

31 August 2021

**Final report by the Complaints Commissioner****Complaint number FCA00956***The complaint*

1. On 10 and 17 June 2021 you asked me to review the outcome of three complaints you had made 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 2 August 2021 and both you and the FCA have commented.

*What the complaint is about*

2. You have made ten complaints to the FCA about investments you made between 2017 and 2019. This report deals with three of those complaints. Because my reports are anonymised, I have referred to these complaints as being about Firms 8, 9 and 10. This follows the numbering in the FCA's Decision Letter to you dated 12 May 2021, so that you and the FCA can identify the firms.

*What the regulator decided*

3. The FCA issued three separate complaint responses. Regarding Firms 9 and 10 its Decision Letters dated 22 April 2021 said that, in both cases, you were out of time to bring the complaints because more than 12 months had passed since you became aware of the circumstances giving rise to the complaint. Regarding Firm 8, the FCA's Decision Letter of 12 May 2021 excluded your complaint on the grounds that the parties you dealt with were not regulated by the FCA. You made further representations to the FCA and these were considered but the FCA confirmed its decisions about all three complaints in emails dated 7 and 17 June.

*Why you are unhappy with the regulator's decision*

4. You have told me that between 2017 and 2019 difficult personal circumstances required you to look at options for investing your capital and to provide you with lost income and a pension. You used a mixture of online resources and brokers available to you, some of whom contacted you direct and, in the case of Firms 9 and 10, implied they were regulated, including referencing the FCA. Although you did not expect all the products or firms to be regulated, you expected the regulator to know about them, and to be confident the firms were only providing services or products suitable to a basic UK investor with appropriate protections, including the Financial Services Compensation Scheme (FSCS).
5. You have also told me that the FCA has failed to understand that the basis of your underlying complaint is its 'failure to regulate'. You consider that the FCA is hiding behind its statutory immunity to avoid taking responsibility for this failure. You consider that the role of the FCA was to protect you from the harm of products and services unsuitable to you and to ensure that products unsuitable to your type of investor were removed from the market place, or given suitable supervision and regulation to ensure they were not likely to be offered to you by firms registered in the UK. You expected the regulator to have been aware of any that were unsuitable and apply its authority to shut them down or remove them. You say that while the FCA was 'in failure mode, I made many investments that should never have been available to me, let alone at a time when personal circumstances were leaving me vulnerable to the scams being marketed. Blind to that failure, and continuing to invest, believing all was good, left me open to many multiple failures, that should have been spotted, supervised or controlled by a reactive and operational regulator'. You wanted to make a general complaint about this but have been forced to make it specific to firms. As a result you have passed these 3 complaints to me.

*My analysis*

6. I first set out below some relevant extracts from the Complaints Scheme (the Scheme) <https://frccommissioner.org.uk/complaints-scheme/>:
  - a. 1.1 Part 6 of the Financial Services Act 2012 (the Act) requires the regulators to maintain a complaints scheme for the investigation of

complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions.

1.2 The relevant functions of the Financial Conduct Authority (the FCA) and the Prudential Regulation Authority (the PRA) are their functions other than their legislative functions.

- 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.
- c. 3.4 Excluded from the Scheme are complaints... c) in relation to the performance of the regulators' legislative functions as defined in [the Act].

*Firm 8*

- 7. Regarding Firm 8, the FCA's Decision Letter explained that your complaint had been excluded on the basis of paragraph 3.4.c) of the Scheme. This was because neither the firm nor the broker concerned were regulated by the FCA, nor were they required to be, and their literature had made this clear.
- 8. The FCA is correct to say that what is and is not regulated arises from legislation rather than the exercise of a 'relevant function'. The FCA is not required to regulate unregulated products or firms, although it should have regard to authorised and regulated firms who use their status to mis-advise and encourage people to invest in unregulated products. As you have noted, questions about the FCA's approach to this 'perimeter' featured strongly in [Dame Elizabeth Gloster's report into the FCA's failed regulation of LCF](#). Reports from my office have also addressed similar issues, including examples of poor supervision and a failure by the regulator to take timely action on misleading financial promotions.
- 9. However, you say that Firm 8's products 'should never have been on the market for UK investors like me'. You have explained to me how you came to be regarded as a 'sophisticated investor' and you have also told me you assumed that if a firm was regulated its products would have been. I am afraid that this is simply not the case. You consider that the regulator should have been 'on top of these firms' to protect you. In the case of Firm 8, I am satisfied that the FCA was correct to say that there were sufficient warnings to alert you to the fact that this

