

Guidance consultation

CONSULTATION ON GUIDANCE UNDER SECTION 234F RELATING TO SUPER-COMPLAINTS AND SECTION 234D REFERENCES



February 2013

What this guidance is about

We are seeking feedback on two pieces of guidance on section 234C super complaints and section 234D references.

The respective pieces of guidance set out our views about presenting a reasoned case for a super-complaint under section 234C or a reference under section 234D of the Financial Services and Markets Act 2000 (as amended by the Financial Services Act 2012). We are issuing this guidance under ss139B(5) and 234G of the FSMA

The guidance also sets out our view about various other matters relating to section 234C and 234D.

Background to this guidance

The Financial Services Act 2012 introduced two new mechanisms to allow certain persons to bring information to the attention of the Financial Conduct Authority (FCA).¹ Section 234C enables designated consumer bodies to make a super complaint to the FCA. Similarly section 234D enables regulated persons and the Financial Ombudsman Service to make references to the FCA.

The FCA must publish a response to a section 234C super-complaint or a section 234D reference within 90 days, stating what, if any, action it proposes to take as a result of the super-complaint or reference and why. A super-complaint is a complaint by a designated consumer body alleging that a feature or a combination of features of the market for financial services in the UK is significantly damaging the interests of consumers. Similarly a section 234D reference is a reference by a regulated firm or the Financial Ombudsman Service alleging that there has been a failure by a regulated firm that is giving rise to consumer detriment.

¹ The FCA is one of the successor organisations to the FSA and will be the primary regulator responsible for the conduct regulation of financial services firms. Its' objective is to make markets work well so that consumers' get a fair deal.

Section 234F requires the FCA to publish guidance on the presentation of a reasoned case for a complaint under section 234C or a reference under section 234D. It may also provide guidance on any other matter that appears to be appropriate for the purposes of section 234C or section 234D.

Draft guidance for designated bodies on super-complaints

The draft guidance for designated bodies on super complaints sets out our views about:

- the purpose of the super-complaint mechanism;
- who is able to bring a super complaint;
- the matters that should be addressed in a super-complaint (including our views about the matters covered by the statutory criteria for making a super complaint);
- the evidence we are likely to need to assess a super complaint;
- how we intend to handle super complaints;
- what action we may take as a result of a super complaint; and
- the publicity in respect of super-complaints.

We would be like to invite stakeholder feedback on the views that we have set out in this guidance.

Draft guidance for firms and the Financial Ombudsman Service when making a reference under s. 234D

The draft guidance for designated firms and the Financial Ombudsman Service when making a reference under s.234D sets out our views about:

- the purpose of the s234D mechanism;
- who can make a reference under s234D;
- which issues can be referred under s234D;
- the matters that should be addressed in making a section 234D reference (including our views about the matters covered by the statutory criteria for making reference);
- the evidence we are likely to need to assess a s234D reference;
- how we intend to handle s234D references;

- what action we may take as a result of a s234D references;
- Exceptions to the FCA's duty to respond; and
- the publicity in respect of s234D references.

We would like to invite stakeholder feedback on the views that we have set out in this guidance.

Draft guidance for designated bodies on super-complaints

Purpose

The Financial Services and Markets Act (FSMA) provides that certain consumer bodies may complain to the Financial Conduct Authority (FCA) about features of a market for financial services in the UK that may be significantly damaging the interests of consumers. This process is intended to provide consumer bodies with a mechanism to raise issues with the FCA about features of the market that may be affecting consumer interests. The FCA must respond within 90 calendar days. This process has been modelled on the ‘super-complaint’ mechanism provided for in section 11 of the Enterprise Act 2002. Section 234G requires the FCA to issue general guidance about the presentation of a reasoned case for a complaint under section 234B.

This guidance aims to help designated consumer bodies make comprehensive and robust complaints so that the FCA can respond in a manner that addresses the complainant’s concerns most appropriately.

Who can bring a super-complaint?

The Treasury is responsible for deciding which consumer bodies should be designated to be able to make super-complaints. The Treasury can make any organisation a designated consumer body provided it appears to them to represent the interests of consumers of any description, including representatives of small and medium sized enterprises (excluding consumers who are authorised financial services firms). The Treasury has published criteria to be applied by them in determining whether to make or revoke a designation. It is expected that those designated bodies will be informed bodies that are in a strong position to represent the interests of consumers, and are able to provide clear reasoning and evidence in support of any complaint they make.

