review into the supervisory intervention on Interest Rate Hedging Products, the review into the failure of London Capital & Finance, and the Connaught review. The evidence shows that ExCo was told on 15 October 2018 about preparatory work carried out by staff to scope the Connaught and IRHP reviews, including identifying potential candidates. In relation to Connaught, staff had prepared a long-list of individuals and were producing a short-list.

66. The FCA has told me that:

    a. In total, 23 people were approached for the role of Independent Reviewer by direct email from Charles Randell. They were all asked about conflicts once they confirmed interest and some were rejected on that basis.

    b. Names came from recommendations from FCA colleagues, from discussions with the Treasury, from the Chair's professional contacts and from online searches of regulatory consultancies, law firms and barristers' chambers with relevant expertise.

    c. A first group of potential reviewers was contacted on 22 March 2019. Further people were contacted on an ongoing basis from the start of April.

d. Charles Randell's searches led him to identify Raj Parker as a possible candidate in early May. Although Charles Randell had no prior knowledge of Raj Parker, Raj Parker's online CV made clear that he had relevant experience of financial services regulation, of acting as an independent reviewer and as a judge. Having made enquiries of professional contacts outside the FCA about Mr Parker's suitability, he decided to approach him.

e. Enquiries made within the FCA and online searches had not revealed any conflicts which Freshfields would have had in relation to Connaught. Raj Parker's clerk also offered to check what involvement Freshfields may have had with Connaught prior to Raj Parker's retirement in October 2016. Charles Randell concluded that it would not be proportionate to impute to Raj Parker the conflicts of a firm which he had left some three years earlier, so that the focus should be on Raj Parker's personal or professional conflicts. Raj Parker had confirmed both in writing and in person that he had no personal or professional conflict with the firms mentioned.

f. There was a three-stage process for the recruitment and selection of the Reviewer. Charles Randell met those candidates who expressed an initial interest, either in person or by teleconference, to give them more information about the reviews, assess their interest and likely suitability. Promising candidates were then met by a wider staff team for further assessment of their suitability for the role, and for them to ask questions about the practicalities of undertaking the review. Decisions to recommend reviewers to Board Sub-Committees were based on these meetings for all three reviews.

g. Raj Parker was identified as the suitable candidate for the Connaught role.

h. The Board Sub-Committee's role was to consider Charles Randell's proposed choice of reviewer and, if it agreed, to approve that person. This was in line with the process carried out for the other reviews and previous reviews.

67. In response to my inquiries, the FCA has informed me that although Raj Parker and a senior FCA staff member who is now a member of ExCo had both worked at Freshfields in the 1990s, they did not work together, nor have they been in

contact since. In a recent email you have told me that you have accepted Mr Parker's assurances that, although this staff member was a member of his department at Freshfields for several years, he cannot recall them ever working together on a case, they did not socialise together and have not met since. For completeness, the FCA has told me that an additional member of ExCo also worked for Freshfields approximately 30 years ago.

68. In December 2018 and April 2019, there were internal discussions about the FCA's legal obligations to carry out an 'open tender process', the April discussions taking place in the light of unsolicited expressions of interest from law firms in relation to the LCF review and Lord Myners' comments that an FCA appointment could look like institutional cover-up. The FCA concluded that it could use the same process it had used for its Davis review in 2014. In my view these discussions focussed on narrow legal risk rather than any wider consideration of stakeholder or public perception. The FCA says that this was not their intention and that the aim was to appoint an appropriately qualified reviewer as efficiently as possible to get the review under way. Although I consider that the selection of Raj Parker was made on a sound basis and in good faith, in my view the FCA should reflect further upon whether there is a broader reputational risk in its current arrangements for appointments of this kind, and whether it should consider suggestions from stakeholders.

Conclusions about Appointment of the Reviewer

69. I am satisfied that it was reasonable for Charles Randell to conclude that Raj Parker was free from conflicts. I note that you wish me to establish whether either of the two ExCo members who had previously worked for Freshfields suggested his name; however, I have concluded that this is not necessary. A number of names were suggested from a variety of sources, steps were in place to test for conflicts and some candidates were then excluded on that basis.

