

On 31 January 2005 the Complaints Commissioner issued a final report on complaint GE-L0307 to the complainant and the Financial Services Authority. The introduction and summary to that report is published below.

CONFIDENTIAL

FINAL REPORT AND FINDINGS

1. Introduction and Summary

- 1.1 This is the report of an investigation by the Complaints Commissioner of complaint reference GE-L0307 against the Financial Services Authority. The complaint falls to be considered under the Main Scheme.
- 1.2 The FSA, from 1 December 2001, took over the functions of the Central Office of the former Registry of Friendly Societies and those of the Assistant Registrar for Scotland. In the autumn of 2003 the complainant contacted the FSA in order to obtain details of the officers of a Friendly Society. He offered to pay for the copies of documents he required but was told that the FSA have a policy that they will only accept payment for this service by credit or debit card. The complainant does not have either type of card and offered to pay by cheque or by cash but the FSA refused to agree to any such alternative arrangement. The FSA suggested that the complainant asked a friend to pay by card and then reimburse him or her. The FSA further suggested an alternative source for the information required and provided the relevant contact number.
- 1.3 The complainant made a complaint to the FSA Company Secretariat, who are responsible for the administration of the complaints arrangements within the FSA, on 16 October 2003 objecting to the FSA policy of accepting payment only by credit or debit card and alleging that this was a bias "*to enhance your own members*". The FSA entered the complaint into the Scheme on 21 October 2003.
- 1.4 The FSA completed their Stage 1 investigation and issued their report to the complainant by letter dated 27 October 2003. In this letter the FSA said that they had inferred that the complainant was making an allegation of bias concerning the FSA's policy of requiring payment only by credit/debit card and that the complainant was implying that this bias favoured the directors of Friendly Societies. The letter confirmed that the complaint had been admitted to the Scheme on 21 October. It set out the reasons why the FSA had a policy of payment in advance by credit/debit card only and pointed out that directors of Friendly Societies (the supposed subject of the complainant's reference to "*own members*") were not members of the FSA but directors of independent bodies. It concluded that the FSA were unable to uphold the complaint.
- 1.5 The complainant was dissatisfied with the FSA's response and contacted the Commissioner by letter dated 7 November 2003. In this letter he complained about not being able to obtain the information he had requested unless he paid by credit or debit card and stated that the FSA should accept cash payment. He quoted from the complaint he had made to the FSA on 16 October, to the effect that credit or debit card payment was to "*enhance your own members.*"

- 1.6 The Commissioner's Office wrote to the complainant on 10 November saying that the Commissioner would examine the matter before writing again and on the same day asked the FSA for copies of the case papers. The papers not having been supplied, a reminder was sent to the FSA on 1 December. On 9 December the FSA supplied the Commissioner with copies of the complainant's original complaint and their response of 27 October. In a covering email the FSA said that the reason the complaint had been investigated was the allegation of bias and that without this allegation the complaint would fall under COAF 1.4.3(2). (COAF 1.4.3(2) states as follows: "*The FSA will not investigate a complaint under the complaints scheme which it reasonably considersamounts to no more than dissatisfaction with the FSA's general policies or with the exercise of discretion where no unreasonable, unprofessional or other misconduct is alleged.*") The email also commented as follows: "*The fact that we do not accept cash, postal orders etc. is not in itself unreasonable behaviour or other misconduct it is merely our policy.*" It provided a further explanation of why the FSA required payment by credit/debit card only.
- 1.7 The Commissioner's Office then wrote to the complainant asking him to clarify which payment methods he had offered and also to clarify to whom he had been referring in his phrase "*enhance your own members*". The complainant confirmed by letter dated 15 December 2003 that the FSA had informed him that there was no other way to pay, only by credit or debit card, and that they had refused payment by cheque. He said that the phrase "*enhance your own members*" referred to the credit card companies who, he alleged, were under the umbrella of the FSA. He repeated his complaint about the FSA's policy, which he believed was wrong in law.
- 1.8 The Commissioner agreed to undertake an investigation and a workplan and timetable were prepared. The Commissioner determined that the complaint had the following three elements:
- (a) that the FSA refused to accept payment other than by means of credit/debit card for provision of names of directors of a Friendly Society;
 - (b) that in making a decision that results in the FSA refusing to accept any money or postal orders (legal tender bearing the Queen's head), the FSA was wrong in law; and
 - (c) that the FSA had shown bias to enhance the interest of their own members, i.e. credit card companies.
- 1.9 These elements were as contained in the complainant's original complaint except that element c) was amplified to clarify that the "*own members*" referred to by the complainant were the credit card companies not, as the FSA had assumed, the directors of Friendly Societies.
- 1.10 In her workplan, which was sent to the FSA, the Commissioner indicated that she would need to interview suitable FSA staff from the finance function who had knowledge of whether or not the FSA did in fact have a policy to accept payment only by credit/debit card for provision of information such as the complainant required and, if so, precisely how it was specified and had been determined. She also required access to the FSA's correspondence with the complainant and to be able to review the FSA Stage 1 case file. The FSA supplied a copy of the relevant Terms and Conditions and also a Policy Proforma that gave some further information about the policy.

