

28 June 2021

Final report by the Complaints Commissioner**Complaint number FCA00912***The complaint*

1. On 25 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 27 May 2021 and both you and the FCA have commented.

What the complaint is about

2. On 6 December 2019 you wrote to the then Chief Executive of the FCA, Andrew Bailey, raising serious allegations about the FCA's approach to regulation of a firm (Firm A) involved in the mis-selling of Interest Rate Hedging Products (IRHPs). Your letter was passed to the Complaints Team for investigation and response.

What the regulator decided

3. The FCA's Decision Letter is dated 3 February 2021. It divides your complaint into ten parts. Seven of these - Parts Two to Five and Parts Eight to Ten – involved specific allegations about the FCA's regulation of Firm A. These complaints were deferred under paragraph 3.7 of the Complaints Scheme (the Scheme) on the basis that they are 'connected to, or arise from, some form of continuing work by the FCA', specifically 'the [Independent Review](#) commissioned by the Non-Executive Directors of the FCA into the supervisory intervention on IRHPs'. The FCA said that an investigation into these aspects of your complaint would commence as soon as possible and that in the meantime you would receive regular updates, commencing in August 2021.

4. Part One of your complaint was that ‘the FCA, and in particular Andrew Bailey, are at all times compromised in prioritising the stability of the UK financial system ahead of legal and regulatory rights of recovery for [Firm A’s] victims by:
 - a. The controlling mechanisms of the Bank of England (BoE), HMT and/or through the
 - b. Financial Policy Committee (FPC), to put the stability of the UK financial system ahead of legal rights of recovery for consumers.
 - c. Andrew Bailey’s conflicts of interests with a ‘foot in every camp’ as a Director of the Prudential Regulatory Authority, a member of the Court of Directors of the Bank of England (BoE) and the CEO of the FCA’.
5. The FCA said that this aspect of your complaint was excluded from the Scheme because it ‘relates to the relationships between the BoE, HMT, PRA and FCA and to the functions undertaken by the CEO of the FCA and their involvement with, and links to, those organisations’, which are not set by the FCA and are therefore not ‘relevant functions’ for the purposes of the Scheme.
6. The FCA also declined to investigate Parts Six and Seven of your complaint, which alleged misconduct by a specific FCA staff member, on the basis that they were not made by the person directly affected as required by paragraph 3.2 of the Scheme. In addition, the FCA said that these complaints had not been brought within 12 months (paragraph 3.3). You were invited to submit any evidence of reasonable grounds for this delay.

Why you are unhappy with the regulator’s decision

7. You contacted me on 25 March 2021 to be within the three months’ time limit provided in the Scheme for bringing complaints to my office. You have formally requested that I review the FCA’s decision.

My analysis

8. *Part One* - The Scheme covers complaints arising in connection with the exercise of, or failure to exercise, any of the regulators’ ‘relevant functions’. The relevant functions of the FCA are its functions other than legislative functions (paragraph 1). I am therefore satisfied that it was reasonable for the FCA to

exclude Part One of your complaint on the basis that the relationships between the regulators, the FPC and HM Treasury are not covered by the Scheme.

9. *Parts Six and Seven* – These aspects of your complaint involved responses given to a third party by an FCA staff member before January 2018. The FCA said that these matters could not be investigated under the Scheme for two reasons: they were not brought by the person directly affected and they were out of time. You were invited to provide any evidence of reasonable grounds for being out of time.
10. The Scheme says that:
 - a. 3.2 Complaints can be made by anyone who is directly affected by the way in which the regulators have carried out their functions, or anyone acting directly on such a person's behalf, provided that the complaint meets the requirements of the Scheme. To be eligible to make a complaint under the Scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.
 - b. 3.3 Complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. Complaints made later than this will be investigated under the Scheme only if the complainant can show reasonable grounds for the delay.
11. You have told me that you only became aware of some of these issues in April 2018 and that they continued to be raised with the FCA by the third party throughout 2018, including email exchanges continuing into December 2018 to which no reply was ever made by the FCA. You have told me that this failure to respond should not be used to 'run the clock down' and 'ignore these vital issues and numerous complaints (expressions of dissatisfaction)'.
12. It may be helpful if I set out more fully these aspects of your complaint and the FCA's response to it. 'Person A' is the FCA staff member, who had left the organisation by January 2018; 'Person B' is the third party, who was eventually joined into your complaint to the FCA; 'Firm C' is the firm you are representing. The complaints were (Part Six) that Person A had either intentionally misled

Person B or, once shown that Person B's allegations were correct, ignored evidence of failings and (Part Seven) that Person A wilfully (or negligently) and repeatedly misinterpreted FCA rules and misled Person B in order to protect the best interests of Firm A over Firm C and the wider group of affected consumers.

13. The FCA's complaint response of 3 February 2021 says:

'Our response to Parts Six and Seven

I do not consider we are able to investigate these parts of your complaint under the Scheme. This is because paragraph 3.3 of the Scheme states complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint.

