

Summary of feedback received

June 2013

Consultation title	Consultation on guidance under section 234C relating to super-complaints and section 234D references
Date of consultation	18 February 2013
Summary of feedback received	<p>Responses on the guidance closed on 18 March 2013. 10 responses were received from firms, trade associations and consumer organisations. Respondents were broadly supportive of the proposed guidance. In particular many supported the proposals relating to:</p> <ul style="list-style-type: none">• pre-engagement;• the information we expect to be included in a super-complaint and a s. 234D reference; and• the process we had set out for handling super-complaints and s. 234D references. <p>Respondents also recommended a number of additions to the expectations set out in the guidance. These included suggestions that we:</p> <ul style="list-style-type: none">• clarify the interaction between our usual decision-making process and the super-complaints and s. 234D mechanism;• expand on the relevant information we expect to be included in a super-complaint or s. 234D reference (for example, to include information about non-monetary difficulties in switching, redress issues and information about access to financial services); and• clarify the mechanics of submitting a super-complaint (such as providing an email address). <p>These have largely been incorporated in the finalised guidance.</p> <p>A number of respondents also raised concerns about issues that were outside the scope of the guidance. For example, one respondent proposed that there should be repercussions for super-complainants or relevant persons who make references frivolously or in bad faith. While the guidance clearly sets out that such super-complaints and references will not be considered,</p>

we have no statutory powers to take further steps in relation to such complainants. Similarly, some respondents suggested that firms would not make use of the mechanism under s. 234D to make references about their own failings. The possibility to do so is provided for in the legislation. The purpose of the provisions is to allow firms to bring matters to our attention to and, in turn, allow us to take regulatory action where that may be more effective at addressing the failings identified. Some respondents also asked whether a s. 234D reference may be made by a skilled person, appointed under s. 166. Our view is that legislation is clear that only a regulated person or the Financial Ombudsman Service may make a reference. As such, we do not think further clarification is necessary to make clear that skilled persons appointed under s. 166 are not eligible to refer a matter to us under s. 234D.

Other respondents have suggested that we should clarify our relationship with the Office of Fair Trading. We recently published a [Memorandum of Understanding](#) (MoU), which outlines how the FCA and the OFT will work together. We think that the MoU is the appropriate place to set out how we will work together in respect of super-complaints.

Some respondents raised some concerns about aspects of the guidance. In particular, these include:

- concerns with our expectation that super-complainants should provide us with information about **pricing of products** and the **profitability of firms** where relevant to the super-complaint;
- our expectations relating to the nature of the evidence to be provided in a super-complaint. The respondent argued that a super-complainant should be able to make a complaint on the basis that we **may be able to access the relevant information** (under our information-gathering powers, for example);
- concerns about the **governance process** in respect of our response to a super-complaint or s. 234D reference. In particular, some respondents suggested that the response should be approved by the Board or the RDC; and

the possibility that a **super-complainant or a s. 234D reference may be made public** before our response is published.

Response to feedback received

Much of the feedback received has been incorporated into the final guidance. We set out below our responses to issues raised that have not been incorporated into the final guidance

Pricing and profitability

One respondent argued that the FCA is not an economic

regulator and that it was inappropriate for a regulator to be considering information about the pricing of financial services or the profitability of firms. Respondents were also concerned about the potential commercial sensitivities involved in providing such information to us.

The FCA's new competition mandate requires us to consider a broad range of issues relating to markets for financial services.. The price-determination of financial services, including firms' profit models, are a core part of understanding markets and can be an indicator of potential harm to consumers. For example, the ability to sustain prices above efficient cost might be an indication of market power. Certain pricing models and firms' profitability may incentivise market conduct that it may be appropriate for us to address. We will, where it may be appropriate to do so, take into consideration the cost of products or services in making judgements about whether consumers are being fairly treated. This is consistent with the information we set out in the [Journey to the FCA](#).

Where information provided to us includes information that is commercially sensitive and confidential, the restrictions in s.348 of FSMA will apply.

We consider it appropriate for us to expect that such information be included in a super-complaint or s. 234D reference where available and relevant to responding to concerns articulated in the super-complaint or reference.

Access to information

Some respondents suggested that super-complainants should be able to refer matters to us where they believe we may be able to access further information. While we have indicated that we may wish to undertake our own investigations to obtain further information, we think that sufficient information should be included in a super-complaint or s. 234D reference to guide any investigation. As such, we continue to expect that super-complainants and those making a s. 234D reference will provide us with robust evidence of the issues they are raising with us.

Governance

Some respondents suggested that responses to super-complaints or s. 234D references should be approved by the Board or the RDC. Our view is that the appropriate governance checks will depend on the nature of the super-complaint or s. 234D reference. In some instances, we agree that it may be appropriate for the Board or the RDC to agree to the response. However, it may be more appropriate for the response to be approved through other governance arrangements within the FCA.

Publicity

A number of respondents were concerned that the guidance did not restrict the ability of super-complainants or those making a s. 234D reference from publicising the fact of their super-complaint or reference.

We are obliged, under FSMA, to publish our response. However, the publicity about the initial super-complaint or reference is a matter for the super-complainant or the referee to decide. As indicated in our guidance, however, we consider that it would be appropriate for this to be discussed with us before publication.

Changes made to the guidance as a result of feedback received

A number of changes have been made to guidance following feedback from respondents. In particular, we have:

- confirmed that any action arising from our response will be subject to the usual procedures and controls;
- broadened the types of information we would expect to be included in super-complaints or s. 234D references to include information about access to financial services, redress issues and non-monetary costs of switching; and
- provided an email and postal address for a super-complaint or s. 234D reference.

[You can access the full text of the guidance consulted on](#)
