

14 July 2023

Final report by the Complaints Commissioner**Complaint FCA14-07-2023***The complaint*

1. I have received 67 complaints about the Financial Conduct Authority (FCA) in connection to Firm X. The FCA has reviewed the majority of these complaints and issued decision letters to complainants, who have exercised their referral rights and sent me their complaints so I can review the FCA's decision with which they are unhappy. A small number (6) of the complainants sent me their complaint directly without approaching the FCA first. Under the Complaints Scheme to which both the regulators and I operate (details of the Complaints Scheme can be found here: (<https://frccommissioner.org.uk/complaints-scheme/>) it is the usual practice for each complainant to have their complaint reviewed first by the regulators before approaching me for an independent review. However, I have reviewed these complaints directly as they are similar to complaints which the FCA has already reviewed and reached a decision on.
2. I have read every complaint that has been submitted to me and every response provided to my preliminary report. I have taken them all into account and reflected the crux of them in this report.
3. It is the usual practice for an individual preliminary report (copied to the FCA) to be issued to each complainant, who is invited, along with the FCA, to comment on my preliminary findings. Following this, a final report is issued on their complaint. In this case, I took the decision to issue one preliminary report on 9 June 2023 encompassing the matters in paragraph 5 below. This is now my final report.
4. I have taken the decision to address complainants in this way to ensure efficiency with minimal delays and disruptions caused to complainants. It is

important that I have been as efficiently resourceful as possible to provide complainants with an answer as quickly as possible.

What the complaint is about

5. I have summarised the complaints I have received under the following five broad categories:
 - a. 'The FCA has previously indicated that they wish to dismiss my claim based on my knowledge of a report by the former directors of the company that a loss would occur. I could not rely on advice from the directors, the certainty and potential scale of the loss was unknown and remains so. There is no certainty at all, given the current volatile energy market and income from that remains unknown until the turbine assets are sold. On that basis, and by the FCA's own argument, the 12 month period to which the FCA refers cannot have yet said to have even started (Element One)
 - b. FCA satisfied itself that Firm X was ensuring that all investors in their bonds were "sophisticated investors" and therefore FCA took no responsibility. It is abundantly clear from distressed letters from many - some of whom invested their life savings - that a large number of investors including myself are not "sophisticated investors" (Element Two)
 - c. FCA investigated Firm X on 2 occasions and gave it a "clean bill of health". It is hard to understand how FCA could have come to this conclusion when large sums of money - around 40% of bondholder investments were used to market more bonds (Element Three)
 - d. FCA is responsible for regulating the banks. None of the banks involved properly supervised over £22 million flowed into the accounts from so-called "sophisticated investors" and large flows out to matters not concerned with wind turbine acquisition and operation, e.g. to sales and marketing individuals and organisations. Indeed one of the accounts was a Client Account for Y's (former director of Firm X) own accountancy Firm (xxx), an account which as you state Firm X enjoyed or should have enjoyed more care given the inherent trust placed in regulated entities in the financial industry. (Element Four)

- e. While FCA has made it clear that it did not regulate the sale of Firm X's bonds, it became involved to some degree but was then went "asleep at the wheel" and failed in its position of responsibility and oversight. This was a complete dereliction of duty. Hence, I believe that my claim for compensation from the FCA for the full value of my investment is valid and justified'. (Element Five)
6. The remedy sought is for the FCA to reimburse bondholders for the full value of their investments.

My analysis

7. The background to this case is that Firm X was set up in 2015 with the purpose of providing green energy. The Firm was not authorised or regulated by the FCA at any time. It raised funding by issuing four phases of mini bonds between 2015 and 2018. The issuing of mini-bonds does not constitute a regulated activity and therefore, Firm X was not required to be authorised by the FCA to carry out this activity.
8. I note that some complainant's set out in their correspondence to me that they had never heard the term 'mini-bond' until receiving the response to their complaints. Whilst the Firm X investments may not have been referred to as 'mini-bonds', but instead were referred to as 'bonds' or 'secured bonds', the use of the terminology is appropriate. Although there is no legal definition of a 'mini-bond', the FCA's description can be accessed here: <https://www.fca.org.uk/consumers/mini-bonds>. It is the case that some sort of terminology has to be used to differentiate the term 'bonds' as transferable debt securities and the type of bonds which Firm X issued, which are non-transferable debt securities. The FCA's position is that it will refer to non-transferable debt securities as mini-bonds and this is the terminology that I have used in my report.
9. The Firm was required, however, to follow the rules (Section 21 of the Financial Services and Markets Act 2000 (FSMA) and the Financial Promotions Order 2005) in relation to how it marketed or promoted its mini-bonds. The FCA's regulatory remit only extended as far as Firm X's financial promotions.

10. The FCA has explained that it appears that, to promote its mini-bonds, Firm X relied on exemptions in the financial promotions' legislation. One such exemption is Article 48 of the Financial Promotions Order 2005, which allows a Firm to market its mini-bonds to certified high-net worth investors without either being an FCA authorised Firm or having had approval from another FCA authorised Firm . The FCA says it did intervene with Firm X in relation to its financial promotions as follows:

‘Following reports in 2016 about the bond issued by Firm X, we commenced an investigation into how the bond was being promoted to consumers. We established that there had been occasions where the bond had been promoted by Firm X to consumers in a way that appeared to breach the financial promotion rules.

Firm X was directed by the FCA to write to all bondholders to clarify how the bond was promoted. The letter included the definitions of Sophisticated Investors and High Net Worth Individuals taken from the Financial Promotions Order. The letter made clear that if anyone believed they did not fall within the permitted categories then they should contact the Firm.

