

28th July 2015

Dear Complainant

**Complaint against the Financial Conduct Authority
Reference Number: FCA00073**

Thank you for your emails. I am also sorry for the time it has taken to complete my review of the Financial Conduct Authority's (FCA) investigation into your complaint.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

You can find full details of how I deal with complaints at www.fsc.gov.uk. If you need further information, or information in a special format, please contact my office at complaintscommissioner@fsc.gov.uk, or telephone 020 7562 5530, and we will do our best to help.

What we have done since receiving your complaint

Since I received your complaint I have considered all of the information presented to me, and where necessary have sought further information from the FCA. I have now completed my investigations, have considered the comments made by you and the FCA on my preliminary findings, and can provide you with my final decision.

Your complaint

From your email and the papers submitted to me by you and the FCA I understand that your complaint can be summarised as follows:

You have been charged a late administration fee of £250 for Firm A and Firm B because you missed the reporting deadline for submitting your RMAR return. It appears you were relying on an automatically generated email reminder from the FCA to submit your returns, and when a technical fault at the FCA prevented this reminder email from reaching you this year, you missed the deadline.

You have explained in your email of 24th April 2015 to me that you ‘refuse to pay a £250 fine per company for a problem caused by the FCA systems failure’.

My position

I note your comments that this is the first time you have missed a GABRIEL return for either of your firms, and also that you have now put a reminder in your diary so that you do not miss the deadlines in future.

I also understand that, having received FCA generated reminders over many years, you may have become reliant on these as a trigger for completing your submissions, rather than relying on prompts generated by your own system’s diary. You feel that you should not be charged a late return fee for ‘a problem caused by the FCA system failure’.

You complained to the FCA on 20th March 2015, but the FCA did not uphold your complaint on the basis that it is not obliged to send reminder emails and it is expected under SYSC 3.2.19R of the Financial Services Handbook that a firm has adequate systems and controls in place to enable it to meet the required deadlines for its regulatory reporting.

As part of my investigation into your concerns I have obtained and reviewed the FCA’s investigation file. I have considered the comments you have made when corresponding with the FCA. I have also referred to the FCA’s Handbook which sets out the requirements it imposes on individuals and firms who wish to be authorised.

I start with the general policy. Administrative fees for late submission of reports have been part of the statutory financial services regulatory system since 2001, and the £250 figure was set, following public consultation, in 2005. Details of the penalties and administration charges applied for the late submission of a return can be found in the FCA rule book under SUP 16.3.14.

SUP 16.3.14 states

- (1) If a *firm* does not submit a complete report by the date on which it is due in accordance with the *rules* in, or referred to in, this chapter or the provisions of relevant legislation and any prescribed submission procedures, the *firm* must pay an administrative fee of £250.

The amount of the administrative fee is intended to recover the costs that the FCA incurs in pursuing firms with overdue returns.

In this case, your submission was received by the FCA after it was due, and the FCA is following the rules laid down in its rule book by imposing a £250 administration fee on your firms.

As I understand it, you are not querying the need for a system of penalties for late returns – which has an obvious rationale – nor are you disputing that your return was late. Your complaint is that the application of the penalty in your particular case is unfair, given the FCA’s admitted failure to send you a reminder. It is clear from the Handbook that the responsibility for submitting GABRIEL returns on time rests with the firm. It is also clear that the FCA is under no obligation to send reminders. By imposing the administration fee following the late submission of your GABRIEL return, the FCA has followed its stated procedures, and I do not consider that the FCA can be faulted procedurally or legally.

I also understand the FCA's position that they have to have a system which they can apply consistently, in order to be fair to all parties. There is a danger that granting waivers of fees, save in the most exceptional circumstances, starts to create precedents which undermine the FCA's ability to recover costs caused by late payment, and undermine the incentive to firms to report promptly.