All of the responses to queries you received from Person A would have been received no later than January 2018. Further, given your arguments about Person A's responses I feel you must have been dissatisfied with them at the time they were given – so I am satisfied you raised the complaint more than 12-months after you became aware. We can look at complaints after this 12-month time bar if you have reasonable grounds for the delay in complaining. If you do, please send me evidence of this as soon as possible; otherwise I will not investigate your complaint under the Scheme.

In addition, 3.2 of the Scheme states:

"Complaints can be made by anyone who is directly affected by the way the regulators have carried out their functions, or by anyone acting on their behalf..." You have confirmed that [Person B] does not wish these points to be treated as his complaint. Instead, you have indicated that you are complaining as [Person B] made these exchanges public and, I assume you feel, that you or [Firm C] relied on them somehow. However, the FCA's correspondence with [Person B] was (from the perspective of the FCA) not for publication. If it was reprinted in full, I feel it would have been clear that it was private correspondence. As such, I find that this aspect of the complaint is also outside of 3.2 of the Scheme as [Firm C] could not reasonably argue that it was impacted or directly affected by private correspondence to which it was not a party to [sic]."

14. I have found the FCA's response to be rather unhelpful on these parts of your complaint, as on the one hand it says that you are not the person 'directly

affected' and therefore cannot complain, while on the other it invites you to provide any evidence of the reasons for bringing these complaints out of time. In its response to my preliminary report, the FCA has told me that it has noted these comments.

15. I note that your complaint is dated 6 December 2019, on behalf of individuals in Firm C. Based on your comments on my preliminary report, I have looked again at the 2018 correspondence between the FCA and Person B, taking into account an email exchange on 14 December 2018 that you indicate left some of Person B's questions unanswered. I accept that this was a continuation of correspondence, and that your complaint was made within 12 months of this exchange. I am therefore not satisfied that it was reasonable for the FCA to decline to investigate these complaints on the basis that they were made out of time (paragraph 3.3 of the Scheme).
16. At the start of its complaint investigation in December 2019, the FCA asked you if Person B was representing Firm C when previously corresponding with the FCA on this matter. Your response was that he was 'engaged in a direct dialogue with the FCA over his concerns that the FCA was not enforcing the Rules, on Firm A in particular, correctly in relation to IRHP sales in particular'. On this basis, and despite the fact that the email exchanges have as the subject line the name of Firm C, I think it was reasonable for the FCA to decline to investigate these complaints under paragraph 3.2. of the Scheme. The core issues underlying the complaint will be considered by the IRHP review and the FCA's Complaints Team will be looking at those matters once the review is concluded and the deferral ends.
17. *Parts Two to Five and Parts Eight to Ten* - The FCA has deferred the remainder of your complaints. The Complaints Scheme says:

'3.7 A complaint which is connected with, or which arises from, any form of continuing action by the regulators will not normally be investigated by either the regulators or the Complaints Commissioner until the complainant has exhausted the procedures and remedies under FSMA (or under other legislation which provides for access to the Scheme) which are relevant to that action. The complainant does not have to be the subject of continuing

action by the regulators for this provision to be engaged. An investigation may start before those procedures are completed if, in the exceptional circumstances of the case, it would not be reasonable to expect the complainant to await the conclusion of the regulators' action and that action would not be significantly harmed.'

18. This wording is not particularly clear but the intention behind it is to ensure that a complaints investigation does not adversely affect or prejudice continuing regulatory action, including in your case an independent review. I am satisfied that this is a reasonable approach in all the circumstances and you have not told me that you disagree with this. The FCA reviews its deferral decisions every six months and you will be able to contact me again if you remain dissatisfied after the FCA has considered and responded to your complaint.

My decision

19. I have concluded that:

- a. It was reasonable for the FCA to exclude Part One of your complaint for the reasons given.
- b. It was reasonable for the FCA not to investigate Parts Six and Seven of your complaint on the grounds that they were not brought by the person directly affected.
- c. It was reasonable for the FCA to defer the remainder of your complaint pending the outcome of the independent review into IRHP. I note that you will be provided with regular updates, commencing in August 2021. You will be able to revert to my office if you remain dissatisfied once the FCA has been able to consider and respond to these aspects of your complaint.
- d. In my preliminary report, I said that the FCA should have offered you an ex gratia compensatory payment to acknowledge the time taken to respond to your complaints (14 months). Although the issues you raised were complex and you received regular updates, the internal process to determine how the FCA was going to respond to your concerns took far too long. I recommended that the FCA offers to pay you £125 for the distress and inconvenience caused to you by this. The FCA agrees that it took too long and has referred me to the apology offered to you for this in its letter of 3

February 2021. It has told me that making an initial ex gratia payment offer at the point a complaint is deferred has been shown to cause widespread confusion to complainants. It has therefore reverted to its original method of making one offer that encompasses all delays at the conclusion of a complaint investigation. I have accepted this, although I believe that the FCA could have said this to you in its decision letter. My primary concern is that any delays suffered by complainants are fully considered during the handling of the complaint. In your case, the FCA has told me that it understands the delay in reaching an outcome on your complaint must be frustrating and that it will review the requirement for an ex gratia payment on completion of the full complaint investigation.

Amerdeep Somal
Complaints Commissioner
28 June 2021