was an unregulated investment, including the fact that the literature from both Firm 8 and the broker you used stated that they were neither authorised nor regulated by the FCA. Therefore, I do not uphold this complaint.

10. I have one observation about the FCA's complaints handling process for your complaint about Firm 8. The FCA's acknowledgment letter to you dated 11 March 2021 said that your complaint was being considered under the Scheme and contained this paragraph:

**What I will do to investigate your complaint** - To investigate your complaint, I will consider the actions of the FCA in relation to [Firm 8 and the broker].

11. However, you then received a Decision Letter saying that your complaint had been excluded and therefore not investigated. In my preliminary report I **recommended** that the FCA reviews the wording in its acknowledgment letters to avoid raising expectations that a complaint will be investigated when it subsequently may not be. In response, the FCA has told me that it has reviewed its template letter and acknowledgment emails and is satisfied that they do not need to be amended. It accepts that an error was made in the initial assessment of your complaint and that communicating a decision to investigate a complaint followed by a decision to exclude it inappropriately raised your expectations. It proposes to offer you an explanation and apology for this. The FCA has also told me that it is reviewing its process to improve the timeliness of sending out initial decisions about whether a complaint is within the Scheme. It will consider how it can learn from your case as part of that work. This is to be welcomed and I agree that the FCA needs to work towards a swifter assessment of the complaints it receives. However, I have recently seen another case where expectations were similarly raised in acknowledgements sent at a very early stage. I therefore repeat my **recommendation**.

*Firms 9 and 10*

12. You invested with Firm 9 in 2017 and with Firm 10 in 2018. In both cases, the firms and products involved were unregulated and you lost your investments shortly after they were made. You did not complain about this at the time.
13. The FCA's two Decision Letters of 22 April 2021 say that these complaints have not been investigated on the basis of paragraph 3.3 of the Scheme, that is

because they were not made within 12 months of you first becoming aware of the circumstances giving rise to the complaint. You say that you only became aware of these circumstances with the publication of Dame Elizabeth's report in December 2020, which 'stimulated you to investigate the regulator's failures, and find they were fully or partly to blame for me being a victim of these investments in the first place'. Your complaint submissions to the FCA said that you were aware of your losses at the time but did not complain because you knew that the products were unregulated. For the reasons explained in relation to Firm 8 above, this was not changed by the publication of Dame Elizabeth's report.

14. You subsequently provided the FCA with further information about your personal circumstances, which the FCA considered before confirming its decisions about Firms 9 and 10 in two emails dated 17 June 2021. Overall, I am satisfied that it was reasonable for the FCA to conclude that your complaints about Firms 9 and 10 were made out of time without showing reasonable grounds for the delay.

*My decision*

15. I have not upheld your complaints for the reasons stated above. You have provided a detailed commentary in response to my preliminary report and repeated your concerns about the UK regulatory environment in which you invested between 2017 and 2019. I have considered carefully all your points and I have made some changes to the wording above. However, these do not change my overall conclusions about your complaint for the reasons given. I realise that my decision is likely to be a considerable disappointment to you but I hope you will understand how I have reached it.
16. I have **recommended** that the FCA reviews the wording in its complaint acknowledgments to avoid raising expectations that a complaint will be investigated when it subsequently may not be.

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Complaints Commissioner  
31 August 2021