

22 June 2021

Final report by the Complaints Commissioner**Complaint number FCA00699***The complaint*

1. On 12 March 2021 you complained to me about the FCA's investigation of your complaint. Both you and the FCA have had the opportunity to provide your comments to my preliminary report which I have reviewed.

What the complaint is about

2. In its decision letter to you dated 26 February 2021 the FCA described your complaint as follows:

Part One

You believe the FCA's stance changed about the due diligence on non-standard investments in SIPP's, in around 2016. You allege that either the FSA guidance provided in 2012 was incorrect, or the stance taken in around 2016 was a mistake.

In August 2012, the FSA approached Firm A to ask which unregulated investments and introducers Firm A was transacting with. At the end of the conversation Firm A sought advice/guidance from the FSA in relation to accepting the business from unregulated introducers into unregulated investments. You stated that Firm A asked if there should be any concerns about this and was told there were no concerns and business should continue as usual.

In September 2012 Firm A submitted its due diligence files on all the unregulated investments and introducers transacted with, to the FSA for review. The only question raised by the FSA at the time was, "can we shred the files?". This reaffirmed the FSA stance at the time and/or a lack of care.

No additional unregulated investments or introducers were transacted with post the review so the review had covered the complete population.

Part Two

You are unhappy about the actions taken when Firm A reported Firm B to the Whistleblowing Team in 2013. You stated that due to press activity about claims arising from Firm B, you contacted the Whistleblowing Team but were not happy with the response you received.

You are unhappy that at the time of the original letter and in 2019, no one contacted Firm A to gain further information. You understood from the whistleblowing review that a number of parties had been contacted and it was decided no action was necessary. You want to know why Firm A were not contacted, and who made the decision no action was necessary, and if the FCA notified the firms involved to let them know the decision.

What the regulator decided

3. The FCA did not uphold your complaint. The FCA Complaints Team could not see any evidence that any verbal or written feedback to Firm A or Mr A stated that the FSA/FCA had assessed the due diligence and found it to be appropriate. They also mentioned that no correspondence could be found which stated that Firm A was told, '...there were no concerns and business should continue as usual...' The Complaints Team also provided that correspondence from 2 May 2013 was in the context of proceeding letters and predicated on the fact that Firm A had stopped doing business with Firm B. They stated it was also based on the fact that Mr A had attended a SIPP seminar and had confirmation as such. The FCA Complaints Team concluded that there was no evidence that either the FSA/FCA stance on due diligence requirements for SIPP operators changed or that Firm A were given any guidance/advice that contradicted the FSA/FCA's stance.
4. In relation to the disclosures Firm A made the Complaints Team summarised that this intelligence was provided directly to the Supervision department and sent to other areas of the FSA. They also clarified their position when it comes to

the sharing of confidential information restricted by law under Section 348 of the Financial Services and Markets Act 2000 (FSMA).

Why you are unhappy with the regulator's decision

Element One

5. You mention in 2012 during a telephone call between Firm A and the FSA, regarding business from unregulated introducers into unregulated investments, Firm A asked if Firm A should have any concerns and were told no, continue business as usual...This was followed up by Firm A sending copies of its due diligence files on every investment and introducer to the FSA for review. The ONLY question from the FSA by email was could they shred the files after the review, which strongly indicates that the FSA did not have any concerns and that there was no reason for Firm A to suspect that their due diligence fell below standard in any way.
6. You then mention in your complaint to me communications that took place in March 2013 as follows,

the FSA said the DD on this particular investment probably hadn't been sufficient however they noted that it had been accepted before the FSA published its updated SIPP operator guidance and prior to the delivery of the SIPP operator seminars where clarity on the FSA expectations was provided.
7. For the above reasons you believe the FSA either made a mistake in their guidance given to Firm A in 2012 or in its stance since and have questioned whether the advice was given with care.

Element Two

8. You informed the FCA on 29 April 2013 of an investment which caused you concerns and in particular you felt the investment may have been falling foul of regulations. You disclosed this to the FCA however you have concerns with the FCA's taking no further action and state this, '...further compounds the general approach as a lack of care by the FSA at this time...'

Element Three

9. You have also asked in your complaint to me for confirmation in relation to numerous issues such as whether contact took place between other firms and the FCA.

Preliminary points (if any)

10. I have reviewed all the material you have provided to me. I have also been provided with the FCA case file.

11. The FSA was the overall regulator of the financial industry until 3 April 2013 when it changed and was renamed the Financial Conduct Authority (FCA). Thus throughout my report where I make references to the FSA or the FCA, this is done in line with who was the entity during the time mentioned.

12. It is important for me to highlight for the purposes of my investigation, matters which are excluded from the scheme which I am unable to investigate.