- 1.11 Subsequent to receiving a copy of the workplan, however, the FSA, in an email dated 22 March, said that they did not understand how any allegation of misconduct arose either in relation to their policy or to their decision to interpret the complainant's reference to "*own members*" in the way that they had. The Commissioner made clear she nonetheless wished to conduct an investigation and this was completed.
- 1.12 The information provided by the FSA to the Commissioner in connection with this investigation has thus been in the form of written material. In addition to the material referred to above the FSA have provided written information concerning two occasions when exceptions to the policy of payment by debit or credit card only have been made. The FSA have also confirmed that they have no files containing details of the process adopted in arriving at and approving this policy.
- 1.13 As explained above (see paragraph 1.8), this complaint has three elements and the Commissioner has reached findings in the case of each element. As also explained above, however (see paragraph 1.11), the FSA have disputed the right of the Commissioner to conduct a Stage 2 investigation into this complaint. As well as making findings in relation to the substantive complaint, the Commissioner has therefore made findings in relation to the FSA's stance with regard to her investigation and these are set out in the following paragraph.
- 1.14 The FSA have disputed the right of the Commissioner to conduct this investigation, arguing that a complaint to which the provisions of COAF 1.4.3(2) in their view apply should not be investigated by the Commissioner. The FSA have maintained that any investigation of FSA policy is outside the Commissioner's remit. As a consequence, there have been delays in obtaining responses to the Commissioner's requests for information. The Commissioner rejects the FSA's arguments in this regard. In summary, she finds as follows:
- (a) The arguments advanced by the FSA in disputing the right of the Commissioner to conduct this investigation are not accepted. They rest on a belief that this complaint "*amounts to no more than dissatisfaction with the FSA's general policies or with the exercise of discretion where no unreasonable, unprofessional or other misconduct is alleged*" (see COAF 1.4.3(2)) and as such should not be investigated by the Commissioner. The FSA admitted the complaint to the Scheme and investigated it, therefore they cannot argue that the Commissioner should not investigate it. COAF 1.4.3(2) permits the FSA not to investigate a complaint that they reasonably consider "*....amounts to no more than dissatisfaction*". The provision imposes no requirement on the Commissioner not to investigate. In the Commissioner's opinion, the FSA should not have considered COAF 1.4.3(2) to apply in this case as the complaint contains an allegation of bias and they did themselves investigate it under the Scheme. Ultimately under the Scheme rules (see COAF 1.5.9) it is for the Commissioner to decide whether a complaint falls within the scope of the Scheme and should be investigated.
- (b) Scheme rules provide (see COAF 1.5(12)) that the FSA will afford the Commissioner, in conducting her enquiries, "*all reasonable co-operation, including giving access to its staff and information*". Whilst the Commissioner accepts that she cannot compel FSA staff to attend for interview in support of her investigations, she finds that the FSA were wrong to take the position that FSA staff would not attend interviews with the Commissioner's Office in this instance albeit that they disagreed with her decision to undertake it.

1.15 Turning now to the substantive complaint, in relation to the first element of the complaint concerning the FSA's refusal to accept payment other than by credit/debit card, the Commissioner's findings are as follows.