70. I am also satisfied that the FCA's appointment of Raj Parker as Independent Reviewer was a decision that it was entitled to make and that its recruitment and selection process followed previous practice. It is clear that Raj Parker has highly relevant senior legal experience. I have seen nothing to suggest that his

appointment was made on any other basis than that he was a suitably qualified candidate for the job. I see no reason to query his suitability or independence.

71. However, the FCA may wish to consider whether this approach, via known contacts, online searches and internal discussion with heavy reliance upon the Chair is the best way to command trust in the process and achieve the degree of demonstrable independence that is required. Although the FCA seeks to retain 'flexibility' and minimise delay, it might assist the FCA to build stakeholder trust and confidence if it did not to seek to control the process so tightly. Options the FCA could consider are asking stakeholders to suggest names, a more open tender process, and the use of a professional search and selection service.

72. I am surprised to see from the various ExCo, Board and Sub-Committee papers that the FCA considers there are no Equality, Diversity and Inclusion considerations in recruitment exercises of this kind.

Protocol for the Review

73. In relation to the Protocol, you have said that:

    a. *You asked Andrew Bailey to confirm the identities of the Accountable Executive and members of the Project Review Board as you are concerned that there may be scope for conflicts of interest.*
    b. *The Reviewer will be limited by the Terms of Reference, so can't go beyond the Remit, and in 12 it's clear that if he wants information from or about other organisations (for instance, the Financial Ombudsman) he must make such requests through the FCA - a huge opportunity for filtering to take place and the Reviewer to be denied the full picture. And if the Reviewer feels he is not receiving sufficient information or co-operation, he has the right to escalate to the Chairman of the FCA, who also chairs the sub-committee that is responsible for his appointment, the Remit and possibly also the Project Review Board.*
    c. *You are concerned that the FCA will have extensive powers to redact what it considers, in its sole opinion, to be privileged information or information covered by FSMA s348, that individuals who were at the time below Director level won't be named and that any individuals and organisations (the FCA included) that might be identifiable will have Maxwellisation rights (section*

E). I suspect it is unusual for such rights to be extended to organisations and of course there is no legal obligation to provide it to individuals, and I would argue unnecessary to do so, especially when those in all but the most senior positions are not to be named. The Reviewer is expected to be guided by the FCA's 'specific individual contacts' in determining whether to act on such representations. There is no corresponding right to review extended to the victims or other relevant stakeholders, despite there having been representations to this effect among those made when the FCA sought inputs from stakeholders on the Remit. This seems to me another example of the process being intrinsically biased in favour of those subject to review and against the complainants.

d. *It was published eight weeks after the Review was announced, and with it the timeline, which requires the Review to be completed and published within nine months (39 weeks). Unless the Protocol was made available solely to the Reviewer before being published, which would be a matter for concern in itself, it would seem that the Reviewer has been without a Protocol and hence unable to commence work for eight weeks - 20.5 percent of the time allocated for the entire exercise. Given the scale of the exercise and in particular the extensive Maxwellisation provisions, there may be a significant risk that the Report will be published late, further delaying what little possibility of transparency, redress or reform may be made possible by this flawed Review exercise;*

e. *The overall effect of the Protocol, in particular that of Paragraph 16, would appear to be to deter present and past FSA/FCA employees and indeed other witnesses from speaking frankly. Requests for meetings should be made through the FCA, prior notification of topics and documents to be discussed should be fed through the same channel, and all meetings should be recorded and transcribed. There are no whistleblower protection measures incorporated into the overall process. The overall effect is that anyone who is or might in the future be affected by your former employer for their own career prospects (including people working in or aspiring to work in that organisation, or regulated firms) would understandably be very nervous about speaking freely.*

74. In response to these issues, the FCA has satisfied me that:

    a. The Independent Reviewer was provided with the draft protocol and asked to provide any comments but did not do so.

    b. The Review was announced on the staff intranet and some drop-in sessions were held. The FCA has also produced a Q&A for staff; this outlines that the FCA supports the review and expects people to participate if asked to do so by the Reviewer. They were also given guidance on how to identify, retain and store relevant documents.

    c. The approach to naming of staff is consistent with the Board's previous approaches and was considered by the Board who insisted on this. It was also covered in the protocol that was provided to the Sub-Committee.