13. In your complaint you made references to contradictory and incorrect FSA guidance. [10.1 c\) of the Complaints Scheme](#) provides exclusions from the Scheme:

14. ‘...c) complaints in relation to the performance of the FSA’s legislative functions under FSMA (including making rules and issuing codes and general guidance)...’

15. Under the Scheme I am unable to investigate issues connected to the FSA’s legislative functions such as the issuing of FSA general guidance. Therefore, it is not appropriate nor for the purposes of the Complaints Scheme, for me to investigate issues pertaining to the FSA’s legislative functions such as guidance that it had issued. So I will not be investigating this element of your complaint.

16. In Element Three of your complaint you have asked for confirmation in relation to contact and communications between the FSA/FCA and other firms. I very much encourage providing as much transparency as possible in my reports and encourage the regulators to do the same. However, I also need to be mindful of areas of confidentiality that are prevalent, such as communications between the regulators and other firms. This means I am restricted with what I can and cannot disclose. Whilst I have not been provided with any third-party communications between firms and the FCA it is worth noting that without

authorised permission from these firms, the FCA and I would not be able to share such communications with you. So, I would not be able to provide any confirmation in relation to contact and communications.

My analysis

Element One

17. In relation to Element One of your complaint you make references to events that took place in 2012 and 2013. As part of my investigations I have been provided with the FCA case file. I can see on 24 August 2012 a telephone call took place between Firm A and two Associates working within the Supervision department as both parties confirm this. You responded to this point in my preliminary report and wanted to confirm that there were two representatives from Firm A on this call. I have not been provided with a call transcript or call recording of this telephone call. This is not unusual given the length of time since this call took place. However, I have specifically asked the FCA to clarify whether a call recording exists for the call that took place on 24 August 2012. The FCA responded and stated that the call originated from Supervision and was not recorded. Both parties dispute what was discussed during the call and without any evidence, I am unable to say for certain what was discussed, or whether the FSA at the time, gave you any assurances that there were no concerns and to '...continue business as usual...' as you suggest. You responded to my preliminary report on this point and directed me to a document providing minutes from a previous meeting produced by Firm A and mentioned '...which clearly states that there are no concerns...' The document is dated 30 August 2012. The main part of this document you have referred me to states the following:

The FSA wants to see Firm A due diligence on the introducers and the investments, which individual A is going to send across to them. Individual A also suggested sending the list of investments that Firm A had rejected which the committee agreed. Individual A asked the FSA if Firm A should have any cause for concern about dealing with the investment discussed or introducers and they confirmed to continue as normal at present.

18. As mentioned previously I have not been provided with evidence such as a call recording or a transcript which would enable me to determine exactly what was

discussed between both parties. I am sorry to say I am unable to rely on the Firm's minutes document alone as a basis to determine the context of the discussion during the call without evidence such as a call recording or transcript. As such, I am unable to conclude that the FSA gave you the messaging that there were no concerns and that you should continue business as normal or provided you with assurances.

19. It also appears from the information I have been provided with, an email may have been sent following this telephone call shortly after, as both you and the FCA have confirmed this. In its case file to me, the FCA did not provide the original email however references were made to the email that was supposedly sent to Firm A, following the call on 24 August 2012. In response to my preliminary report both you and the FCA helpfully provided an email dated 24 August 2012 which was sent following the telephone call that took place on 24 August 2012. In this email the FSA summarised its information request which requested copies of the due diligence Firm A had carried out on three firms. The FSA also requested a copy of Firm A's new business register for the last 24 months. Having been provided with this email I am satisfied at that stage there were ongoing information requests from the FSA and it does not appear the communications indicate the FSA were fully satisfied with Firm A, rather curiosity towards Firm A followed by subsequent information requests.
20. In my preliminary report I explained that the earliest correspondence that had been provided to me was a letter from Firm A to the FSA dated 25 February 2013. This letter was addressed to one of the Associates that was part of the telephone call of 24 August 2012. In response to my preliminary report both you and the FCA provided an earlier piece of correspondence which was an email dated 21 February 2013. In this email the FSA confirmed a call took place that morning with Firm A and the FSA summarised what was discussed during the call, '...the FSA has received information regarding Firm B which we would like to better understand...' The FSA subsequently went on in the email to request information about Firm B. The FSA were specific with what information they needed and gave a timeline for this information to be provided which was 5 business days. Having reviewed this email which has been helpful, I am satisfied

that concerns were raised from this point in relation to Firm B alone and the FSA acted accordingly.

21. In your letter in response dated 25 February 2013 I am able to see that Firm A provided the FSA with further information responding to their information request, '...Further to our recent conversation, please find enclosed the information as requested...' Firm A also confirmed in the letter that they had stopped working with Firm B that was subject to the information request.

