25th February 2014

Dear Complainant,

Your complaint against the UK's Financial Services Regulator
Reference: FSA01599

I write with reference to your email of 7th January 2014 addressed to the Office of the Complaints Commissioner.

I need to explain my role and powers. Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints' scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner charged with the task of investigating those complaints made about the way the regulators have themselves carried out their own investigation of a complaint that comes within that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role.

From 1st April 2013, as part of the changes implemented by the Government, the Financial Services Authority (FSA) was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulators of the UK's financial services industry. I would add that although the FSA has been replaced, transitional provisions have been put in place to enable the continued consideration of complaints against the FSA. As your complaint relates to the inactions of the FSA, in relation to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new transitional complaints' scheme.

As set out in the consultation paper (CP12/30 Complaints against the regulators) and confirmed in the policy statement (PS13/7 Complaints against the regulators), any complaints against the FSA which have not been concluded as of 1st April 2013, together with any new complaints, will continue to be investigated by the FCA Complaints Team with the cooperation of the PRA if needed and my office. In practice, this means that, although the governing legislation will have changed there will be no change to the manner in which, or the terms under which, your complaint is investigated.

Your complaint

From your recent letter I understand that you are unhappy with the outcome of the Regulator's investigation into your complaint. You add that, the Regulator has upheld your complaint and set out that it upheld your complaint as it believes "*that some further action could have been taken in 2008*". However, you have approached my office as you say that your "*concern/complaint now is why further action wasn't taken in 2008 to prevent loss of investors monies (and to prevent further investment by new investors post 2008)*".

Coverage and scope of the Transitional Complaints Scheme

The new Transitional Complaints Scheme provides as follows:

> *9.1 The transitional complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions under FSMA. The transitional complaints scheme covers complaints about the way in which the FSA has acted or omitted to act, including complaints alleging:*
>
> *a) mistakes and lack of care;*
>
> *b) unreasonable delay;*
>
> *c) unprofessional behaviour;*
>
> *d) bias; and*
>
> *e) lack of integrity.*
>
> *9.2 To be eligible to make a complaint under the transitional complaints scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.*
>
> *9.3 The transitional complaints scheme does not apply to the Bank's functions under Part 5 of the Banking Act 2009 (overseeing inter-bank payment systems) as this was not previously subject to these complaints arrangements.*

I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. The FSMA (as the relevant legislation in place at the time) stipulated in Schedule One that the FSA is exempt from "liability in damages". It stated:

> *(1) Neither the Authority nor any person who is, or is acting as, a member , officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.*
>
> *(2) (Irrelevant to this issue under investigation)*
>
> *(3) Neither subparagraph (1) nor subparagraph (2) applies*
>
> *(a) if the act or omission is shown to have been in bad faith; or*

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998.

I have referred to the FSMA here as it was the FSMA which was the relevant legislation when the investigation into your complaint commenced and when the events about which you are unhappy occurred. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. You have not adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The transitional complaints scheme nevertheless then goes on to provide in paragraph 6.6 that:

> *Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis.*

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a "*compensatory payment on an ex-gratia basis*".

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

> *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol provides:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the FSA (as opposed to others involved in this unhappy series of events) which is incompatible with the Human Rights Act 1998 which directly caused any loss to your possessions. Any loss you may have incurred would have been as a direct result of the actions of the administrator of your pension fund, rather than as a result of any actions of the FSA as the UK's financial services regulator.

My Position

From your letter to my office you are clearly and understandably unhappy with the events which occurred following the decisions you made to invest with the firm in 2007. In this case, you appear to be indicating that you are unhappy that the Regulator did not protect your interests as a consumer by acting upon the information which was presented to it.

I can appreciate why you remain understandably unhappy with the overall position and in particular your belief that the Regulator did not act appropriately upon the information presented to it in mid-2008. In its decision letter, the Regulator has explained that:

> "*Through our investigation into your complaint we have identified that the Authority might have acted differently in 2008. As a minimum we are of the view that Supervision could have engaged with EFCD to see whether any action in relation to Firm A would have been appropriate. But it is far from certain, however, that this would have resulted in any action by the FCA, still less successful action*".