75. The FCA has also told me that the Accountable Executive for the Review is Jonathan Davidson, Director of Supervision and Authorisations. The Project Board names (which it has supplied to me) are confidential. I note that you also received this information from the FCA in response to a Freedom of Information Act (FOIA) request.

Conclusions about the Protocol

76. I consider that it was appropriate for the FCA to share the Protocol with the Independent Reviewer before publication. It is not a document that I would have expected the FCA to consult on more widely with stakeholders. Protocols for other reviews have been in similar terms. In general, I consider that it is up to the Reviewer to raise with the FCA any aspect of the Protocol that he considers might be or is inhibiting his conduct of the Review and to renegotiate the terms.

77. I am satisfied that it is within the FCA’s discretion to set boundaries for the level at which staff should be named by the Reviewer. Although I would not expect staff to be compelled to speak to the Reviewer, I take your point about encouraging staff to come forward in confidence on a whistle-blowing basis where appropriate. In my view, this is a matter for the Reviewer to raise with the FCA if he considers it to be necessary. It will also be a matter for him to tell the FCA if he considers that he needs further time to complete his review for any reasons and, if this is due to delay or lack of co-operation by the FCA, to say so.

78. In my published decisions on the Patellis and Nettleship complaints, I said the following about the FCA's approach to the confidentiality requirements of Section 348 of the Financial Services and Markets Act 2000 (S348):

> *I have also considered the reliance placed by the FCA on s348 as a reason for not disclosing further information to you. My understanding is that this applies only to confidential information received by the FCA in the course of its statutory duties. S348 cannot in my view be used to protect information generated by the FCA itself, nor information which is already in the public domain. I recognise that the FCA has a difficult task in deciding what information should properly be disclosed, particularly when balancing its various legal responsibilities or when there is a danger of prejudicing proceedings. Nevertheless, in my view there is scope for greater openness in this case, which is why I have referred extensively to the further material I have reviewed.*

79. I would expect the same principles to apply to the FCA's publication of the outcome of the Review.

Your complaint about Andrew Bailey

80. In considering this aspect of your complaint, I have looked at information supplied by you and the FCA about your engagement with Andrew Bailey, who joined the FCA as CEO on 1 July 2016 until March 2020, and other FCA staff and what has resulted from this.

81. On 27 October 2016, you approached Andrew Bailey in your personal capacity to request a meeting following the release of the New City Agenda report calling for regulatory reform. You said that your experience with Connaught and discussions with a wide range of stakeholders affected or concerned by 'financial services crimes' across the sector had given you valuable insights into required regulatory reform and that you would like to make a presentation to the FCA.

82. You attended the FCA in December 2016 and January 2017 to make your presentation to the Private Secretary to Andrew Bailey. He briefed Andrew Bailey on his meetings with you on 26 January 2017. I note that this briefing includes a note of action taken to pass to relevant teams three concerns you had raised: about changing the wording of job advertisements that you felt played down the FCA's consumer protection role; about concerns you had raised about some staff conflicts of interest; and about widening the scope of the Review.

83. Following this, you had further exchanges with the Private Secretary who informed you that the FCA would not be taking up your offer of consultancy to help lead cultural reform, organisational change and a review of governance at

the FCA. You were told that Andrew Bailey was recently in post and had his own plans to lead change in the FCA, including responding to a consultation the FCA was then running on its future mission.

84. In March 2017, you wrote to Andrew Bailey with two suggestions about the Independent Review into Connaught: that the scope should be widened to include FCA as well as FSA actions (the Board minutes of 3 November 2016 had referred only to the FSA) and that stakeholders should be consulted. Both things were done. You made further submissions about the FCA's approach to redress and restitution for Connaught investors. You also asked for an undertaking that the liquidators would be consulted on any redress proposals. Andrew Bailey responded to you on 11 April 2017 setting out his view of why this would not be appropriate: the need to preserve the FCA's independence, particularly where the liquidators had a financial interest in the outcome; the FCA, having conduct of the investigation, being best placed to decide the appropriate outcome. You continued to correspond with Mr Bailey on these and other matters in April and May 2017, including your concerns about Capita selling part of its business.

85. In April 2019, you again requested a meeting with Andrew Bailey regarding Connaught, other financial collapses, and the issue of wider cultural reforms at the FCA. This correspondence continued both before and after you submitted your formal complaint on 11 July 2019. You met Andrew Bailey and members of his team on 31 July 2019. You discussed your complaint, your objections to the Review and other matters, and indicated your intention to submit a Subject Access Request and further Freedom of Information Act requests. Thereafter, with your and my agreement, the FCA referred your complaint directly to me for consideration.

86. I have noted your objections to the nature of the July 2019 meeting, staff attendance and the notes taken as set out in paragraph 7 above. While I understand why you would have preferred to have been told the names of those attending the meeting in advance, these matters do not appear to me to demonstrate evidence of bad faith by Andrew Bailey. It is clear that the FCA went to some trouble to ensure that you had a further opportunity to make your points. I have addressed your concerns about the nature and extent of the Review and about the Protocol in this report.

87. I have seen from the FCA's file that correspondence between you and the FCA has continued since the 31 July meeting and that you have had the opportunity to provide your own document showing points of disagreement with the recorded minutes of the meeting. The internal evidence I have seen shows that this document has been logged with the formal record.

Conclusions about your complaint about Andrew Bailey

88. Before your engagement with Andrew Bailey, you had requested the opportunity to make presentations to his two predecessors and had raised your concerns about Connaught and other matters from 2012. You are clearly passionate about how the regulator could reform, and committed to your belief in the contribution you could make to this. I am satisfied that you have been given several opportunities to put these views to the FCA and you did eventually meet Andrew Bailey. There was no obligation on him to accept your proposals and suggestions and I do not agree with your assertion that he does have such an obligation *unless he can show that doing so would not improve the FCA's ability to perform its statutory functions*. Nor can I under this Scheme form a view about whether his failure to do so has caused consumer detriment. There is evidence that several points you made as a result of your contact with his Executive Office were acted on, and you received several clear and full responses to the points which you raised.

My decision

89. Your overall complaint was that FCA's Chair, Charles Randell and the then CEO, Andrew Bailey *have been and are acting in bad faith, doing all they can to prevent the full truth about the regulator's incompetence and dishonest cover-up efforts in the Connaught case from being exposed, endeavouring to evade financial liability to the victims and obstructing efforts to introduce long-overdue reforms based on the problems identified in the case*. Questions of bad faith are ultimately a matter for a court to decide but I have not seen any evidence to support your view that Charles Randell or Andrew Bailey have been *doing all they can to prevent the full truth about the regulator's incompetence and dishonest cover-up efforts in the Connaught case from being exposed, endeavouring to evade financial liability to the victims and obstructing efforts to*

introduce long-overdue reforms based on the problems identified in the case. The evidence shows that between 2016 and 2017 measures were taken to secure a settlement for Connaught investors and an independent review was eventually commissioned. I have not seen anything that suggests either Andrew Bailey or Charles Randell took active or any steps to prevent this, indeed they had oversight of the FCA while these steps were implemented You were also given access to present to the FCA your proposals for reform; it was within the FCA's discretion not to accept or implement them. Therefore, I do not uphold your complaint.