On the other side of the argument I can understand why you feel that the FCA should take some responsibility for its systems failure and be sympathetic to your position, particularly given your previous record of compliance and the fact that you acted promptly as soon as the problem became clear, submitting your return one working day after receiving the fee notification email (although this notification was one week after the deadline had passed), and your return was therefore ten days late.

Conclusion

For the reasons given above, I cannot fault the FCA's decision that you are liable for the late charge. Nor do I think that it would be right for me to recommend that the FCA should waive the charge as a goodwill gesture, since I am aware that to do so might create unfairness in relation to other people who have been required to pay the penalty in similar circumstances.

However, I do make the following two recommendations. The first is that the FCA should express some regret for the systems failure – the two responses which you have received to date seem to me to lack any note of significant regret. While – as I have set out above – the FCA is not obliged to send reminders, the fact is that by setting in place a system of reminders they have inevitably created an expectation which, in your case, they have not fulfilled. While that expectation does not, in my view, amount to a legal precedent, that the expectation needs to be acknowledged, even if it does not change the overall decision.

Second, I recommend that the FCA consider whether, in the future, there should be some recognition in cases where it is clear that reminders have not been sent (i.e. the reminder fault is clearly with the FCA). Such a system might involve a short period of grace (say a few working days), or even a modest discount. It need not involve the use of elaborate discretion, but would be a means of marking a shortcoming in the system – and provide an incentive to the FCA to ensure that the reminder system was working adequately. In my view, this would be in line with general good organisational practices, and would not undermine the fundamental principle that responsibility remains with the regulated firm.

I set out the above conclusions in my Preliminary Decision and the FCA has stated that it accepts both of my recommendations. In its response, the FCA expressed this as follows:

‘ In respect of your recommendations, we agree that the FCA could have shown more regret for the failure that occurred. It is very unfortunate that the system failure occurred and whilst we did not uphold Mr Silver's complaint it would have been appropriate to show more empathy for his situation when responding to his complaint.

‘Whilst we still maintain that it is a firms' responsibility to ensure its GABRIEL returns are submitted on time we do acknowledge that there was a system failure which is regrettable and that we have taken on board your second recommendation. Should such an unfortunate event occur the FCA will give consideration to how this is recognised and whether any further steps should be taken.’

There is one final point I wish to address. In your comments to my Preliminary Decision, you stated that ‘The GABRIEL portal is only open to firms to make their reports during certain windows. My next reporting is due in September and it would be physically impossible to submit this until the portal next opens. Because these portal openings are not set in stone on the same day, the FSA had a system from the beginning of GABRIEL that would inform firms when the portal was about to open to allow a firm to prepare a submission, and then a second email to tell a firm when it was actually open for the submission to take place.’

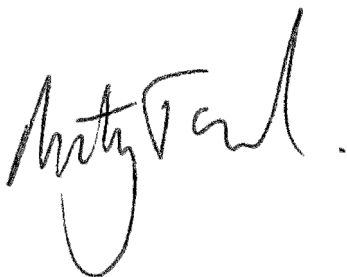
Whilst the FCA accepts that the technical system failure preventing the FCA from sending a reminder was an unfortunate event, the FCA has pointed out that the Gabriel system gives a schedule of return dates in advance so firms are aware when, in future, they need to submit RMAR. I quote the explanation directly below from the FCA response to my Preliminary Decision:

‘GABRIEL is accessible to firms at any time they wish to log on. However, for obvious reasons, a return cannot be made available for completion until the period end date has passed. However, when a firm logs into GABRIEL it does give a schedule of returns so a firm will be able to see in advance the dates of the reporting periods and the deadline for submission even though they may not yet be able to complete those returns.’

I am sorry, but as a result of my investigation I am unable to conclude that the FSA has not correctly 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 have, however, recommended that the FCA properly expresses regret for its shortcomings, and that there should be a system for considering how to deal with any future instances of failures to issue reminders. The FCA has accepted both recommendations.

I am copying this letter to your Member of Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner