



## **VIEWS FROM THE COMMISSIONER**

**NOVEMBER 2009**

### **The Enforcement and the Regulatory Decision Committee (RDC) Process**

A number of complainants have commented in their submissions to my office that they have either chosen not to make written and oral representations to the RDC or have been advised (wrongly in my view) not to make such representations by their legal advisers. It is my view that individuals or firms who are going through the Enforcement and the RDC process should make representations to the FSA and RDC at every opportunity and should always make oral representations to the RDC when given the option. I shall explain my reasons for this stance;

- 1) If representations throughout the process are made this removes the opportunity for the FSA or RDC to state that by not making representations the individual or firm in question has apparently accepted the FSA or RDC position in its entirety. This can have significant implications with regard to costs awards later in the process.
- 2) It is quite conceivable that during the course of oral representation and the consequent interaction between the RDC and the firm or individual concerned that important matters which would affect the decision of the RDC could come to light, which the firm or individual had not realised were significant and hence had not been mentioned or given proper weight in the written submissions.
- 3) If the firm or individual believes it has nothing to hide and demonstrates this position by its willingness to answer questions put to it by the RDC this can only be in its benefit in relation to the RDC decision. If a firm is unwilling to bear such scrutiny it can only lead to the RDC calling that firm or individuals integrity into question and possibly taking a harsher stance than it otherwise would.
- 4) It is not the case nor should it be that by exercising this right the position of the alleged offending firm or individual is thereby prejudiced.

### **Sole Trader/Partner/Limited Company**

It is clear to me that a number of complainants, normally sole traders or small partnerships do not have sufficient understanding of the levels of liability held by different entities. It is apparent that many sole traders for example are unaware that if a large claim against them were to be successful not only could they lose all the assets held in relation to the work that they do but also their personal assets such as their home could be at risk also. I suggest that every sole trader or small partnership should ensure that they have a clear understanding of their amount of potential liability in the event of a large successful claim against them. If they do not have a clear understanding they should

take legal advice on the matter. Furthermore run off cover is particularly important when they retire. In that context it is not sensible to rely upon an indemnity given in the disposal documentation for protection against future claims. In the event of such a claim unless insurance is place the liability remains in place and assets of a personal nature are at risk.

### **Statutory Aims and Objectives of the FSA**

A number of complainants in their submissions to my office have tried to rely upon a very limited construction of the statutory objectives or aims of the FSA. The most common construction argued relates to “consumers”. For example this relates to “helping retail consumers achieve a fair deal”. A number of consumers have tried to argue, erroneously in my view, that this relates to consumers in the singular sense, that is, if as an individual, they have suffered a loss then logically the FSA has failed its statutory objectives. This is clearly not the case. Sometimes the FSA is approached by a firm who submits a plan of action to the FSA that it proposes to take due to, for example, difficult market conditions. For example this might relate to a large population of different class of consumers and changes in the firm’s treatment of such consumers which may lead to an unavoidable loss to some consumers. The FSA will then make its position clear bearing in mind its statutory aims and objectives-as a result of this some classes of consumers may suffer loss. However the FSA has not failed in its aims or objectives as it has made its decision based on its appraisal of the situation as a whole in relation to the different classes of consumer. Losses possibly suffered by one class of consumer is clearly a better situation than losses inevitably being suffered by all classes of consumer.

### **Firms who do both authorised and unauthorised business**

We have received complaints regarding the losses suffered due to firms not making distinction between its authorised and unauthorised products. Similarly there are policies being sold which apparently contain elements that are authorised and elements which are not. These distinctions and the potential effects are apparently not being made sufficiently clear to consumers and are only coming to light when a claim is being made to the Financial Services Compensation Scheme (FSCS).

Clearly it is a difficult position for the FSA because it cannot regulate that which it is not responsible for regulating. However clearly there is a problem for consumers with this issue. I hope the FSA will give consideration to how it can make firms make these distinctions clearer to the consumer.

### **Undertakings to the FSA**

We have received complaints with regards to two related issues with regard to individuals making agreements or undertakings to the FSA. The first issue relates to individuals accepting an arrangement suggested by the FSA not to undertake approved person status

for some particular timeframe. We have received complaints where an individual agrees to such an undertaking and then becomes aware of what the complainant considers to be similar cases where individuals have received bans for lesser amounts of time than the arrangement the complainants have already accepted. As a result the complainant complains that this is unfair and that their arrangement should be retrospectively changed. It is my view that as long as the arrangement was clear and understood by both parties at the time it was made then there is no reason for that arrangement to be revisited. In any arrangement the onus is on both parties to understand what they are agreeing to even more so if they are legally represented. Later events and the passing of time might show that the arrangement was a 'good deal' to make or possibly a bad one for each party. However this does not make the arrangement in some way incorrect or unfair.

