

Finalised guidance

Guidance for Regulated Persons and The Financial Ombudsman Service on making a reference under s.234D

June 2013

Purpose

- 1.1 Under the Financial Services and Markets Act (FSMA), regulated persons and the Financial Ombudsman Service (Ombudsman Service) may refer certain matters to the Financial Conduct Authority (FCA). Section 234G requires us to issue guidance about the presentation of a reasoned case for a reference under s.234D.
- 1.2 This guidance aims to help regulated persons and the Ombudsman Service to make comprehensive and robust references so that we may respond in a manner that addresses the concerns most appropriately.

Who can make a reference under section 234D?

- 1.3 Section 234D provides that a 'relevant person' may refer matters to the FCA. A 'relevant person' is defined as either the scheme operator (ie. Ombudsman Service) or a regulated person. A regulated person for the purposes of this section includes:
 - an authorised person;
 - an electronic money issuer; or
 - a payment service provider.
- 1.4 References should be submitted electronically to FCASuper-Complaints@fca.org.uk or in hard copy to:

Redress Policy
Policy, Risk and Research Division
The Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Which issues can be referred?

- 1.5 Section 234D establishes two alternative sets of conditions that must be satisfied before a relevant person may make a reference to the FCA. A relevant person may only refer a matter to us under s.234D where the matter being referred is either:
- a regular failure by one or more regulated persons to comply ('failing') with requirements applicable to the carrying on by that person or persons of any activity, which has resulted in consumers having suffered loss for which, if they brought legal proceedings, a remedy or relief would be available (s. 234D(3)); or
 - a regular act or failure to act ('conduct') for which, if a complaint were made to the Ombudsman Service, it would be likely to determine the complaint in favour of the relevant person and award redress or make a direction (s.234D(6)).
- 1.6 While the Ombudsman Service may refer a matter relating to any failing or conduct by any regulated person, s.234D provides that a regulated person can only refer a matter to us if that reference relates to that person's own failing or conduct.
- 1.7 When making a reference to us, the relevant person should indicate which set of conditions it satisfies.

Matters to be addressed in a reference

- 1.8 When making a reference, the relevant person should write to us setting out the reasons why, in its view, the conditions set out in s.234D are satisfied, taking particular care to clearly identify, where applicable:
- 1.9 For the first set of conditions:
- the relevant requirement that has not been complied with;
 - what activity the relevant requirement relates to;
 - how the regulated person's conduct has failed to meet the relevant requirement;
 - the extent and frequency of the failing;
 - the impact of the failing on consumers, that is, loss or damage that has been suffered (or that may be suffered); and

- what remedy or relief would be available to consumers if they brought legal proceedings regarding the failing.
- 1.10 For the second set of conditions:
- what conduct by the regulated person would form the basis of a Ombudsman Service award if a complaint were made;
 - the extent and frequency of the conduct;
 - the reasons they think the Ombudsman Service would make an award; and
 - what award the Ombudsman Service would be likely to make if a consumer complained about the conduct of the regulated person.
- 1.11 The relevant person should clearly state that they wish to make a s.234D reference. The relevant person should support that reference, wherever possible, by documented facts and evidence. This will help prove that the reference meets the conditions imposed by s.234D. They should also clearly identify the outcome they are seeking. The aim is to provide relevant information and evidence to help us carry out a full appraisal of what action, if any, is required for the regular failings or conduct by the regulated person or persons.
- 1.12 Relevant persons are encouraged to discuss their references with us before submitting a formal reference. This will allow us to highlight any gaps in the information. Where we hold information that may be relevant to the reference, an early discussion with the relevant person may help us carry out some preliminary investigative work before formally receiving the reference. Relevant persons will also benefit from an early discussion with us as it may allow us to better understand whether their reference meets the statutory conditions, as well as understand the information we will require for our consideration.
- 1.13 We will not consider a reference if it does not meet the relevant set of conditions. Relevant persons may still communicate with us about matters not meeting the conditions through other channels. Regulated persons should contact their usual supervisory contact and the Ombudsman Service should talk to their regular contact in the FCA.
- 1.14 Whether a firm is considering communicating with us through (for example) their supervisory contact or via a formal reference under s.234D, it should always regard its duty to deal with its regulators in an open and cooperative way and disclose anything relating to the firm which the regulator would reasonably expect notice of, in line with Principle 11, SUP 15.3.1 and SUP 15.3.7.
- 1.15 Given the formal and public nature of the reference procedure under s.234D, where a regulated person has referred a matter to us, we would usually expect to see confirmation that the reference is being made with the support and approval of the person or persons responsible for directing that regulated person's affairs.