Consumer bodies wishing to seek designated status should contact the Treasury for further information or can find information [[link to be inserted here](#)].

Matters to be addressed in a super-complaint

When making a complaint, the super-complainant should write to the FCA setting out the reasons why, in its view, a UK market for goods or services has a feature or combination of features which is or appears to be significantly harming the interests of consumers and should therefore be investigated. The super-complaint should be clearly identified as such. The complaint should be supported, wherever possible, by documented facts and evidence. The objective of presenting the case is to help the FCA undertake a full appraisal of whether any feature or combination of features of a UK market is or appears to be significantly damaging consumer interests and what action, if any, is required.

Complainants are encouraged to discuss their complaints with the FCA before submitting a formal super-complaint. This will allow the FCA to highlight any gaps in the information that would hinder its consideration of the complaint. Where the FCA holds information that may be relevant to the complaint, an early discussion

with the complainant may enable the FCA to undertake some preliminary investigative work before formally receiving the complaint and will enable complainants to better understand the information the FCA will require for its consideration.

Features of the UK market

The designated consumer body will need to highlight the features of the relevant market for financial services that may be damaging the interests of consumers. FSMA² provides that a feature of a market in the UK for goods or services is to be read as a reference to:

- the structure of the market concerned or any aspect of that structure;
- any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
- any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.

This may cover, for instance, complaints about issues arising from the characteristics of a certain financial product or service, or from the conduct of any authorised or exempt person, any recognised investment exchange, or any person or activity covered by section 19 of FSMA, whether or not that person is acting in contravention of the general prohibition. It may also cover issues arising from consumer behavioural weaknesses.

We note that, while the FCA may consider complaints about any feature of a market for financial services, the FCA may have limited authority to take action in certain circumstances. This may especially be the case where another regulator may be better placed to address the concerns raised.

For the purposes of making a complaint, a market must be in the UK and includes:

- any market which operates in the UK (or part of the UK) and in another country or territory (or in a part thereof); and
- any market which operates only in a part of the UK.

We expect that a cross-border issue that may affect consumers in the UK or that involves UK firms is likely to satisfy this requirement. We will not consider an issue that solely affects consumers, firms or markets in overseas jurisdictions.

² Section 140A, Financial Services and Markets Act 2000 (as amended by the Financial Services Bill 2012).

The interests of consumers

The complainant should set out why it considers that a feature of the relevant market for financial products or services is, or may be, significantly damaging the interests of consumers, including where applicable:

- the features of the relevant market, including any details about market practice, product features and/or pricing in relation to the relevant product or service;
- details of the conduct of the relevant authorised persons (or their customers) identified as damaging;
- details of any relevant FCA rules and guidance or other relevant guidance, policies or legislation (for instance, EU rules) that the relevant authorised person may be failing to comply with;
- whether any particular class or classes of consumers may be particularly vulnerable to harm;
- how the relevant feature of the market is or may be causing damage to the interests of the relevant class of consumer, including the impact and extent of the damage or potential damage and an explanation of how this has been assessed or estimated; and
- an indication of what outcome(s) the complainant is seeking as a result of the super complaint to address the damage to consumers that has been identified.

We note that it is not necessary for a complaint to demonstrate that the interests of consumers have *actually* been damaged. Where a complaint does not demonstrate that consumers are actually suffering harm, they should provide clear information as to why they think that that consumer interests may be damaged.

A consumer is any person who has used, may use, or otherwise has relevant rights or interests arising from the use of any financial product or service regulated by the FCA. It includes for instance any person who has acquired, may acquire, or holds relevant rights or interests in relation to investments.

While this may include a class of consumers who do not reside in the UK, it should be noted that there may be a more limited range of actions that the FCA could take for complaints about damage to the interests of those consumers.

We expect that, in most cases, the consumers will be retail customers (being persons acting for purposes outside his trade, business or profession). We note, however, 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 complaint. As such, we will consider any complaint that clearly identifies the potential impact on consumers.

Super-complaints must relate to the interests of consumers generally or to those of a specific class or classes of consumer. Complaints about damage to the interests of individual consumers will continue to be handled by the Financial Ombudsman Service.

Evidence

All matters raised in the complaint should be supported by documented facts and evidence where possible. While the FCA does not expect complainants to provide the level of evidence necessary for the FCA to take regulatory action, the information provided by the complainant should be sufficient to enable the FCA to determine whether a further investigation into the issue is warranted.