This brings me on to the second issue. Both parties should be mindful of the terms of the arrangement or undertaking and how that will pan out in the future. We have had complaints in relation to the publication of information by the FSA relating to individuals both at the time of an arrangement or related action by the FSA subsequently. Individuals who enter into such arrangements or undertakings with the FSA should ensure that how and what the FSA publishes any material to that individual is covered in the terms of the arrangement both at the time and what, if anything, can be published in a future occasion.

### **Court Orders to Freeze Company Assets**

It is unfortunate that we receive a substantial number of complaints concerning the FSA applying to the Court to freeze assets of firms. The complainants see this as the FSA being over zealous or biased against the firm in question. During such procedures the FSA is often limited in what it can say publicly on the matter due to the constraints placed upon it by statute. It should be noted that for the normal consumers it is far more palatable to believe that the FSA is acting wrongly than to consider the possibility that they have been the victim of some sort of illegal enterprise and have lost a substantial amount of money. Many such complainants refuse to accept that they have been the victims of fraud until the Enforcement process is complete, which is often many months or even years after the original freezing order was put in place. It is only when the Enforcement process is complete and the FSA makes public its findings that such consumers begin to accept that they may have been the victims of a fraud.

If money has been given to a firm and the FSA obtains a freezing order against that firm it is important to remember that such an order has been granted by a judge sitting in court who has had sight of confidential documents which the consumer has not seen. Judges making such orders consider the impact upon consumers and consequently would not do so without adequate evidence to justify that position.

### **Land-banking Schemes**

We have received a number of complaints with regard to the FSA treatment of 'land-banking' schemes. Such schemes usually consist of individuals purchasing relatively small plots of land in concert with others in the expectation of selling all the plots collectively to a large company at a substantial profit. Often in such schemes the scheme organisers apparently apply for planning permission for the land, a common theme being that such planning permission is for a shopping centre or a supermarket. Such schemes can be regulated by the FSA and can be entirely legitimate. However many schemes are not regulated nor legitimate and normally leave the complainant having bought a near worthless plot of land with inadequate or no access to it for much more than it is worth. Consumers should be aware that if they are approached about such a scheme they should exercise extreme caution before investing any money with it.

### **Part IV Permissions and Fees**

#### *Cancellation of Part IV Permissions of Firms after 31<sup>st</sup> March deadline*

There have been a number of complaints to my office concerning firms having to pay annual fees for longer than anticipated due to their cancellation notice not being received by the FSA until after the deadline (31<sup>st</sup> March). Many of these complainants provide no reasoning for why they believe they should not pay the fee other than it's 'unfair'. Some complainants admitted that the appropriate form missed the FSA cancellation deadline by some months.

Ultimately the position is that the firm has agreed to the rules and guidance laid down in the FSA handbook in signing its original application for authorisation. The onus is subsequently on the firm to know and abide by the FSA rules and guidance, and in these cases, submit the cancellation form before the deadline. All firms who wish to cancel their Part IV permissions (authorisation) to carry on regulated activities must formally apply to the FSA using the appropriate form. To avoid incurring fees for 2009/10 the deadline for submission of the appropriate form was 31<sup>st</sup> March 2009. This is applied consistently to all FSA regulated firms. It is of little consequence whether a firm has been carrying out the regulated activity or not during this time. The onus is upon the firm and it must bear the responsibility for its own failings. Unless a firm can demonstrate evidence which shows that the FSA received the appropriate form correctly filled in prior to the deadline, or some other substantial reasoning for not paying the appropriate fee, it is unlikely that I will consider making a recommendation to the FSA to alter its position.

The following link takes you to the 'Cancellation of Part IV Permission Application Form' [http://www.fsa.gov.uk/pubs/other/cancellation\\_form.pdf](http://www.fsa.gov.uk/pubs/other/cancellation_form.pdf)



## Complaints Commissioner

### *Notification of changes to numbers of Approved Persons in Firms*

Likewise, I have received a number of complaints about the size of firm's fees in relation to the number of approved persons it has. If the firm does not notify the FSA of a reduction in the numbers of its approved persons prior to the deadline of 31<sup>st</sup> December then it has only itself to blame. It should be noted that the firm is obliged to complete a Form C within seven business days of the staff member leaving the employ of the firm.