90. However, in relation to Connaught, the events I have described indicate a degree of institutional defensiveness and a reluctance to initiate independent scrutiny without external pressure and drivers. I have also observed a lack of clarity in the recorded decision-making about the type of independent review required. I also consider that the FCA should review the process by which independent reviewers are appointed in the future, although I believe that Raj Parker is well qualified for the role.

91. Although I have identified these weaknesses in processes, it does not follow that the independent review now under way is compromised. There is no reason to believe that the reviewer will not be able to produce a robust and independent report.

92. I have **concluded that**:

    a. Your complaints about Charles Randell are not upheld;

    b. Your complaints about Andrew Bailey are not upheld;

    c. There is no good reason to suspend or alter the current independent review.

93. Although I have not upheld the specifics of your complaints, I consider that there are some generic issues which your complaint raises which deserve to be addressed. For that reason, I propose to invite the FCA to consider the following **recommendations:**

    a. The FCA is clearer – internally and externally – about the different types of review which it might undertake in response to concerns about regulatory failure, whether or not the statutory test is reached (paragraph 49). In my

view the FCA's policy as currently expressed narrows down the options for non-statutory reviews in an unnecessarily restrictive way;

b. The FCA reviews the process by which it identifies and appoints independent reviewers to build public trust (paragraph 71);

c. the FCA commits to carrying out an assessment of the enforcement action on Connaught, taking into account stakeholders' views and concerns, once the enforcement action and the Independent Review are finally concluded. In the meantime, the FCA should continue to provide me with updates on the continuing action, with any explanation of the continued delay it can provide. (paragraph 63);

d. The FCA and the other regulators consult promptly on proposals for this Complaints Scheme, including the compensation arrangements, bearing in mind the four years since I first raised this issue (paragraphs 59 and 60). The FCA has said in its first response to this recommendation that its consultation on the Complaints Scheme will not necessarily include 'arrangements for compensation in such matters'. It has added that it is 'considering carefully how we can give greater clarity on the FCA's approach to payments of ex-gratia compensation'. In my view this is an inadequate response to an issue on which there needs to be a wider debate.

Antony Townsend
Complaints Commissioner
9 April 2020

Chronology

Overview of FCA activity and decisions re Connaught June 2016 to August 2019

- **June to December 2016**: FCA making internal decisions at ExCo and Board level regarding their approach to Connaught, including whether and what type of a review of its own and the FSA's actions is required.

- **5 December 2016**: the FCA Board announces that it '*will appoint an external third party to conduct a review into the regulation of firms connected with the Connaught Series 1 Income Fund. The substantive review will begin once the current enforcement investigation has ended. The FCA intends to publish the outcome of the review, to the extent that we can*'.

- **In 2017:** Mark Steward met the Connaught APPG to explain how the FCA conducts enforcement investigations and to provide an update where possible.

- **From July 2017**: Monthly FCA Project Board Updates on Enforcement Action.

- **1 Aug 2017**: Andrew Bailey letter to the Chair of the Treasury Select Committee that included an update on Connaught.

- **10 Nov 2017:** FCA published a Final Notice to Capita reflecting an agreement that Capita would pay an amount to be calculated up to s £66m to cover investors' loss.

- **16 January 2018**: FCA staff prepare a briefing note for incoming FCA Chair Charles Randell (from 1 April 2018) on Regulatory Failure and explain they are now starting work on the Review.

- **24 July 2018:** Andrew Bailey letter to the Chair of the Treasury Select Committee that included an update on Connaught.

- **October to December 2018:** Internal discussions about the Terms of Reference for the Connaught Review, including input from the FCA's legal team. Creation and first meeting of a Board Sub-Committee for the Review.

- **January to June 2019:** Terms of Reference for the Review being drafted, including consultation with HM Treasury and stakeholders. Arrangements for the process to appoint the Reviewer, including decisions about suitability criteria.

- **20 June 2019:** FCA announces the name of the Reviewer and Terms of Reference.

- **14 August 2019:** FCA publishes a Protocol for the conduct of the Review.