The first set of conditions – s.234D(3)

The relevant requirements

- 1.16 The relevant person should clearly identify the relevant requirements that have not been complied with. These include Handbook rules, statutory provisions and general law obligations, wherever such requirements would give rise to a remedy or relief through legal proceedings.
- 1.17 While we do not require relevant persons to necessarily identify all the relevant requirements that may be applicable to the specific activity, we expect that relevant persons will clearly highlight the relevant requirements it considers that the regulated person has failed to comply with.

The activity the relevant requirement(s) relates to

- 1.18 Section 234D captures a wide range of activities. However, we expect that references will generally concern failings relating to conduct rules relating to the performance of a regulated activity. The relevant person should clearly identify the nature of the activity.

How the regulated person's conduct has failed to meet the relevant requirements

- 1.19 Relevant persons should also provide a clear explanation of the nature of the failing. This should include a detailed description of the conduct by the regulated person that has led to the failing and an explanation of why, in the relevant person's view, that conduct has failed to comply with relevant requirements.
- 1.20 We would expect relevant persons to set out the context and background to the relevant conduct so we can better understand the circumstances in which the conduct in question has taken place.

The extent and frequency of the failing

- 1.21 References under s.234D(3) must be about a 'regular' failing. The relevant person making the reference should demonstrate that the failing is a common event and not a one-off incident. So we expect that references under s.234D will concern recurring or systemic failures. Relevant persons making a reference to the FCA should explain the frequency and extent of the failing in question to help us assess whether the reference meets the statutory conditions set out in s.234D.
- 1.22 A reference to us by a regulated person regarding its own failings does not fulfil the regulated person's obligations to ensure that it identifies any recurring or systemic problems. If firms identify such problems they should (in line with Principle 6) consider whether they ought to act with regard to the position of customers who may have suffered harm from, or been potentially disadvantaged by, such problems but who have not complained. If so, they must take appropriate and proportionate measures to ensure that those customers are given appropriate redress or a proper opportunity to obtain it.

This may include a review of files and other measures (see Dispute Resolution: Complaints Chapter of FCA Handbook, DISP 1.3.6G). Principle 11 is also relevant; it requires a firm to deal with its regulators in an open and cooperative way, and to disclose to us appropriately anything relating to the [firm](#) of which we would reasonably expect notice. While it may be appropriate in certain circumstances for firms to bring issues to our attention by way of a s.234D reference, the scope of their duty of openness and cooperation under Principle 11 is much wider.

The impact of the failing on consumers

- 1.23 The relevant person should clearly identify both the nature of the loss or damage (or potential loss or damage) to consumers and the how the failing caused (or may cause) the loss or damage. While the relevant person does not need to provide an exact quantification of any loss, it should aim to at least describe the range of actual or potential losses to consumers.
- 1.24 The meaning of ‘consumers’ is explained in section 1G of FSMA. Generally speaking, a ‘consumer’ is a person who uses, has used or may use regulated financial services. However, we expect that in most cases, the consumers suffering loss or damage will be retail customers (individuals acting for purposes outside their trade, business or profession). We note that consumers’ interests may be damaged indirectly, for instance where they are beneficiaries of funds or pension schemes that have been negatively affected by the feature of the market that is the subject matter of the reference. So we will consider any reference that clearly identifies the potential impact on consumers and how such harm might arise.

Availability of remedy or relief in legal proceedings

- 1.25 A reference may only be made where, if the consumer had initiated legal proceedings, the failure to comply with the relevant requirement would give rise to the availability of remedy or relief for a consumer (s.234D(3)).
- 1.26 We would encourage relevant persons to provide robust evidence and clearly set out the argument to support their view that a remedy or relief would be available in legal proceedings. This could include providing us with a clear articulation of the relevant persons’ understanding of the legal position relating to the failure and of the liability to consumers arising from the failure. Where possible, we would encourage the relevant person to refer the FCA to the relevant legal authorities on which it has developed its view.