The following link takes you to the 'Form C – Notice of Ceasing to perform a Controlled Function' form on the FSA's website. [http://www.fsa.gov.uk/pubs/forms/imap\\_formc.doc](http://www.fsa.gov.uk/pubs/forms/imap_formc.doc)

The following link takes you to the 'Form C' notes on which can also be found on the FSA's website. [http://www.fsa.gov.uk/pubs/forms/imap\\_formc\\_notes.doc](http://www.fsa.gov.uk/pubs/forms/imap_formc_notes.doc)

All of the appropriate forms required to apply for or to alter an individuals regulated status can be found on its website. The following link will take you to the appropriate page. <http://www.fsa.gov.uk/pages/Library/Communication/Forms/handbook/supervision.shtml> (The links contained in this document were correct at the time of publication).

### *Late regulatory returns and associated fees*

Some firms have similarly complained about having to make returns 'online'. The FSA has consulted at length on this process prior to the commencement of the process. There are clear benefits to all parties for reporting to be done in this way. Similarly to the cancellation process, the requirement for online reporting is clear in the handbook which regulated firms have agreed to follow whilst authorised. The onus is clearly on the firm to have sufficient capability to fulfil this responsibility

### *Conclusions*

It is of concern that so many firms continue to appear to have not appreciated the rules by which they are bound. It is important to appreciate that the onus is on the firm to comply with these rules. The FSA is not obliged to explain or notify firms of such rules. Some firms have tried to use the lack of FSA notification to mitigate their position. Such a position does not deviate from the fact that the onus is on the firm to comply with the rules. Clearly to do this, firms should ensure that they are well acquainted with the rules.

### **Firms receiving a passport to conduct business in the United Kingdom**

Firms from other European Economic Area (EEA) states, which already hold authorisation from their home state regulator, are able to apply for authorisation to conduct regulated business within the United Kingdom. This authorisation is provided

by the home state regulator and means that the firm does not have to go through the usual FSA authorisation process.

Where a firm has received an 'inward services passport' the FSA is only able to regulate how it conducts its business in the United Kingdom. The FSA does not regulate or approve the firm, as this is something the home state regulator continues to do. This means that if consumers experience problems with the firm they will have to approach the home state ombudsman (or equivalent body) and will not have the benefit of recourse to either the FOS or the FSCS.

The Commissioner previously brought to the attention of the FSA the uncertainty experienced by the general public on the issue of regulation of an EEA 'inward services passported' firm's activities in the United Kingdom. As a result of this the FSA reviewed the situation and a proposal was included in the FSA's March 2008 Quarterly Consultation Paper. This proposed new rules to clear up consumer confusion about the regulatory status of EEA firms that operate in the United Kingdom under an 'inward services passport'. Under the new rules EEA firms operating in the United Kingdom, but regulated in their home state, are no longer able to use the FSA logo on financial promotions and statements sent to United Kingdom customers.

### **Controlled Function of Firms authorised through a network**

Section 347 of the Financial Services and Markets Act 2000 (the Act) imposes a requirement upon the FSA to maintain a register of approved persons and make this available to the public, although it gives the FSA a discretion of how it does this. The FSA fulfils its responsibilities through its Register of Approved Persons (the Register) which is available through its website. Although the Act sets out certain information which must be contained within the Register, it provides the FSA with a discretion as to what additional information it makes available/displays to the public.

Where a firm is an authorised representative of a network, rather being directly authorised by the FSA, the Register will indicate that a customer adviser is a CF30 (previously a CF21) of the network rather than the firm. Likewise, where the firm is established as a limited company, the Register will show that anyone holding the position of a director is a CF1 (AR) of the network rather than a CF1 of the firm.

Recently a case was brought to my attention where the complainant was unhappy with the Register entries for himself and other individuals who undertook controlled functions for a firm which was authorised through a network that had received a public censure from the FSA. I was satisfied that the Register entries were correct (and linked the individuals to the network) as the individuals concerned applied for authorisation through the network and at the time the firm in question was not directly authorised by the FSA.

### **Failing to regulate financial institutions/ensuring that financial institutions have sufficient capital/the current financial climate**

There have been a number of complaints to my office from complainants who claim that the FSA has failed to supervise adequately the financial services industry (with particular attention being paid to the banking sector). Many of these complaints have been in the form of a statement which amounts to a general dissatisfaction with the FSA and as such in accordance with Paragraph 1.4.2A of COAF I have been unable to investigate these complaints. In accordance with paragraph 1.4.1 of COAF, complainants submitting complaints to my office should substantiate the allegation, clearly show how they have been directly affected by the FSA's actions or inactions, and indicate how I, acting within my powers and jurisdiction, am able to remedy the situation.