22. The FSA provided you with its response to this in a letter dated 12 March 2013. It was also at this point that the FSA requested confirmation as follows,

We do however require the Firm to confirm that the due diligence undertaken for all existing investments, which remain available to scheme member investment, meet the FSA expectations communicated to Firm during the recent SIPP operator seminar.

23. You responded to this letter by email on 26 March 2013 with enclosures. The FSA responded to this email by letter on 18 April 2013 highlighting that some points remained unanswered. You later responded to the FSA by letter on 1 May 2013. In this letter you mentioned that you had taken on board all the points that had been highlighted with regards to existing and future business. It appears you also attached a copy of a letter you had sent to HMRC at the time, regarding your own concerns with a different investment and wanted to share your own due diligence on this investment. The FSA provided you with a closure letter on 2 May 2013 confirming,

We have reviewed the information supplied and write to confirm we are satisfied with the Firm's response and shall now close our case with no further action required by the Firm.

24. I appreciate you have stated in an email following the telephone call on 24 August 2012 the FSA confirmed they did not have any concerns and that there was no reason for Firm A to suspect that their due diligence fell below standard. Having now seen the email following the call of 24 August 2012, it is clear to me that the FSA still had further concerns at that time, by requesting specific information of due diligence regarding three separate Firms and additionally requiring Firm A's new business register for the last 24 months. When looking at

this information request in comparison with the FSA's information request of 21 February 2013, the latter request focused on just one investment (Firm B), so they were different requests and concerns.

25. Based on what I have seen it appears the FSA were concerned about a particular investment and made enquiries with Firm A. The FSA also pointed out that it had received information regarding Firm B which overall appeared to be the reason for its request and the reason it reached out to Firm A. It wasn't until May 2013 that the FSA confirmed it was satisfied with Firm A and that no further action was required. As such I am unable to see that the FSA confirmed there were no such issues in 2012 given the evidence that has been provided to me. As mentioned earlier in my report, I believe concerns were raised in August 2012 and additionally in February 2013, however these were connected to two separate issues.
26. I am sorry to say that I disagree that the FSA did not have any concerns at the time and I am also unable to conclude that FSA guidance was not given with care.

Element Two

27. In relation to Element Two of your complaint you have noted your concerns regarding a particular investment. You passed this information onto the FCA in 2013 and have raised concerns that the FCA took no further action and believe they approached the issue with lack of care.
28. I have seen the communications that took place in 2019 when you asked for an update in relation to the letter that Firm A sent to the FCA in 2013. I have looked at the response you received from the Senior Associate in July and August 2019. I believe the Associate gave you a satisfactory response with regards to what the FCA could and could not share with you. I think they tried to be as transparent as they could be, as they informed you that,

What I can share is that enquiries did occur as a result of the disclosure you made to us. Your concerns were considered, and the firm assisted the FSA to understand whether actual harm occurred. Once all of the FSA's lines of enquiries concluded, it was decided that no further action was required at that time.

29. The sharing of confidential information given to the FCA about firms is restricted by law under FSMA. I can see this was explained to you by the Associate in their emails. Like the FCA, I am also required to respect confidentiality. This means that sometimes I cannot report fully on the confidential material to which I have access. However, as part of the Complaints Scheme, I have access to all the FCA's complaints papers, including confidential material. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably. Sometimes this means that all I can say to complainants is that, having studied the confidential material, I am satisfied that the FCA has (or has not) behaved reasonably – but I am unable to give further details. This can be frustrating for complainants, but it is better that I am able to see the confidential material.
30. I understand why you made enquiries to the FCA about the particular investment in question. It must be noted that the FCA welcomes information from consumers who report concerns. However, as the FCA communicated with you in the decision letter, they are unable to let you know what is done with the information you provided to them. This is because Section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds about firms as confidential and restricts how that information is dealt with. Equally any information that is not restricted by s.348 FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals who also have legal protections. Under this policy the FCA will not normally disclose the fact of continuing action without the agreement of the firm concerned. There is a good explanation of the statutory and FCA policy restriction on information sharing here <https://www.fca.org.uk/freedom-information/information-we-can-share>
31. The Office of The Complaints Commissioner has in the past persuaded the FCA to release further confidential information to help complainants understand what has happened, but this is not always possible. As such and as the FCA confirmed with you, there is no general right for members of the public to know the outcome of reports the FCA makes. However, I can confirm that based on the FCA case file which has been provided to me, I am satisfied the FCA have taken on board the information you shared with them and used it appropriately

where the need arises. Overall, I am satisfied with the way the FCA dealt with this aspect of your complaint.

My decision

32. I realise you may be disappointed with my decision but for the reasons outlined above I am unable to uphold your complaint.

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Complaints Commissioner

22 June 2021