Second set of conditions – s.234D(6)

The conduct that would form the basis of a Ombudsman Service award if a complaint were made

- 1.27 A relevant person should aim to provide us with a clear articulation of the relevant person's understanding of the Ombudsman Service's general approach in relation to the acts or failures to act that amount to the conduct in question, with reference to the Ombudsman Service's reasoning.
- 1.28 We expect that the relevant person will provide evidence of previous determinations by the Ombudsman Service(as provided for in DISP 3.6.6) relating to the matters in the reference. Its published approach to specific issues may also help the relevant person to show the Ombudsman Service's approach and the likelihood of successful complaints by consumers. If only one determination is available, this may be enough if the decision in favour of the consumer was sufficiently unambiguous. Determinations that are finely balanced (so that similar cases could be, or have been, determined against the complainant) are less likely to demonstrate that the Ombudsman Service would be likely to uphold complaints about the conduct in question in favour of consumers.
- 1.29 If a relevant person is unable to provide evidence indicating the Ombudsman Service view regarding the conduct in question, we are unlikely to be able to consider an application under s.234D(6).

The extent and frequency of the conduct

- 1.30 References under s.234D(6) must be about an act or omission that has occurred on a regular basis. As such, as with references under s.234D(3), the relevant person making the reference should demonstrate that the act or omission is a common occurrence and not a one-off incident. The guidance above on this aspect of the first set of conditions will also be relevant here.

The reasons why it is thought the Ombudsman Service would be likely to make an award

- 1.31 The relevant person should clearly explain why it considers that the Ombudsman Service would make an award to the consumer regarding the act or omission by the regulated person.
- 1.32 If the act or omission would not be one where the Ombudsman Service would be likely to make an award then the matter does not meet the statutory requirements for a reference under s.234D.

What award the Ombudsman Service would be likely to make

- 1.33 The relevant person should indicate what award (or direction) the Ombudsman Service has made or would be likely to make in relation to a complaint made regarding the conduct that is the subject matter of the reference. This should be supported by reference to determinations or, where available, publications by the Ombudsman Service indicating its likely approach to an issue. We may disregard references about matters giving rise to only small awards, not of significant consequence either to consumers' financial position or to the scale of the regulated person's business, under the exceptions provided in s.234F (see below).

Evidence

- 1.34 All matters raised in the reference should be supported by evidence and detailed information wherever possible. While we do not expect relevant persons to provide the level of evidence necessary for us to take regulatory action, the information provided by the relevant person should be sufficient for us to determine whether a further investigation into the issue is warranted.
- 1.35 The information provided should not only aim to demonstrate that the relevant criteria has been met for a reference under s.234D, but also aim to provide us with sufficient context to the issue being addressed in the reference to help us determine the most appropriate course of action to pursue.

How will references be handled?

- 1.36 We will examine the contents of the reference in more detail to determine if it meets the relevant set of conditions as set out in s.234D. We will not consider references that do not meet either set of conditions in s.234D. Relevant persons uncertain about whether their intended reference meets the applicable set of conditions in s.234D are encouraged to contact us for an informal discussion before submitting a formal reference.
- 1.37 If the reference satisfies the criteria under FSMA, we will assess the quality and completeness of the information and evidence supplied. We will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. Where we finds that a reasoned case for reference has not been made or that it requires clarification, we will contact the relevant person as soon as possible requesting further information or clarification. Where a request for clarification or further information is made, the relevant person will be given a set time in which to respond. We may also choose to meet with the relevant person making the reference to raise any immediate questions about the evidence submitted and to offer a broad indication of its lines of enquiry.
- 1.38 We may then carry out wider enquiries, with a view to testing the evidence provided and obtaining any further information we consider necessary to form a reasoned view on

whether the reference justifies further action. Exactly how we do this will be determined on a case-by-case basis, but may involve:

- internal research;
- public requests for information;
- carrying out an in-depth supervisory review of the relevant regulated firm(s);
- publishing information we already hold;
- approaching any relevant businesses or trade associations for information;
- approaching consumer organisations, trading standards departments, government departments and/or other public bodies for information;
- initiating thematic work or some other form of market study or research;
- consultation with the Ombudsman Service, the FSCS, the Prudential Regulation Authority, the relevant panels or any other relevant body; or
- any other action we deem necessary.

