

12 July 2021

Final report by the Complaints Commissioner**Complaint number FCA00908***The complaint*

1. On 18 March 2021 you asked me to review the outcome of your complaint to the Financial Conduct Authority (FCA). I have carefully reviewed the documents that you and the FCA have sent to me. My preliminary report was issued on 10 June 2021 and both you and the FCA have commented.

What the complaint is about

2. You complained to the FCA about what you considered to be an aggressive and threatening email from the FCA's pensions transfer team following up a request for data from your firm that had been sent to an incorrect email address. You said that there had been a delayed response from the pensions transfer team until the matter became public and you were also concerned that you had received different treatment on the grounds of race, including nationality, based on assumptions about your surname. You set out your exemplary record in your field and said that the FCA's email was extreme, including threatening to close down your firm. You wanted a formal apology from the FCA's Chief Executive and a charitable donation made by the FCA to a charity of your choice.

What the regulator decided

3. The FCA did not uphold your complaint but offered an apology for the distress caused to you by the regulator initially using an incorrect email address which meant that you received a follow-up email that would have surprised you.

Why you are unhappy with the regulator's decision

4. You consider that the FCA should have upheld your complaint, which still stands.

My analysis

5. The FCA's files show that in July 2020 its pensions transfer team sent informal information requests to collect data from all firms with permission to advise on Defined Benefit pension transfers as part of its ongoing work in monitoring this market, which has high levels of unsuitable advice. These requests preceded the introduction of a new permanent regulatory return and were sent to ensure that the FCA has the data it needs to assess risks and take appropriate action.
6. Two such requests were sent to you, on 1 and 20 July 2020, to an old email address that you had updated in 2016. These emails were notified to the FCA as 'Bounced'. A third, follow-up, email was also sent to this old, incorrect, email address on 18 November 2020. This email contained a formal request for the information, using the FCA's S165 powers: <https://www.handbook.fca.org.uk/handbook/EG/3/2.html>. It was successfully received by you and you responded to it immediately.
7. The FCA's internal investigation into your complaint shows that the July 2020 emails were experienced by the FCA as a 'soft bounce', that is they showed as not received for temporary reasons (such as an inbox being full) rather than being permanently rejected. This seems to be confirmed by the fact that the third, November 2020 email, was received and responded to by you, even though it was not the address that you reasonably expected the FCA to use to communicate with you. You endeavoured to locate the July 2020 emails but could not find them and asked the FCA to provide screenshots, which it did.
8. The FCA accepts that it used an incorrect address to correspond with you in July and November 2020, and it has apologised to you for this. It has also explored in detail how this occurred and some explanation was provided to you in the FCA's letter of 27 November 2020. My review of the FCA's files shows that, for a small number of firms, the approach used to select email addresses prioritised an address that was subsequently found to be out of date. The conclusion was that this had been caused by the FCA's use of different systems, not all of which had been updated. This problem was known about and most issues should have been resolved by April 2020 but this did not apply to the approach used here. The Complaints Team's investigation considered this and concluded that the

pensions transfer team had acted in good faith; however, no further explanation about what had happened was provided in the complaint response sent to you.