Before I comment further it may be useful if I explain the role and responsibilities of the Regulator (as set out in the FSMA which was the governing legislation at the time the unhappy events took place). Whilst the Regulator is able to receive information or 'intelligence' from consumers pertaining to the actions of regulated firms, the fact that a consumer has alleged that a firm may have acted inappropriately *does not* (my emphasis) in itself mean that action will be taken against the firm.

Before the Regulator can take action, it must first assess the information a consumer has provided and then, if it feels it appropriate, it must then conduct its own further enquiries to establish if there have been any breaches of its rules. I would add that the fact that the Regulator has not indicated what action, if any, it took as a result of the information provided to it (or what enquiries it may have made) does not mean that it is has failed to fulfil adequately its objective of protecting consumers.

However let me start with the general issue of protecting consumers. I must go into some detail. I do that more as a need to give the fullest possible consideration to every aspect of your complaint. My starting point must be the FSMA itself. Section 2 of the Act set out the FSA's general duties (as the relevant financial services Regulator at that time) in the following manner:

(1) In discharging its general functions the Authority must, so far as is reasonably possible, act in a way—

  (a) which is compatible with the regulatory objectives; and

  (b) which the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are -

  (a) market confidence;

  (b) public awareness;

(c) the protection of consumers; and

(d) the reduction of financial crime.

(3) In discharging its general functions the Authority must have regard to—

(a) the need to use its resources in the most efficient and economic way;

(b) the responsibilities of those who manage the affairs of authorised persons;

(c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(d) The desirability of facilitating innovation in connection with regulated activities;

(e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;

(f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;

(g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority.

(4) The Authority's general functions are—

(a) its function of making rules under this Act (considered as a whole);

(b) its function of preparing and issuing codes under this Act (considered as a whole);

(c) its functions in relation to the giving of general guidance (considered as a whole); and

(d) its function of determining the general policy and principles by reference to which it performs particular functions.

(5) "General guidance" has the meaning given in section 158(5).

From this you will see that, although the Act required the FSA (as the relevant Regulator) to discharge its regulatory objectives, it gives it a discretion over how it does this providing that its act in a way which:

(a) is compatible with the regulatory objectives; and

(b) the Authority considers most appropriate for the purpose of meeting those objectives.

The composite effect of these provisions in today's world was to create an inevitable tension between market confidence, through the exercise of the then Regulator's regulatory powers and the protection of consumers. In effect the then Regulator had to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives. Issues like the ones raised in your complaint therefore inevitably involved a consideration of difficult and differing courses of action for any Regulator when seeking to deal both with prudential regulation and consumer protection. That is the generic background to the issues raised by your complaint and I have borne in mind when examining in detail all the many records the FSA has now presented to me when I examined your complaint in all its detail.

Next I turn to the issue of disclosure of what action the Regulator took after receiving the information that it did receive. Quite reasonably given what you have stated in your complaint to my office any complainant will pose the question relevant to this issue "*well what exactly did the Regulator do when supervising the firm with a view to safeguarding my interests as a consumer (specifically as a result of the information I presented to it)?*" In answering those questions however Parliament has imposed real restrictions upon both the Regulator and myself by the imposition of section 348 of the FSMA (as rehearsed in the 2012 Act) as to how those questions can be answered in the case of a complainant.

In summary, Parliament by virtue of Section 348 of the FSMA (and section 18 of Part 2 of Schedule 12 of the 2012 Act) imposes upon the Regulator (both previous and present) a ruling of confidentiality in the context of disclosing its response or position when acting in the discharge of its functions as the relevant regulator. This means that, other than in limited circumstances, the Regulator is unable to disclose any information about what action it did or did not take against a firm or individual (and the reasons for that decision).

In this instance, while I do not believe that the exceptions apply and I cannot comment further on what action the Regulator took, I do myself have the power to delve more deeply into such matters, in my role as Complaints Commissioner, to enable me to be satisfied as to the propriety of what the Regulator did done. I am however, although I can do this, limited, in most cases, as to the further disclosure of the details that I am informed about. I am therefore unable, directly, to answer the questions you have posed.

However, what I can say is that, from the considerable information the Regulator freely provided to me, it does appear that it has carried out entirely appropriately its duties as the UK's financial services regulator. The Regulator considered the information provided to it by a number of sources and acted upon that information.

Although I cannot comment in depth on what action the Regulator took, I can confirm that, although the Regulator accepts that it could have made further internal references, the information the Regulator has provided indicates that it did consider in considerable detail the information presented to it. Following its own enquiries I believe that the Regulator undertook what I consider to be a reasonable course of action.

I can also say that the action the Regulator took enabled it to assess clearly and consider in detail the information which had been passed to it. It certainly did not ignore the warnings it was given and it made *judgements* (my emphasis) following its own enquiries which in all the circumstances I consider to be reasonable ones.

As indicated above, the provisions of Section 348 of the FSMA limit what disclosures I can make to you what I can say, in general terms, is that following the referrals it received the FSA made a number of enquiries of the firm concerned. These initial enquiries led to the Regulator undertaking a visit to the firm to obtain further, more detailed, information. Following consideration of this information it issued the firm with a report which the firm to undertake certain actions including the firm obtaining an independent skilled person report (as set out within Section 166 of the FSMA). I would add that the FSA's enquiries and visit, together with the independent Section 166 skilled persons report, resulted in the firm, its process and its directors/staff being placed under considerable close examination.

Given that the Regulator clearly took significant action as a result of the information presented to it I believe that the Regulator's actions were reasonable. I would also add that, sometimes, particularly with hindsight, I can be left with the impression that different conclusions may have been reached by those involved. Yours is not such a case.

Although I have set out what action the Regulator took, I can understand why your feel that the Regulator should have taken further action. I accept that the Regulator too accepts this view and has also upheld your complaint. When reviewing the Regulator's file I am aware that it has accepted that it could have made further internal referrals however, it has also highlighted that:

> "*Supervision explained that on receiving information in 2008 about Firm A and Administrator H, the Authority considered and did follow up, a number of issues relating to the authorised firm, Administrator H. Administrator H was the vessel of some of the funds invested into Firm A. They explained that Firm A was a non-authorised marketing firm. On the face of the matter, therefore, Supervision had no jurisdiction. This is why they pursued this matter via the then regulated entity Administrator H. It does not seem unreasonable for Supervision to focus their attention on the regulated entity, as their key role is to supervise regulated firms. We can confirm that on receiving information in 2008 about Administrators H the Authority considered and did follow up a number of issues relating to the authorised firm.*
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> *One additional action that Supervision might have taken at the time was to refer any information relating to Firm A, that they felt may require further investigation, to the Authority's Unauthorised Business Team (UBT). Had they done so UBT may have assessed the information to establish if there was indeed a case of potential unauthorised business to pursue. This possible additional action would have required the following steps.*
>
> - *A legal analysis to establish whether Firm A was carrying on regulated activities (review of any available contractual information, review of relevant websites and other public sources).*
> - *Intelligence checks on the firm and individuals.*
> - *Risk assessment on the scale of activity and potential consumer detriment.*
>
> *It should be emphasized (sic) that the particular products in question were ambiguous. It is far from certain that the firm would have been operating outside the perimeter and in breach of FSMA. Even if UBT had formed a view that it was, this would ultimately have been a matter for the court*".

