

**The FCA's response to the
Complaints Commissioner's Report
FSA01600**

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We have considered the Commissioner's Final Decision on complaint FSA01600 and would comment as follows.

We accept that the Stage One investigation of the Complainant's complaint was subject to unreasonable delay. We have apologised to the Complainant for this delay and shall deduct £500 from the amount owed by the Complainant following the penalty imposed by the Upper Tribunal.

However, we do not accept that it was unfair to publish the final notice in this case nor do we consider that it is appropriate to remove it from our website at this time. We have reached this conclusion reluctantly as we respect and value the role that the Complaints Scheme plays in making the FCA an accountable organisation. The disagreement reflects the FCA's different view on the interpretation of the statutory provisions concerning the publication of final notices and what constitutes unfairness. We acknowledge that publication of our findings will have an impact on people but that does not make it unfair. We do not think that the circumstances of this case render publication of the final notice unfair. Enforcement allows the FCA to hold to account those who break the rules and, in doing so, help protect consumers and maintain the integrity of the market. At the heart of our credible deterrence agenda is the goal of raising standards making clear the consequences of non-compliance.

In this case there was a public Tribunal hearing and a published Tribunal decision (in accordance with principles of open justice). In order to implement the Tribunal decision, the FCA was required to give the Complainant a final notice. Section 391 of the Financial Services and Markets Act 2000 ("FSMA") provides that the FCA in "giving a final notice must publish such information about the matter to which the notice relates as it considers appropriate". However, the FCA may not publish information under s391 if in its opinion publication would be unfair to the subject of enforcement action.

The background to the complaint was enforcement action taken by the FCA consistent with its credible deterrence strategy, which is used to deter firms and individuals from operating in a way that can harm the integrity of the market or consumers. Publishing enforcement outcomes raises awareness of our standards, and is an important way of deterring future breaches; it is a core component of our strategy.

The FCA is required to have regard to the "regulatory principles", one of which is that it "should exercise [its] functions as transparently as possible".

This material is reflected in our Enforcement Guide which states: "Publishing notices is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action" (paragraph 6.10).

At the end of the enforcement process, where a final notice has been given, there is a strong presumption in favour of publication. This is also reflected in the Enforcement Guide which provides that "The FCA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a final notice" (paragraph 6.8). We consider that the Commissioner has given insufficient consideration to these matters when assessing unfairness. The publication of the final notice in this case is entirely consistent with our published policy and practice over many years.

In addition, the Commissioner appears to have expanded the discretion given to the FCA by section 391(6) ("may not publish") into a duty imposed on the FCA to carry out a pre-publication investigation into whether publication of a final notice would be unfair. For the reasons summarised in the Final Decision, the FCA still disagrees with this interpretation as it has a different view of what section 391 FSMA requires.

In accordance with the Commissioner's recommendations, we have undertaken a review of our procedures to ensure that we have due regard to section 391 FSMA before a decision to publish a final notice is taken and that this is documented.

The Commissioner notes the Tribunal's statement that they did not wish to impose a penalty which would bring to an end the Complainant's rehabilitation. As our final notice makes clear, we have not prohibited the Complainant from working in financial services. Given the Commissioner's comments however we will, in order to provide additional context, endorse the Final Notice to give prominence to para 129 of the Tribunal Decision.