9. Based on what I have seen, I have no reason to doubt that the internal team acted with good intentions; however, maladministration still occurred. The FCA's problems with out of date and disconnected systems were not new and were clearly known about. You had a reasonable right to expect that the FCA would communicate with you at the address you had provided since 2016. In my view the FCA's complaint response, and the apology that you received for the 'surprise' of receiving a S165 notice fails to fully acknowledge this and the impact upon you. Although I agree with the FCA that the notice does not threaten to close down your firm, it is a formal notice from the regulator that so far as you were concerned came 'out of the blue'. It refers to the FCA's powers to enforce compliance, including regulatory sanctions such as public censure or financial penalties, and criminal sanctions for providing false or misleading information.
10. I also note from the FCA's files that the data requests were initially voluntary but that at some stage a decision was made to send a formal notice, using the FCA's s165 powers, to those who had not responded, in order to ensure a reply. The internal team's view seems to have been that there was no intention to be threatening, and the use of a s165 notice was designed to obtain the highest level of response possible. The FCA's complaint response says that: *Given the importance of the data to the FCA, formal powers were used to ensure the completion of the survey.* However, the Complaints Team was told in the course of its investigation that there was no formal process for making such a decision.
11. This seemed to me to be unsatisfactory as the FCA should be able to document the decisions it has taken. I asked the FCA to comment on this in response to my preliminary report. It has now told me that the ad hoc data requests for Defined Benefit pension transfers, including whether firms would be compelled to provide data using the FCA's S165 powers in the event of non-provision, were referred to the FCA's Information Governance Board *before* any data requests were issued to individual firms. It says that: 'issuing such a broad request in such circumstances – including to compel firms to provide data - is an unusual occurrence'. However, on this occasion it was considered essential in view of the high risk and potential for consumer harm. The use of a s165 notice in these

circumstances was clearly within the FCA's powers. However, I am surprised that the existence of this process was not revealed by the FCA's own complaint investigation. Indeed, as noted above, the Complaints Team was told that there was 'no formal process' for making such a decision.

12. The approach taken also seems to me to underestimate the effect of a formal notice on those who receive one, particularly if the initial data request does not indicate that this option might be used in the case of a non-response. In my view, the FCA should be more sensitive to the impact of its actions on those that it regulates and it would have been better practice for the FCA to have warned firms that they might be compelled to provide this information. In your case, this was exacerbated by the use of an incorrect email address and the fact that you had not seen the earlier requests at all. I can understand why you were so distressed to receive the formal S165 notice, as this was the first you knew about the FCA interest in your firm.
13. You have told me that the FCA has 'history' in treating your ethnicity with disrespect and pointed me to an incident seven years ago when the FCA agreed that a response to you from a call centre operator was unacceptable. From the evidence I have seen, I am satisfied that your firm was not specifically targeted and that the FCA's data requests were not tailored to you based on any kind of racial or other profiling. I accept that the initial requests were sent to all firms with defined benefit pensions transfer permissions and the follow-up request, with the S165 notice, to all those who did not respond to the initial requests.

My decision

14. I have upheld your complaint in part as I consider that the FCA's complaint response should have done more to acknowledge the impact on you of its use of an incorrect email address and should have provided you with further explanation about how this had occurred. The FCA has accepted this outcome and says that it will provide additional information to you to explain why that particular email address was used and to acknowledge the impact on you, in line with the recommendations in my report.

15. There is no evidence in the FCA's files that your firm was specifically targeted or that there was any racial element based on nationality for the email requests to you. I do not uphold this aspect of your complaint.
16. I am also satisfied that the time taken for the pensions transfer team to respond to your initial complaint, from 18 November to 27 November, was reasonable.
17. I have noted the FCA's response to my preliminary report about the apparent lack of a documented, formal process for decisions to use its S165 powers to require information following informal requests. In view of the fact that the FCA now says that there was such a process, I **recommend** that:
- a. the FCA considers whether any training is needed within the relevant internal team about the importance of giving careful and accurate responses to enquiries from the Complaints Team.
 - b. the FCA considers whether it should warn firms, in circumstances where this is the case, that a non-response to an ad hoc data request may later be followed by a s165 notice compelling provision of the information.
18. I **recommend** that the FCA should add to its written apology to you an offer to pay you (or a charity of your choice) the sum of £75 for the distress and inconvenience caused to you by its use of an incorrect email address and the impact upon you of receiving to that address a formal notification under S165. Although I note that you consider this amount to be too low, the FCA has accepted this recommendation and will offer the payment to you. It will then be your choice whether to accept the amount and what to do with it if you do accept.

Amerdeep Somal
Complaints Commissioner
12 July 2021