We took action in September 2016 to stop any further breaches and ensure that the company and its marketing agents understood their obligations and would comply with the financial promotions rules in future.

We also ensured that the company offered a refund to the consumers who had purchased bonds as a result of non-compliant promotions up to that point and sought to confirm that this action had been taken’.

11. In my review of the complaint files I have seen relevant information from this time to satisfy myself that this outline of the FCA's actions is accurate. Whilst I cannot provide further details due to confidentiality restrictions I hope that this provides some assurance to the complainants that this has been checked.
12. Around 2020 Firm X began to experience cash flow issues and on 28 May 2021 it wrote to all bondholders to say that it had a ‘deficiency in asset value when compared to bondholder obligations’, and that the FCA had at times intervened in its commercial development, the most significant of which was in 2016.

13. Bondholders were invited to vote on the two options about the future of the firm in June 2021. Bondholders agreed to consider Option 2, a compromise agreement. In August 2021 it appears Firm X sent a Proposal Document to bondholders dated 20 August 2021. On page 7 of this document, the firm set out a timeline of events leading up to the Compromise Proposal. Under May-September 2016 the document states: 'Firm X face regulatory issues with the Financial Conduct Authority disrupting fundraising and ability to progress investment at proposed sites.'
14. Firm X bondholders began to submit complaints to the FCA from October 2022. The FCA's decision was that it would not investigate the complaints. It relied on paragraph 3.3 of the Complaints Scheme which provides that complaints should be made within 12 months from the date on which the complainant first becomes aware of the circumstances giving rise to the complaint. The FCA considered that the circumstances first became known to the complainants on 28 May 2021 when the complainants first became informed about the FCA's involvement with Firm X, as well as the fact the Firm could not meet its obligations to them. The FCA did not find there were reasonable grounds for the delay and therefore applied a time bar to the complaints.
15. Although the FCA did not formally investigate the complaint, it provided supplementary information and comments (such as the ones in paragraph 8 above) which it felt might be useful to complainants. The FCA also confirmed that it had passed the information complainants provided to the relevant areas within the FCA to consider.
16. I can accept complaints which are out of time if I feel there is good justification. Having said that it is not practical for the Complaints Scheme to have an indefinite open time frame for lodging complaints. That is why the Scheme requires complainants to lodge a complaint within twelve months of becoming aware of the circumstances giving rise to their complaint. This ensures that an investigation into the complaint can be conducted at the time of, or close to the originating events of a complaint. The Complaints Scheme does not have unlimited resources; however, I always carefully consider cases where paragraph 3.3 has been used to ensure that it has been used appropriately and

not being used to avoid addressing complaints, and I confirm I have done so in this case.

17. At this stage the question for me is whether the complaint was referred in time and whether I think the FCA were right to use paragraph 3.3 of the Complaints Scheme as reasons to not investigate the complaint. I have considered the complaint points as to why it is felt the complaint is within time (Element One).
18. The complainants' argument is that the certainty and potential scale of loss was unknown in May 2021 and remains so, and therefore the 12 month period to which the FCA refers has not even begun. I note that this point was again raised by a number of complainants to my preliminary report which I carefully considered before finalising this final report.
19. The FCA's argument is that 'considering that bondholders were being asked to vote on proposed options on Firm X's future, were informed that in all likelihood there would be a deficiency in asset value when compared to the Firm's Bondholder obligations and Firm X's Directors suggested that one of the factors in having to make this decision was because of the FCA's actions, we believe that you were aware of the circumstances giving rise to your complaint in May 2021'.
20. My view is that it is clear complainants were on notice that there was an issue with their investment on 28 May 2021, and that there was a suggestion by the Firm's directors in the period May – August 2021 that this was attributable in part to the FCA. This was quite some time before complainants approached the FCA. It might be that complainants felt that they might obtain a financial resolution to their situation through the administrators or other avenues and that they were waiting to see what would happen, but they could have lodged a complaint at any time if they felt the FCA had failed to protect investors. It was always open to them to lodge a complaint with the FCA, but they chose not to do so. They did not have to explore or exhaust other avenues before making a complaint to the FCA. The possibility of financial rectification of actual or potential losses through the Firm's administrators is not reasonable grounds to delay making a complaint. There was nothing to prevent complainants from making a complaint to the FCA, even if they were exploring other avenues.

21. On this basis, I consider that it was reasonable that the FCA set out that it was unable to look at the complaints under paragraph 3.3 because complainants have been aware of the circumstances and issues in relation to Firm X and the FCA in connection to it giving rise to their complaint at a much earlier point in time.
22. In response to my preliminary report some complainants set out :

In addition, I do not know of a single bondholder who knew about the FCA complaints procedure until we were told about it, let alone time scales for making complaints. Perhaps that is further indication that we were not “sophisticated investors” and nor is the Complaints procedure sufficiently easy to locate and become known to individuals. I would suggest this is contrary to any philosophy around Consumer Protection and “Fair Notice” and another reason why you would exercise your discretion (if indeed you must as we contend, we are within time).

23. Whilst I have considered this viewpoint put forward, it is my position that the FCA Complaint Scheme is publicly available information on its website, and it is easily searchable on internet search engines.

My decision

24. For the reasons above, I agree the FCA was right not to investigate the complaint under paragraph 3.3 of the Complaints Scheme. Therefore, my decision is that the complaint is out of time and I do not uphold Element One of the complaint. In view of this, I have not investigated Element Two to Five of the complaint, as it follows on from Element One that complainants are out of time under the Complaints Scheme to raise these complaints.

Amerdeep Somal
Complaints Commissioner
14 July 2023