

6 February 2017

Dear Complainant,

Complaint against the Financial Conduct Authority Reference Number: FCA00190

Thank you for your correspondence about your complaint against the Financial Conduct Authority (FCA). I have now considered your complaint and I am writing to you with my final decision. In finalising my decision, I have taken into account comments which you and the FCA have made on the preliminary decision which I shared with you in December.

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.

What we have done since receiving your complaint

I have reviewed all the information you and the regulator have provided us with initially. I have also sought and received further information from the FCA. My decision on your complaint is explained below.

Your complaint

Your complaint is extensive, technical, and complex, but its essence is as follows:

- a. In 1998, you and your wife were directors of a firm ("firm I"), which was initially dormant but later became a financial advice firm. Your wife applied to be regulated by the Personal Investment Authority as a manager and adviser, and her application was supported by another firm, "firm B". The form indicated that your wife acted as the principal of firm I, which was to be an appointed representative (AR) firm of firm B.
- b. In 2001, firm B made an application on your behalf, and the form indicated that firm I was to be an appointed representative of firm B;
- c. In 2001 the PIA was replaced by the FSA, to which regulation was transferred;
- d. In 2004 your firm, firm I, became directly regulated by the FSA. In the same year, your association with firm B ended;
- e. In 2005, firm B was publicly censured by the FSA for breaches of the FSA's rules and principles;
- f. In 2009, you became aware that the entries of you and your wife on the FSA register, dating back to 2004, gave the impression that you and your wife had been directors and appointed representatives of firm B, and that you had undertaken controlled functions for firm B, neither of which was correct;
- g. In 2009 you complained to the FSA. A key element of your complaint was the damage which you considered that the misleading information had done to your reputation and business. After some extensive correspondence in which the FSA asserted the correctness of the entries, the FSA upheld your complaint on the grounds that the

information (even if legally and factually correct – a matter which you dispute) was misleading and not easily understood by consumers. The FSA concluded that rectifying the matter by amending the register would be too costly, but undertook to consider the matter again “if, in the future, there is a redesign in the way information about appointed representatives is displayed”. The FSA also undertook to provide guidance notes to clarify that the designation CF1 Director (AR) referred to the individual’s role with a firm which was in turn an appointed representative of a principal firm, and did not mean that the individual was himself or herself an AR for the principal firm;

- h. In the same year, you complained to the then Complaints Commissioner, who upheld the FSA’s decision (and did so again when you approached him for reviews in 2010 and 2013);
- i. In 2012 and 2013 there was correspondence between you, your MP and the FCA (which had assumed the functions of the FSA). Although this did not result in a change to the register, the then Chief Executive of the FCA repeated the assurance that your concerns would be taken into account in a future review of the register;
- j. In October 2015, your MP wrote to the FCA to say that the new version of the register continued to display the misleading information about you and your wife. In a response to your MP, dated 18th November 2015 and signed on behalf of the then Director of Authorisation, the FCA stated: *“We have considered the points raised by Mr [H] as we did before the implementation of the new register when Mr [H] contacted us. However, as has been explained in previous correspondence to him and yourself we do not agree that the entries on the Register are incorrect or merit changing”*.
- k. In December 2015, you made a complaint to the FCA. In June 2016 you approached my office because the FCA had not kept you informed of progress as they had undertaken to do. My office made several attempts to speed the progress of the FCA’s investigation; l. On 14 October 2016 the FCA issued their decision. They upheld your complaint. They found that, contrary to what your MP had been told, there was no evidence that the FCA had taken your concerns into account when amending the register. However, they concluded that, even if your concerns had been taken into account, it was unlikely that the register would have been amended, given the costs which would have been incurred. The investigation also uncovered the fact that the explanatory notes (referred to in g. above) no longer existed, and the FCA therefore undertook to introduce explanatory help text on the new version of the register. In recognition of the delay in completing their investigation of your complaint, and the failure to honour the undertaking to consider your concerns during the redesign of the register, the FCA apologised, and offered you £500 as an ex gratia gesture of goodwill;
- n. On 16 October you replied to the FCA. You said that, while you could not disagree with anything in the decision letter, it did not adequately address the totality of your concerns. In particular, you were concerned that all you had been given was the promise of some unspecified explanatory text at an unspecified date; that the decision failed to acknowledge the extent to which the information on the register was misleading and – in your view – factually incorrect; that the decision failed to acknowledge the extent of the financial, reputational and stress-related damage which you had been caused; and that, during the protracted investigation into your complaint, you had been led to believe that the matter was likely to be properly resolved, a belief which was negated by the outcome.