1.39 The relevant person may be contacted to clarify issues or for further information as appropriate. Given the broad numbers of persons that may make a reference under s.234D, it will not be possible to discuss ongoing progress of a reference with all relevant persons. Where appropriate and feasible, however, we will aim to liaise with relevant persons during our consideration to inform them of the progress with the response.

What action will result from a reference?

1.40 Where a reference meets the relevant set of conditions in s. 234D, we are required under s. 234E to publish a response to the reference within 90 days setting out how we propose to deal with the reference, explaining in particular whether we have decided to take any action, if so, what action, and in any event, reasons for our decision. Any action taken by us will be subject to the usual procedures and controls that may be relevant to that action. For example, if we proposed to make changes to our rules as a response to a reference, it will follow its general consultation process for the making of rules. The possible outcomes of a reference include but are not limited to:

- regulatory action by us (including, but not limited to, taking enforcement action against a firm or firms or varying permissions granted under FSMA);
- initiating a consumer redress scheme under s. 404 of FSMA;
- initiating a review of any relevant rules or guidance;
- referring the reference to another regulatory, supervisory or enforcement agency that may be better able to address the reference;
- initiating further assessment of the matters raised in the reference;
- deciding that no action should be taken; or

- dismissing the reference as frivolous, unnecessary or made in bad faith.
- 1.41 Where our response includes potential regulatory action against a relevant person, we will aim to discuss this with the firm before publishing a formal response. Any discussions held with the relevant person will be subject to the general restrictions on us relating to the disclosure of confidential information, as outlined in s.348 FSMA.
- 1.42 Our response will set out the reasons for deciding what action to take. These might include, for example, setting out any aggravating or mitigating factors in the firm's behaviour or systems and controls, and/or the extent to which the issue is relevant to other firms.

Exceptions to our duty to respond

- 1.43 S. 234F provides that the duty to respond in s.234E does not apply if we consider that the reference is frivolous, unnecessary or made in bad faith. Where we reaches this conclusion we must inform the person who made the reference within 90 days and provide reasons.
- 1.44 We expect that for the purposes of s. 234D, a reference that is frivolous, unnecessary or made in bad faith is likely to be one that, for example:
- does not raise a matter that is significant to a firm or a class or classes of consumers with whom that firm engages;
 - raises a matter without sufficient grounds for doing so, in circumstances where the relevant person is likely to be aware that this is the case;
 - is made in circumstances such that the relevant person knows, or should know, that the reference is not the appropriate channel for communication with us about the matter, for example:
 - the reference concerns a matter that is already the subject of supervisory or enforcement action in relation to the regulated person in question (where that is known to the relevant person);
 - where the relevant person is merely seeking to establish if any law, rule, regulation or guidance has in fact been breached by a regulated person; or
 - where the reference is made by a regulated firm with the primary purpose of highlighting failures by other regulated persons other than itself.
 - in relation to references by a regulated person, where the reference pertains to a matter on which we (or our predecessor, the FSA) has already expressed a clear public view or published guidance;
 - where the relevant person appears to be seeking to circumvent, interfere with or hinder an ongoing supervisory action or enforcement investigation;
 - where the firm refers a matter to us with the intent of obtaining a competitive advantage on the market without any corresponding benefit to consumers; or

- where the reference has been made with the intention of delaying or frustrating the determination by the Ombudsman Service of complaints made to it.

1.45 The above list is not exhaustive but is merely intended to indicate the type of reference in relation to which our duty to respond is unlikely to apply.

Publicity for references

1.46 It is for a relevant person to decide whether or not to issue a press notice recording that it has made a reference. However, relevant persons should first consult with us to avoid jeopardising investigations that could be hampered by public disclosure of the reference. In such circumstances, the agreement of the relevant person may be sought to keep the existence of the reference confidential for a period. If a firm knowingly publishes information that is subject to an ongoing investigation, that firm could be acting in breach of its obligations regarding its relationship with the regulator.

1.47 We are required to publish the response to the reference (and the published response will include a copy of the reference). As a minimum, this publication will include a copy of the complaint and our reasons for our proposals on our website. If appropriate, a press notice may also accompany the response.

1.48 In some circumstances we may decide that it would also be appropriate to issue a press notice when we receive the reference, for example if the announcement of the reference was to be combined with a public request for information. This will be decided on a case-by-case basis. The relevant person may be encouraged to create a public summary of their s.234D reference to help the submission of relevant information from interested parties.