Where relevant and feasible, the complainant should endeavour to provide the FCA with evidence about:

- details of the market (including details about the nature of the financial product or service concerned) to which the complaint relates, and whether there are particular aspects of the product or service causing potential problems for consumers;
- whether the complaint relates to the market as a whole or only to certain firms or parts of the market;
- sales or distribution practices that could be having an impact on consumers, for instance high-pressure selling or inappropriate targeting of consumers;
- any available indicators showing how well-informed consumers are, relative to firms, about the costs, risks and benefits of financial products and services offered by different suppliers;
- whether complex aspects of the financial product or service, the way in which it is distributed, or difficulties in properly assessing cost, risks and benefits, present particular problems for consumers;
- any costs incurred by consumers as a direct result of switching to alternative suppliers or of seeking to exit or terminate the financial product or service;
- the general level of profitability of firms in the relevant sector for the financial product or service and/or pricing structures of the relevant financial product or service;
- practices by firms in the relevant sector that may be restricting or distorting competition;
- whether the relevant financial product or service is only supplied together with other product or services rather than separately;
- whether claims relating to the financial product or service or elements of the financial product or service are covered by the FOS and the FSCS;
- the general quality of the financial product or services in the relevant sector;
- details of any industry codes of practice or guidance that apply to the good or service; and
- any other matter that may be relevant to assessing whether a feature of the relevant market is or may be significantly damaging the interests of consumers.

Given the possible breadth of complaints that may be made, it is not possible to provide exhaustive guidance on the type of information and evidence that may be required. For example, a complaint about breaches of applicable regulatory requirements will require significantly different information compared to complaints about gaps in the regulatory framework. Complainants should consider the type of complaint being made and ensure that they have made a reasoned case for the FCA to consider. Ultimately, it will be for the FCA to consider what action is most appropriate when responding to a complaint. However, a complete and thorough complaint will ensure that the FCA is best placed to assess the matters raised and respond appropriately.

Complaints that do not provide sufficient information to the FCA to determine whether further investigation or action is warranted will be dismissed as unfounded. Similarly, complaints that are, or appear to be, frivolous or vexatious will be rejected. For example, a complaint that does not raise any new information about a matter that we have already published a view on, or that we have already responded to as part of a previous complaint, may be rejected on the grounds that it is vexatious.

How will super-complaints be handled?

The FCA will examine the contents of the complaint in more detail to determine if it meets the criteria set out in FSMA, that is:

- the complainant is a designated body;
- the complaint is about a feature or combination of features of a market for financial services in the UK; and
- there is a reasoned case showing that the feature or combination of features complained of is or appears to be significantly damaging the interests of consumers.

All the criteria must be satisfied for the complaint to receive super-complaint status. If the FCA believes that the super-complaint is frivolous or vexatious, it will reject the complaint.

If the complaint satisfies the criteria under FSMA, the FCA will assess the quality of information and evidence supplied. The FCA will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. Where the FCA finds that a reasoned case for complaint has not been made or that it requires clarification, it will contact the designated body as soon as possible requesting further information or clarification. Where a request for clarification or further information is made, the super-complainant will be given a set time in which to respond. If it fails to do so, the FCA may consider making a formal response that no action will be taken regarding the complaint. The FCA may choose to meet with the designated body making the complaint to raise any immediate questions about the evidence submitted and to offer a broad indication of its lines of enquiry.

The FCA may then carry out wider enquiries with a view to testing the evidence provided and obtaining any further information it considers necessary in order to form a reasoned view on whether the super-complaint justifies further action. Exactly how it does this will be determined on a case-by-case basis, but may involve:

- internal research;
- public requests for information;
- carry out a review of the relevant regulated firm(s);
- 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 FOS, the Financial Services Compensation Scheme, the Prudential Regulation Authority, the Financial Services Consumer Panel or any other relevant body; or
- any other action it deems necessary.

The complainant will be kept informed of progress and may be contacted to clarify issues or for further information as appropriate.

What action will result from a super-complaint?

The FCA is required under s. 234D to publish a response to the complaint within 90 days setting out how it proposes to deal with the complaint, explaining in particular whether it has decided to take any action, and if so, what action it proposes to take, with reasons. The possible outcomes of a super-complaint include, but are not limited to:

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

Publicity for super-complaints

It is for a complainant to decide whether or not to issue a press notice recording that it has made a super-complaint. However, complainants should consult with the FCA to avoid jeopardising investigations that could be hampered by prior disclosure of the complaint. In such circumstances, the agreement of the complainant may be sought to keep the existence of the super-complaint confidential for a period.