My findings

The core of your complaint

Despite the complexities surrounding the changes in regulatory architecture over the period covered by your complaint, and the details of the approved persons and appointed representatives regime, the core of your complaint boils down to the fact that the register entries for you and your wife both contain the following information:

Controlled Functions	Firm Name	Start Date	End Date
CF1 Director	[Firm I]	20/11/2004	05/05/2011
CF1 Director (AR)	[Firm B]	01/12/2001	20/11/2004

The FSA's and FCA's contention that this is legally and technically correct relies upon the argument that the addition of "(AR)" after "CF1 Director" in the first column indicates that the person concerned is a director of a firm acting as an appointed representative of the authorised principal firm indicated in the second column. Frankly, this is a stretch of logic: as the FSA conceded seven years ago, the information, as presented, is misleading, and not easily understood by consumers. The purpose of the register is not simply to be legally and technically correct, but to provide usable information to its users, and on that measure it clearly failed in this case. If the firm name column in the second row had read something like "Firm I, acting as appointed representative of firm B" then the test would have been met – but it did not.

I do, however, note and welcome the fact that, since the FCA issued its decision on your complaint, explanatory text has been added to the website. The text which now appears above your entry, reads:

'(AR)' in the Controlled Functions column is used to show that the person performs/performed the function in a company or partnership which is/was an Appointed Representative of an authorised Principal firm. In this situation, it is the name of the Principal firm that is shown in the Firm Name column as it is that firm that is responsible for the appointed representatives [sic] regulated activities.

In your response to my preliminary decision you drew my attention to the fact that you had also complained about your wife's entry, as follows:

CF21 Adviser	[Firm B]	01/12/2001	20/11/2004
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You make the point that that entry was arguably even more misleading. While I understand your concern about that matter, and agree that it gives rise to similar problems, I have not dealt with it further since it relates to an obsolete function.

The follow-up to your original complaint

In 2009 your original complaint was upheld, but the FSA concluded that it would be too expensive to remedy the problem immediately. Whether that decision was right or wrong at the time it was made is an historical issue which I do not intend to revisit. However, in 2012 and 2013 it is clear that, in response to the representations made by you and your MP to the FCA's then Chief Executive, the FCA acknowledged the validity of your concerns, and

repeated the FSA's undertaking to review the matter as and when the register system was being reviewed. The FCA did not fulfil that undertaking, as they have now admitted. It appears that the good intentions expressed in Martin Wheatley's letters were not translated into action when the register was being reviewed. This failure was exacerbated by the fact that the explanatory guidance which had been introduced to ameliorate the problem identified in 2009 had been removed. The result was that, when the revised register system went live in 2015, the position was actually *worse* than it had been in 2009.

The FCA's letter of 18th November 2015

As referred to above, your concerns about the issue, following the launch of the revised register system, were revived by your MP in October 2015. The FCA's reply, which was sent on behalf of the then Director of Authorisation, included the following:

We have considered the points raised by Mr [H], as we did before the implementation of the new register when Mr [H] contacted us. However, as has been explained in previous correspondence to him and yourself we do not agree that the entries on the Register are incorrect or merit changing.

I agree with the decision not to change the CF1(AR) controlled function labels on the register, as the information is an accurate record of the information provided to us, and the register does not state that either Mr or Mrs [H] were ever directors of [firm B]. The FCA has devoted considerable time and resource to addressing Mr H's concerns to date and we do not have anything further to add.

I hope that this is helpful.

In my view, that letter should never have been sent in those terms. It is objectionable on a number of grounds:

- a. As the Complaints Team concluded later, following their investigation, there is no evidence to support the statement that your concerns had been considered in advance of the implementation of the new register system;
- b. The statement that "we do not agree that the entries on the Register are incorrect or merit changing" contradicts the views expressed earlier by the FSA and the then Chief Executive of the FCA that there was a case for changing – and in any event, for the reasons I expressed above, ignores the fact that, even if the information is technically correct in a very narrow sense, it is clearly misleading and therefore undermines the purpose of the published register;
- c. The reference to the "decision not to change the CF1(AR) controlled function labels" seems to refer to a decision that was never, in fact, made;
- d. The letter is dismissive of your concerns. In the light of everything that had happened since 2009, that was unacceptable.

