



2nd December 2008

Dear Complainant

**Complaint against the Financial Services Authority
Our Reference GE-L0885**

I am writing to advise you that I have now completed my investigation into your complaint.

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the Financial Services Authority (FSA) has itself carried out its own investigation of a complaint. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. Full details of Complaint Scheme can be found on the internet at the following website; <http://fsahandbook.info/FSA/html/handbook/COAF>.

The Complaint

Your complaint is about the FSA requiring you to pay an annual fee of £7,977.09 and a late return fee of £250 totalling £8,227.09. This fee is your annual fee as an approved person for the year 2007/08. You contend that:

- 1) You had made a telephone call to the FSA on March 27th 2007 and that *“the sole purpose of my call was to obtain the FSA’s assistance in cancelling (my) permission”*.
- 2) *“I was told by your (the FSA) adviser, when talked through the cancellation or permissions form, that the process would take 3 months”*.
- 3) *“I, therefore, had no reason to believe that there was any problem with the resignation process until I received my fee note.”*

Findings

- 1) The deadline for cancelling of permissions to avoid the following year's fees is 31st March.
- 2) The FSA has stated that there is a record of your call on the 27th March 2007 to the Firms contact centre team of the FSA. It has stated that this call was "to discuss cancelling permissions". The recorded version of the call is no longer available.
- 3) The FSA has also stated that you "*created and validated an application to cancel permissions form*" on the FSA 'Firms Online' system. It also states that although the form was created and validated "*the form was not submitted*".
- 4) There is no evidence to counter your statement that you lacked computer literacy and I therefore accept that as the case.
- 5) Your contention is that you believed that you had submitted the form properly and that you had no reason to be concerned that your application had not been properly submitted. You also infer that as you had been informed that the process could take some months this was the reason that you were not concerned about not receiving any correspondence from the FSA about the matter.
- 6) The cancellation form on the online system has to be properly completed and properly submitted to take effect. It is clear that this did not happen. It is clear that the form was started and some parts of it were completed but it was not properly submitted.
- 7) When your firm first became authorised under the rules of the FSA you agreed to be bound by its rules and obligations.

In your complaint to me you do not contend that the form on the online system was properly completed and properly submitted. What you do contend is that you were not aware, or made aware, of any reason why you should think that your form had not in fact been properly completed and properly submitted.

The first issue that I must have some regard to is that the onus is on the firm to know the correct FSA rules and guidance which all concerned are bound by. It is my view that you must bear a certain amount of culpability for the fact that you did not start the process until very close to the deadline, thereby leaving yourself little margin for error. Bearing in mind that you were aware of the deadline it seems reasonable to me to believe that you were also aware of the ramifications of not submitting prior to the deadline, namely that the following year's fee became payable. The logical conclusion of that is that you believed that you had completed the process properly or that you believed you had completed it sufficiently to avoid any negative ramification. Both constructions of the thought process you employed between the 27th March 2007 and the deadline lead to the conclusion that you must have accepted the risk of something going wrong in your attempt to cancel your permissions.

It seems to me from the evidence that you made little effort after the 27th March 2007 to confirm with the FSA that it had successfully received your application for a change in your permissions. If there had been such attempts at confirmation then the problem encountered would have been identified and no further fees would have become payable.

Furthermore had there been evidence of you contacting the FSA in the interim to double check that your application for cancellation had been successful I would have been more likely to take a sympathetic view to your position. It also appears that you failed to have due regard to the FSA's handbook when making your application. Specifically I would draw your attention to SUP 6.4.7 which states:

SUP 6.4.7 When an application is received, the FSA will send the *firm* a written acknowledgement. The *firm* will be required to provide information which, in the opinion of the FSA, is necessary for it to determine whether to grant or refuse the application for cancellation of *Part IV permission*. The Cancellations Team will work with the *firm's* usual supervisory contact at the FSA during this process

Had you consulted the handbook you would have been aware that under SUP 6.4.7, "*when an application is received, the FSA will (my emphasis) send the firm a written acknowledgement*". The fact that you did not receive an acknowledgement (either by email or in written form) should, in my opinion, have alerted you that there was a potential problem with the electronic submission you believed you had made. In my opinion, having not heard from the FSA you should have contacted it to establish whether your request for cancellation had been received. If you had done this, you would have been aware that this was the case and that your firm was still authorised by the FSA and, as such, was still accruing and remaining liable for its fees. As such, the fact that you were unaware that your form had not been correctly submitted is not the fault of the FSA.

Similarly, had you checked the FSA's website, in relation to the cancellation of Part IV permissions (<http://www.fsa.gov.uk/Pages/Doing/Cancel/index.shtml>) you would have seen that once a cancellation of permissions application has been successfully submitted (and received) by the FSA, an acknowledgement is sent. Again, as you did not receive an acknowledgement, you should have been aware that there was a potential problem with the submission you believed you had made.

I accept that you asked for assistance in submitting the application. However, whilst the operator can instruct you on what you needed to do, he cannot actually observe what you are doing and is reliant upon you correctly following any instructions he gave. Ultimately, even if you were led to believe you had submitted your form, as you did not receive the acknowledgement that both the cancellation procedures and SUP 6.4.7 of the FSA handbook indicated would be sent to you, you should have been aware that there was a possible problem with your submission.

As it is clear the FSA will send an acknowledgement, it was your responsibility (my emphasis) to confirm that you had successfully submitted your cancellation application. In my opinion, the fact that you did not receive the acknowledgement should have indicated that you needed to take further action in this regard.