- (a) The Commissioner has been mindful of the statutory obligations on the FSA to make records available to the public and of any statutory guidance relating to payment for access to these records. In this case the complainant was seeking information that the FSA has an obligation to provide under Section 104 of the Friendly Societies Act 1992 (the "Friendly Societies Act"). Under Section 104(2) of the Friendly Societies Act any member of the public is entitled to be furnished with a copy of all or any of the documents or records kept in the public file of a friendly society. Section 104(2A) allows the FSA to charge a reasonable fee for making the public file available to any person for inspection and/or for furnishing any person with a copy of any documents or records.
- (b) The Friendly Societies Act, however, gives no guidance as to how any such payments should be made. The Commissioner has therefore considered whether the application of a policy only to accept credit/debit cards was reasonable and whether this prevents the FSA from fulfilling its obligations under Section 104. Clause 3 of the FSA's Public Domain Search and Copy Facilities Terms and Conditions as at 2 September 2002 (the "Terms and Conditions") states that "*payment will only be accepted in the form of a credit or debit card.*" The policy does not provide for circumstances where a member of the public does not have a credit or debit card and does not allow for alternative methods of payment.
- (c) The Commissioner is concerned that the FSA may be failing in its statutory obligations under Section 104 of the Friendly Societies Act by adopting a policy of only accepting payment in the form of credit or debit cards. As the complainant was unable to use either of these payment methods the FSA in fact failed to meet their obligation under the Friendly Societies Act. The complainant made reasonable offers of alternative methods of payment but the FSA declined his proposals and did not offer to waive the fee.
- (d) The Commissioner must conclude, therefore, that the FSA's insistence both on receiving payment and on receiving it only by means of a credit/debit card has unreasonably prevented the complainant from accessing documents that Section 104 of the Friendly Societies Act requires the FSA to make available to "any member of the public". The FSA, in the Commissioner's view, acted unreasonably in not deviating from their position that they only accept credit/debit cards as a means of payment. The FSA have made exceptions in the past and, bearing in mind their statutory obligations under Section 104 of the Friendly Societies Act, the Commissioner considers that they should either have waived the fee or accepted the complainant's offer to pay in an alternative way. This element of the complaint is therefore upheld.

1.16 In relation to the second element of the complaint, the FSA's refusal to accept cash payments, the Commissioner finds that the FSA are entitled to recover their costs and are entitled to seek to persuade members of the public to use forms of payment that are cost-effective to the FSA. The Commissioner accepts that there are risks with a practice of sending cash through the mail and that there are no general requirements under statute or common law for the FSA to accept payment by cash or postal orders. This element of the complaint is therefore not upheld, but the

Commissioner believes the FSA needs to consider alternative arrangements for members of the public or organisations who do not have access to credit or debit cards. Because the Commissioner has not been able to interview FSA staff who might have been able to provide her with more information about the policy, its development and implementation, and in the absence of any record kept by the FSA, it is difficult to establish what consideration, if any, was given to this when the policy was first formulated. It may be that the FSA's policy to have a preference for credit/debit card payments is acceptable; however in the Commissioner's view the application of the policy in practice needs to permit exceptions in appropriate circumstances.

1.17 In relation to the third element of the complaint, the allegation of bias in favour of credit card companies, the FSA have provided both to the complainant and to the Commissioner a written explanation of why the policy was adopted. Its purpose appears to have been to reduce transaction costs to the FSA. Although the result of this is that the FSA must pay the credit card companies the appropriate levy on each transaction the Commissioner does not accept that the credit card companies sought to gain influence or advantage from the arrangement, or that the FSA has sought to give particular benefit to these companies. The FSA has no responsibility for the regulation of these firms. This element of the complaint is therefore not upheld.

1.18 In the light of her findings, the Commissioner makes the following recommendations.

(a) Taking first the matter of the FSA's stance in relation to her investigation of this complaint, the Commissioner regards the FSA's incorrect interpretation of Scheme rules (an interpretation that they sought to impose only after they themselves had admitted the complaint to the Scheme and investigated it), their attempts to dissuade the Commissioner from carrying out an investigation once she had decided that the matter fell within the scope of the Scheme and should be investigated, and their failure to afford the Commissioner 'reasonable co-operation' in conducting her enquiries into this complaint as the Scheme rules require as an extremely serious matter. The Complaints Scheme is an important component of the system of checks and balances that Parliament wished to see operate in relation to the FSA and, in accordance with FSMA, the role of the independent Complaints Commissioner is a central feature of the Scheme. The Commissioner recommends that this case be reviewed by an appropriate member of top management to see what lessons can be learned and that the FSA take the necessary steps to ensure that their staff comply with the terms of their own Scheme in all cases.

(b) In relation to the substantive complaint the Commissioner recommends as follows:

- i. The FSA should apologise to the complainant for failing to provide the material he had asked for and that the FSA were obliged to provide under Section 104 of the Friendly Societies Act.
- ii. The FSA should review the application of their payment method policy to ensure that obligations to provide documents are fully met and that they do not discriminate against those members of the public who do not possess credit or debit cards. The Commissioner is sympathetic to the FSA's wish to minimise costs wherever possible, and it may be that a policy to have a preference for credit/debit card payments is acceptable; however, the application of the policy in practice should

be reviewed so that exceptions can be, and are, permitted in appropriate circumstances.

- (c) The FSA have confirmed that these recommendations have been accepted and fulfilled.

1.19 The Commissioner has decided to publish the Introduction and Summary to this report.