It should be noted, however, that the FCA is required to publish the response to the super-complaint. As a minimum, this will be to place a copy of the response on its website to achieve publication. If considered appropriate, a press notice may also accompany the response.

In some circumstances the FCA may take the view that it would be appropriate to issue a press notice itself, for example if the announcement of the complaint was to be combined with a public request for information. This will be decided on a case-by-case basis. Complainants may be encouraged to create a public summary of their complaint, where not already in the public domain, to assist the submission of relevant information from interested parties.

Draft guidance for firms and the Financial Ombudsman Service when making a reference under s. 234D

Purpose

Under the Financial Services and Markets Act (FSMA), firms and the Financial Ombudsman Service (the Ombudsman Service) may refer certain matters to the Financial Conduct Authority (FCA). Section 234G requires the FCA to issue general guidance about the presentation of a reasoned case for a reference under s. 234D.

This guidance aims to help firms and the Ombudsman Service to make comprehensive and robust references so that the FCA may respond in a manner that addresses the concerns most appropriately.

Who can make a reference under section 234D?

Section 234D provides that a ‘relevant person’ may refer matters to the FCA. A ‘relevant person’ is defined as either the scheme operator (ie. the Ombudsman Service) or a regulated person. A regulated person for the purposes of this section includes:

1. an authorised person;
2. an electronic money issuer; or
3. a payment service provider.

Which issues can be referred?

Section 234D establishes two 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 the FCA under s.234D where the matter being referred to the FCA relates to either:

1. in relation to one or more regulated persons, a regular failure to comply (‘failing’) with requirements applicable to the carrying on by that person of any activity, which has resulted in consumers having suffered loss in respect of which, if they brought legal proceedings, a remedy or relief would be available (s. 234D(3));

or

2. in relation to one or more regulated persons, regular acts or failures to act ('conduct') in respect of which, if a complaint was made to the Ombudsman Service, the Ombudsman would be likely to determine the complaint in favour of the relevant person and award redress or make a direction (s. 234D(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 the FCA where that reference relates to that person's own failing or conduct.

When making a reference to the FCA, the relevant person should indicate which set of conditions the reference satisfies.

Matters to be addressed in a reference

When making a reference, the relevant person should write to the FCA 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:

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 in respect of the failing.

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 brought a complaint in respect of the conduct of the regulated person.

The relevant person should clearly state that they wish to make a section 234D reference. The relevant person should support that reference, wherever possible, by documented facts and evidence. This will help demonstrate that the reference meets the conditions imposed by s. 234D. We would also encourage them to clearly identify the outcome they are seeking from the FCA. The overall objective is to provide relevant information and evidence to help the FCA undertake a full appraisal of what action, if any, is required in relation to the regular failings or conduct by the regulated persons.

Relevant persons are encouraged to discuss their references with the FCA before submitting a formal reference. This will allow the FCA to highlight any gaps in the information that would hinder its consideration of the reference. Where the FCA holds information that may be relevant to the reference, an early discussion with the relevant person may enable the FCA to undertake some preliminary investigative work before formally receiving the reference. Relevant persons will also benefit from an early discussion with FCA as it may allow them to better understand whether their reference meets the statutory conditions, as well as understand the information the FCA will require for its consideration.

The FCA will not consider a reference if it does not meet the relevant set of conditions. Relevant persons may still communicate with the FCA 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.

Whether a firm is considering communicating with the FCA through (for instance) their supervisory contact or via a formal reference under s. 234D, it should always have regard to 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.

Given the formal and public nature of the reference procedure under s. 234D, where a regulated person has referred a matter to the FCA, 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

The relevant person should clearly identify the relevant requirements which 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.

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

Section 234D captures a wide range of activities. However, we expect that references will generally concern failings relating to conduct rules pertaining 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

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 constitutes a failure to comply with relevant requirements.

We would expect relevant persons to set out the context and background to the relevant conduct so the FCA may better understand the circumstances in which the conduct in question has taken place.

The extent and frequency of the failing

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. Accordingly, 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 so as to enable the FCA to assess whether the reference meets the statutory conditions set out in s. 234D.

We should note that a reference to the FCA by a regulated person in respect of its own failings does not discharge 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 detriment 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 FSA 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 [the FCA](#) appropriately anything relating to the [firm](#) of which the FCA would reasonably expect notice. Whilst it may be appropriate in certain circumstances for firms to bring issues to the FCA's 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

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 need not provide an exact quantification of any loss, it should aim to at least describe the range of actual or potential losses to consumers.