Similarly, as you claim that you are not computer literate, it is unclear why you opted to complete the online version of the cancellation form. I appreciate that you say that you were told it would be 'better' to complete the online version of the form, but, in my opinion, this explanation does not explain adequately why you decided to opt for the electronic version. This is particularly pertinent as you had sufficient time to submit a paper version of the form before the 31st March 2007 deadline and a paper application was submitted in December 2007.

This is a difficult case to come to a clear conclusion on given the conflicting principles and issues that I must have regard to in these matters which I have referred to in the preceding paragraphs. As before, in arriving at my decision I accept that the amount of money involved is not insubstantial. However, when coming to a conclusion I must have regard to your actions, the FSA's rules and the manner in which you have conducted yourself when corresponding with the FSA and my office.

Following notification from the FSA that your 2007/08 fees were due, you contacted it in August 2007 and stated that you had complained to the FSA that the fees had been incorrectly charged. Although the FSA confirmed that the Complaints Team had not received your complaint, it agreed that the fees would be returned to you but asked that you resubmit your complaint. Although you agreed to do this, and the FSA returned your fees, you did not actually complain to the Complaints Team until January 2008. You have offered no explanation for this delay, particularly as you appear to have told the FSA that you had resubmitted the complaint when you clearly had not.

I am also concerned that, when you complained to the FSA in January 2008, you stated you had not been an active IFA since the date that you attempted to submit your cancellation of Part IV Permissions form. In fact on your complaint form you stated:

"I would ask that the initial resignation as per my telephone call with your helpdesk should hold good. I have not been active as an IFA since that date".

However, during my investigation into your complaint you admitted that you had conducted authorised business after you attempted to submit your cancellation form and at a time when you believed that you were no longer authorised. In your letter to my office of 15th September 2008 you stated

"I had conducted 4 or 5 items of regulated business on the understanding that a 'gap' would be allowed where my resignation would be processed before I was accepted into the Network A. When it became evident that I would not be joining Network A, all regulated activity stopped"

Although you claim that a member of FSA staff led you to believe this would be acceptable; the rules on this are clear. As I am sure you are aware, it is a criminal offence to conduct regulated activity when you are not authorised to do so. Whilst it may take some time for the FSA to process a cancellation form (meaning that your firm's permissions may well have been cancelled during the 2008/2009 charging year), when you tried to submit your application to cancel your firm's authorisation (Part IV Permissions), so as not to incur fees for the 2007/2008 charging year, you stated that you requested that the FSA cancelled your authorisation with immediate effect (i.e. from 27th March 2007). By making this request, it imposed on you a requirement that you would not undertake any regulated activity after the form had been submitted or in this instance after you attempted to submit the form (i.e. after 27th March 2007).

Had it not been for the fact that you had not correctly submitted the cancellation form, you would effectively have committed a criminal offence by completing regulated business when you clearly did not intend to be authorised by the FSA. I do find it unattractive that, in your correspondence with me, you believe that that is acceptable behaviour. I would also add that the fact that you have provided incorrect and misleading information to the FSA could suggest that you have not been completely open with the regulator and consequently, in my opinion, this brings into question your ability (under the fit and proper test) to be both an approved person and to hold a customer function.

Ultimately, from the papers presented to me I am unable to find any evidence to show that the FSA either acted incorrectly when pursuing this matter or that it incorrectly dealt with your complaint. I am therefore unable to alter the decision previously made by the FSA. I appreciate that you will be disappointed with my findings, but hope that you will understand why I have arrived at this decision. I would also point out that, as consequence of my decision the outstanding fees, which currently total £8,227.09, are now payable in full and, if you have not already done so, you should immediately contact the FSA to arrange payment.

Recommendation

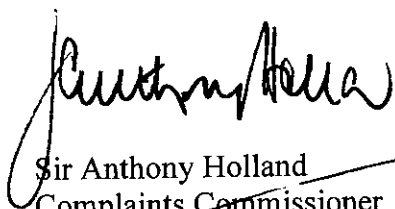
Although I am unable to uphold your complaint, or conclude that the FSA has acted inappropriately in this matter, it is clear that the FSA accepts that the process by which firms and approved person communicate needs to be improved. To this effect the FSA has made a commitment in its annual report to make it "easier for firms and consumers to do business with us". I would endorse this commitment.

Additionally, as part of their investigation into your complaint, the FSA complaint handler made a number of recommendations in relation to the process adopted by the FSA when dealing with enquiries relating to the cancellation or alteration of permissions. These included:

- Although it would not have helped Mr X as he alleges he is 'far from computer literate', at the start of this investigation it was not immediately evident from the FSA's website that cancellations must be submitted by 31 March in order to avoid incurring a regulatory fee for the following year (1 April – 31 March). (<http://www.fsa.gov.uk/Pages/Doing/Cancel/index.shtml>). *NB: The FSA has since moved this information to a more prominent position: (<http://www.fsa.gov.uk/pages/Doing/Cancel/process/index.shtml>)*
- Neither the paper application to cancel permissions form nor the online version includes reference to the importance of submission by 31 March in order to avoid incurring a regulatory fee for the following year (1 April – 31 March). The FSA should consider amending this.
- Although our investigation has not found that Mr X's call was passed to the Permissions' Team, we believe that Permissions' department should consider keeping records of all telephone calls requesting information about cancelling permissions. This would give us important evidence when considering complaints of this nature, but would also provide useful information for the FSA generally (particularly if callers are asked for the reason for cancellation).
- We believe that any caller to the FCC/Revenue/Cancellation teams requesting information about cancelling should be told emphatically that the cancellation form must be submitted (not just 'validated', which is a term that can cause confusion), and that, in order to avoid on-going fees, this form must be before 31 March.

I would also endorse these recommendations and I look forward to the FSA keeping me updated on these issues.

Yours sincerely



Sir Anthony Holland
Complaints Commissioner