The letter has parallels with another case involving a register entry which I dealt with earlier in 2016, and which can be found at <http://fsc.gov.uk/wp-content/uploads/FCA00140-FD-10-08-16.pdf>. In that case, the FCA initially refused to amend a misleading register on the grounds that it was "accurate", and only late in the day accepted that an amendment was required. While the cases have many different features, it seems to me that both are examples of the FCA failing to put itself in the shoes of the regulated person or the end user of the register.

The handling of your current complaint

As the FCA has acknowledged, the FCA's consideration of your latest complaint took too long. Having carefully studied the papers I am, however, satisfied that the FCA's Complaints Team undertook a thorough, if extended, exercise to get to the bottom of the issue and see whether the matter could be put right. This included exploring with the FCA's IT department whether changes to the register could be achieved at acceptable cost – that exercise looked at a number of options, and concluded that a full solution would cost between £50k and £100k to implement. I am also satisfied that the FCA was right to say that, even had your concerns been considered during the register system review, it is unlikely that the changes would have been made.

I have reached that view on the following assumptions – which I am not in a position to test fully, although it is clear from the documents which I have reviewed that the FCA did look at the options in some detail while they were investigating your complaint:

- a. that the FCA's estimate that the cost of making a substantial change would be at least £50k was a reasonable one;
- b. that relatively few people have been adversely affected by this problem, and
- c. that the additional text which the FCA have now included on register entries (see above) represents a cost-effective means of addressing the problem.

It is nonetheless a matter of concern that changes to the register appear to be so costly. The FCA have made the point to me that although the proposed change may appear minor, it involves changes to the underlying data in the register, and that is expensive. It is also a matter of considerable concern that there appears to have been no reliable system for logging possible changes to the register to ensure that they were reviewed at the appropriate moment.

Finally, it appears that during the investigation the Complaints Team raised your expectations about the likelihood of a resolution to this problem, expectations which, in the event, were not fulfilled. I am satisfied that the Complaints Team's intentions were good, but your expectations should not have been so raised.

Conclusions

The following are my main conclusions:

- a. You and your wife have been the unfortunate victims of an unintended consequence of the design of the FSA's (and now FCA's) register, coupled with a particular set of personal circumstances;
- b. Since 2009 the FSA/FCA have accepted that your register entries are misleading, and have committed to reviewing the register design at an appropriate moment;
- c. Explanatory text to ameliorate the problem was made available on the website in 2009, but for reasons unconnected with this complaint was removed and not replaced when the amended register went live in 2015;
- d. In 2015, when the register system was revised, your concerns were not considered, despite the FCA's undertaking to do so;
- e. The letter issued to your MP in November 2015 made factual assertions which are not supported by evidence, contradicted the position of the then Chief Executive of the FCA, and showed a lack of concern for the difficult situation in which you and your wife were placed. It should not have been sent in those terms;

- f. The Complaints Team undertook a thorough, but over-lengthy, investigation into your complaint, and unfortunately raised your expectations about a resolution to the complaint;
- g. The new explanatory text on the register goes some way to address the concerns;
- h. The FCA's decision that the cost of a proper fix to the register – at over £50k – was disproportionate is a matter of judgement. I do not consider that that decision is clearly unreasonable, but it is a matter of concern that the register is so inflexible that amendments to correct misleading information should be prohibitively expensive. Given this, it seems unlikely that the changes you would like to be made to the register will be made until a major overhaul of the system is undertaken.

Recommendations

The FCA has already issued you with an apology, and offered an ex gratia payment of £500, to acknowledge the failure to review your concerns when the register system was being amended, and the length of time it took to conclude your complaint.

In my view, there are two other failures which need to be taken into consideration. The first is the deletion of the explanatory text, which exacerbated the problem; and the second, and in my view more serious, was the misleading letter sent to your MP on 18th November 2015. For those reasons, **I recommend that the payment should be increased to £1500**. I recognise that such a payment would not address the damage which you have described in your complaint. However, Parliament has decided to exclude the financial services regulators from damages (except in very narrow circumstances such as demonstrable bad faith), and while the complaints scheme can provide compensatory payments for demonstrable direct financial loss, it cannot award the kinds of damages that a court might provide.

I make two other recommendations to the FCA:

- a. The FCA should consider whether this case, and the other one to which I refer, suggest that staff need to be reminded that, when considering representations from regulated individuals, they need to consider not only the procedural correctness of what the FCA has done, but also the possible unintended impact upon the individuals;

- b. The FCA should consider whether the problems in making amendments to the register, illustrated by this case, may suggest that the current register design is too inflexible. The FCA have informed me that the design of the TARDIS system, from which information for the register is taken, is being reviewed as part of the preparations for the move of the FCA's headquarters. That is welcome.

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