I appreciate that some complainants feel that the FSA has not ensured that banks hold sufficient reserves and I feel that I should also comment on this. Capital reserves for financial institutions (specifically banks) are set by the FSA, but in doing this, it has to have regard to international agreements/standards (the Basel accords), the organisation's business (and risk) model and appreciate that many banks now operate globally. Whilst the FSA can require an institution to hold a certain level of capital reserves, under Basel II, only a banks Tier 1 (core or immediate) capital has to be either held on deposit with the Bank of England or in 'liquid' financial instruments such as its own ordinary and preference shares. Basel II also allows further reserves, Tier 2 capital, to be held in a number of other investments which are either not as secure as ordinary or preference shares or more illiquid.

### **Personal Hearings**

I have previously provided my views on personal hearings. Recently, a number of complainants have requested a meeting with me to discuss their complaints. I have declined these meetings as I conduct my investigations on the basis of an inquisitorial approach based on the documentation presented to me. I hold the view that, if I were to have meetings, then both parties would have to be present possibly with lawyers attending. In my opinion, this would then be only a short step to this making my inquisitorial investigation, into a quasi-adversarial one, but without the safeguards that such a process involves in a court situation.

### **Equitable Life**

Complaints about the failure of the Equitable Life Assurance Society (ELAS) have, over my tenure, been a common referral to my office. Recently complainants have referred to the report compiled by the Parliamentary and Health Service Ombudsman (PHSO) and her findings of maladministration on the part of the FSA and other bodies. When considering this it is important to remember that the report was based on regulation of the



ELAS over the period April 1988 to November 2001. It must be noted that the FSA acting as agent on behalf of HM Treasury (under arrangements made under the Deregulation and Contracting Out Act 1994), was only responsible for the regulation of the ELAS between 1<sup>st</sup> January 1999 and 30<sup>th</sup> November 2001.

I would also add that the period of time covered by the PHSO's report is important as, the reported failings occurred prior to 1<sup>st</sup> December 2001, which is the date when the Act came into force. This means that if I consider that a complaint about this matter can be investigated by the FSA and my office, then it would fall under the *transitional complaints scheme*. Under Paragraph 2.1.3 of COAF, being a Statutory Instrument approved by Parliament, a complaint which falls into "*the transitional complaints scheme* does not make provision for compensatory payments to be made to complainants". Effectively that means that whatever my views or no matter how much I may sympathise with a complainant's position I am not able to recommend any financial award.

I would also add that although the PHSO's found instances of maladministration on the part of the FSA, and recommended the establishment and funding of an independent compensation scheme, her report (and recommendations) was addressed solely to HM Treasury and not to the FSA or any other body.

On 15<sup>th</sup> January 2009 the Government issued a detailed response to the PHSO's report (this can be viewed on the internet at:

[http://www.hm-treasury.gov.uk/d/equitablelife\\_150109.pdf](http://www.hm-treasury.gov.uk/d/equitablelife_150109.pdf)).

Similarly, on the same day the FSA issued its own response on the PHSO's report: ([http://www.moneymadeclear.fsa.gov.uk/news/firm/equitable\\_life.html](http://www.moneymadeclear.fsa.gov.uk/news/firm/equitable_life.html)). In its response the FSA stated:

*"The Government has published a detailed paper setting out its response to the Parliamentary Ombudsman's report into the regulation of Equitable Life. The Government's paper includes comments on the findings made in relation to the period when the FSA was regulating the society as HM Treasury's agent. The FSA agrees with those comments"*.

In its response, the Government has accepted that that maladministration occurred in the prudential regulation of the ELAS during the period covered by the PHSO's report. Similarly, the Government also accepts that some ELAS policyholders have been adversely affected and that action is needed on its part to seek a fair remedy, which may well include financial redress. To this end the Government has instructed Sir John Chadwick (a former judge of the Court of Appeal of England and Wales) to advise it on how, and to what extent, compensation may be payable to affected ELAS policyholders.



## Complaints Commissioner

The final position however remains fluid since a recent claim for judicial review, brought by the Equitable Members Action Group, was partially successful. Precisely what impact the judgment will have upon Sir John's eventual conclusions remains to be seen therefore at this moment the overall and final outcome has still to be determined.

Sir Anthony Holland  
November 2009