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

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)).

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 the FCA 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 which would form the basis of a FOS award if a complaint were made

A relevant person should aim to provide the FCA with a clear articulation of the relevant person's understanding of the FOS's general approach in relation to the acts or failures to act that amount to the conduct in question, with reference to the FOS's reasoning.

We expect that the relevant person will provide evidence of previous determinations by the FOS (as provided for in DISP 3.6.6) relating to the matters in the reference. Its published approach to specific issues may also assist the relevant person in evidencing the FOS'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 which are finely balanced (so that similar cases could be, or have been, determined against the complainant) are less likely to demonstrate that the FOS would be likely to uphold complaints about the conduct in question in favour of consumers.

If a relevant person is unable to provide evidence indicating the FOS's view in relation to the conduct in question, the FCA is unlikely to be able to consider an application under s. 234D(6).

The extent and frequency of the conduct

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 FOS would be likely to make an award

The relevant person should clearly explain why it considers that the FOS would make an award to the consumer in relation to the act or omission by the regulated person.

If the act or omission would not be one where the FOS 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 FOS would be likely to make

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

Evidence

All matters raised in the reference should be supported by evidence and detailed information wherever possible. While the FCA does not expect relevant persons to provide the level of evidence necessary for the FCA to take regulatory action, the information provided by the relevant person should be sufficient to enable the FCA to determine whether a further investigation into the issue is warranted.

The information provided should not only aim to demonstrate that the relevant criteria have been met for a reference under s. 234D, but also aim to provide the FCA with sufficient context to the issue being addressed in the reference to enable the FCA to determine the most appropriate course of action to pursue.

How will references be handled?

The FCA 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. It will not consider references that do not meet either set of conditions in s. 234D. Relevant persons uncertain as to whether their intended reference meets the applicable set of conditions in s. 234D are encouraged to contact the FCA for an informal discussion before submitting a formal reference.

If the reference satisfies the criteria under FSMA, the FCA will assess the quality and completeness of the information and evidence supplied. The FCA will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. Where the FCA finds that a reasoned case for reference has not been made or that it requires clarification, it 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. The FCA 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.

The FCA may then carry out wider enquiries with a view to testing the evidence provided and obtaining any further information it considers necessary in order to form a reasoned view on whether the reference justifies further action. Exactly how it does this will be determined on a case-by-case basis, but may involve:

- internal research;
- public requests for information;

- carry out an in-depth supervisory review of the relevant regulated firm(s);
- 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 Financial Services Compensation Scheme, the Prudential Regulation Authority, the relevant Panels or any other relevant body; or
- any other action it deems necessary.

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, the FCA will aim to liaise with relevant persons during its consideration to inform them of the progress with the response.

What action will result from a reference?

Where a reference meets the relevant set of conditions in s. 234D, the FCA is required under s. 234E to publish a response to the reference within 90 days setting out how it proposes to deal with the reference, explaining in particular whether it has decided to take any action, and if so, what action it proposes to take (with reasons). The possible outcomes of a reference include but are not limited to:

- regulatory action by the FCA (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 FSA 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, vexatious or made in bad faith.

Where our response includes potential regulatory action against a relevant person, we will aim to discuss this with the firm prior to publishing a formal response.

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 the FCA's duty to respond

S. 234F provides that the FCA may decline to respond to a reference if it considers that the reference is frivolous, vexatious or made in bad faith. Where it declines to respond, the FCA must do so within 90 days and provide reasons.

We expect that for the purposes of s. 234D, a reference that is frivolous, vexatious or made in bad faith is likely to be one that, for example:

- does not raise a matter that is materially 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 the FCA about the matter, for instance:
 - the reference concerns a matter which 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 the FCA (or its 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 the FCA 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 FOS of complaints made to it.

The above list is not exhaustive but is merely intended to provide an indication of the type of reference in relation to which the FCA's duty to respond is unlikely to apply.

Publicity for references

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 the FCA 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. We note 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.

As noted above, the FCA is required to publish the response to the reference (and the published response will include a copy of the reference). As a minimum, this will be to place a copy of the response on its website to achieve publication. If considered appropriate, a press notice may also accompany the response.

In some circumstances the FCA may take the view that it would be appropriate to issue a press notice itself on receipt of 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 assist the submission of relevant information from interested parties.