From this, although the Regulator accepts that further internal referrals could, and probably should have been made, there is *not any clear evidence* (my emphasis) that making such an internal referral would have led to the Regulator adopting a different approach or that such a referral would have resulted in action being taken against the firm and/or the product provider concerned. Indeed the Regulator has highlighted that it was "*far from certain that the firm would have been operating outside the perimeter and in breach of FSMA. Even if UBT had formed a view that it was, this would ultimately have been a matter for the court*".

Conclusion

As I have explained above, the FSA has satisfied me that, although it is unfortunate that it cannot comment further on the matter, it did undertake what it considered were an appropriate series of investigations when made aware of the whistleblower's concerns. Although this may appear unhelpful, the FSA has to act in accordance with the provisions imposed upon it by the Act. Similarly, whilst the Regulator accepts that although it could have made an internal referral, even with the benefit of hindsight, it "*is far from certain that the firm would have been operating outside the perimeter and in breach of FSMA*". Given this continued uncertainty, although the Regulator accepts that an internal referral it was an avenue which should have been taken, this *does not support the view or suggestion* (my emphasis) that the Regulator's failure to pursue a possible internal referral has impacted upon you or other investors.

When assessing a complaint, my investigations have to be conducted under the rules of the Transitional Complaints Scheme. As such, whilst you are clearly disappointed that, although the Regulator has upheld your complaint and apologised for its failure, it has not gone further and considered the issue of the potential losses you and other investors are now facing. Paragraph 6.6 of the rules of the Transitional Complaints Scheme address possible outcomes for a successful complainant in the following terms:

> "*What are the possible outcomes for the complaint?*
>
> *6.6 Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis*".

As such, when assessing a complaint, I have to consider a number of factors which include, but are not limited to, the:

- Regulator's actions at the time when it became aware of the actions which ultimately led to the complaint;
- Nature and extent of Regulator's investigation into the complaint;
- Regulator's decision as a result of the its complaint investigation; and
- arguments and further evidence presented to my office by the complainant.

In this instance, it is clear from the Regulator's file that, as soon as it was alerted to potential failures by the firm, it undertook what can only be described as a significant investigation. It is unfortunate that the Regulator failed to refer its concerns internally but, as the Regulator has indicated, there is nothing to suggest that, even with the benefit of hindsight, such a referral would have result in a different outcome to either the action taken by the Regulator or for affected consumers.

With this in mind, I believe that the apology the Regulator has made to you is the appropriate remedy. I appreciate that you feel that all of your questions have not been answered and, although I do have some sympathy for the position you find yourself in, given the provisions of Section 348 of the FSMA and the fact that there is currently an ongoing criminal investigation, neither the Regulator nor I are able to provide further details about the investigation the Regulator commenced in 2008.

I should also add that, although it is unfortunate that the Regulator failed to refer its concerns to another internal department, given that, even with the benefit of hindsight, a different outcome would have been achieved there is nothing to suggest that the Regulator neither failed to act appropriately nor that it failed to comply with its statutory objectives. As I have explained above the FSA has to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives.

Here the Regulator made such judgements and took action which was not unreasonable given the concerns it had at that time. I have already indicated above that the Regulator's files shows that it did consider and acted upon the information presented to it. I would also add that the regulatory regime operated within the UK is not a zero failure one and, as a result, there will be situations where a firm fails and consumers will, unfortunately, incur a loss. Whilst the FSA aims to prevent this happening, it is simply not possible in all cases especially where it is believed a sophisticated fraud may have taken place. The fact that Section 348 of the Act prevents the FSA (and me) from confirming in specific detail what action, if any, the FSA took and the reasons for that decision is not, by itself, evidence that it failed either to consider adequately the information you provided or that it failed in its any or all of its statutory duties.

It is a matter of regret for me that you have suffered in the way that you and, whilst the Regulator possibly should have made further internal referrals there is nothing to suggest that this would have resulted in a different outcome. My Final Decision, in this unhappy matter, is that the Regulator has investigated fully and adequately your complaint. I should add that the I also consider that the apology the Regulator made to you, as a result of it upholding your complaint, is, in my opinion, the appropriate remedy.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner