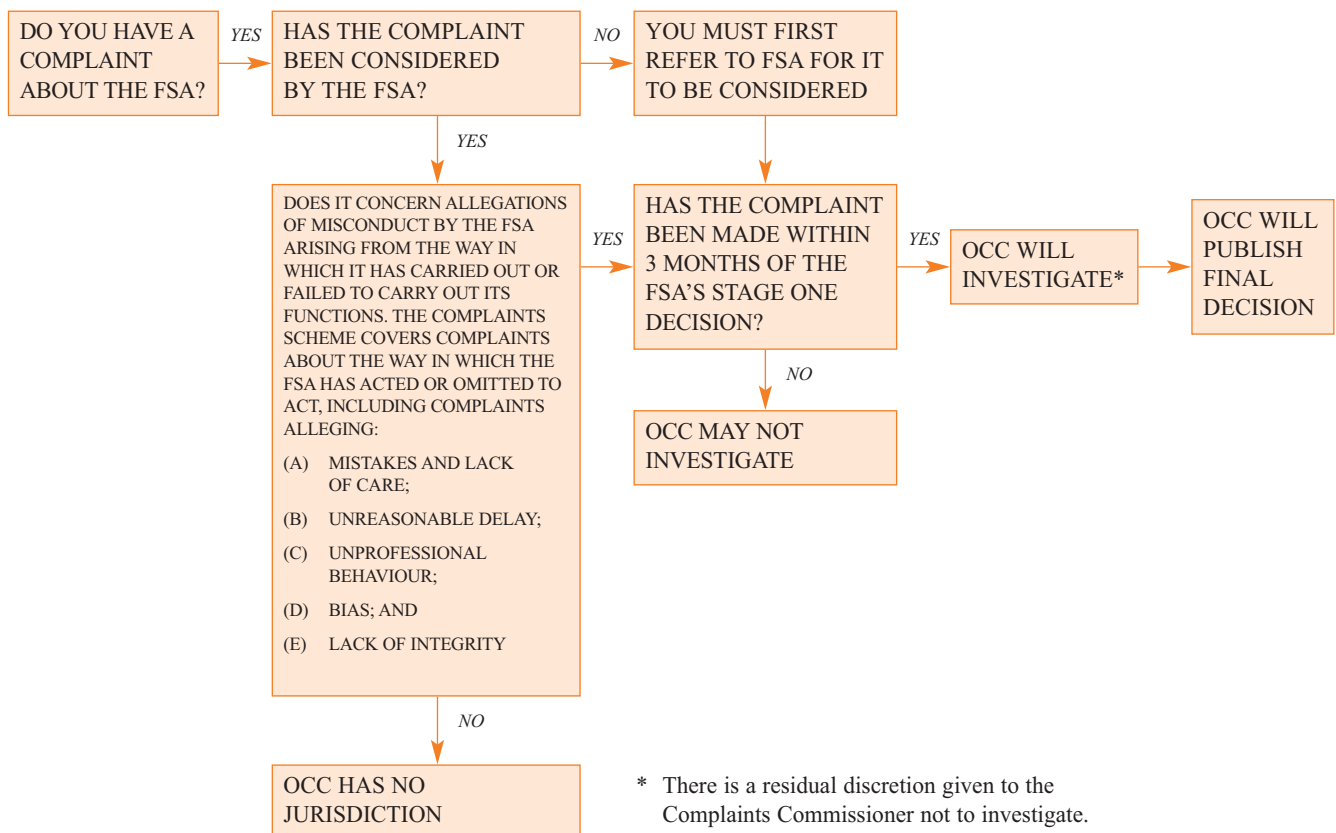




# Office of the Complaints Commissioner Annual Report for 2009/10



\* There is a residual discretion given to the Complaints Commissioner not to investigate.

## Complaints Against the Financial Services Authority

(extract from rules made pursuant to the Financial Services and Markets Act 2000 “the Act”)

- COAF 1.1.1 (G)**
- (1) Paragraph 7 of Schedule 1 to the Act requires the FSA to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of its functions under the Act (other than its legislative functions).
  - (2) The FSA is required to appoint an independent person as Complaints Commissioner to be responsible for the conduct of investigations in accordance with the complaints scheme.

**COAF 1.1.2 (G)**

The complaints scheme provides that there may be two distinct stages for each complaint. In the first stage, the FSA itself will investigate any complaint that meets the requirements of the complaints scheme (see COAF 1.4 (G) (Coverage and scope of the scheme)) and take whatever action to resolve the matter it thinks appropriate. A complaint will normally only proceed to the second stage if the complainant is dissatisfied with the FSA's determination of his complaint or how it has been handled. This second stage consists of investigation of the complaint by the Complaints Commissioner, followed, wherever he finds for the complainant, by his recommendation to the FSA on the form of redress, if any, that is appropriate in the circumstances.

- COAF 1.1.3 (G)**
- (1) The complaints scheme is made by the FSA in accordance with its obligations under paragraphs 7 and 8 of Schedule 1 to the Act.
  - (2) Where the Act requires the FSA to make a particular arrangement as part of the complaints scheme, this is recognised in the following text by the use of the word "must". In contrast, where a provision in the complaints scheme states that someone "will" do something, this denotes that the FSA is committing itself or the Complaints Commissioner to some action which, though not specifically required by the Act, is nevertheless viewed as necessary to give effect to the intentions of the Act.
  - (3) Each provision in the complaints scheme is, consistent with the style and format of the Handbook, identified by the letter "G". It nevertheless constitutes a definitive statement of the complaints scheme which the FSA is required to maintain.

**COAF 1.1.4 (G)**

The complaints scheme has effect from 3 September 2001.

**COAF 1.1.5 (G)**

In this complaints scheme, "complaint" means any expression of dissatisfaction about the manner in which the FSA has carried out, or failed to carry out, its functions under the Act other than its legislative functions.

(NB. G = Guidance)

## Annual Report for 2009/10

This is the Ninth Annual Report of the Office of the Complaints Commissioner.  
It covers the period from 1 April 2009 to 31 March 2010.

Matters covered in its content are:

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## **Sir Anthony Holland**

Sir Anthony was appointed as the Financial Services Complaints Commissioner on 3 September 2004 for a three year term. He was reappointed as the Complaints Commissioner for a further three years on 3 September 2007. The position of the Complaints Commissioner was created by the Financial Services and Markets Act 2000 to provide an independent means by which the regulated community could have an independent adjudication on complaints against the Financial Services Authority. H.M. Treasury's approval is required under the Act for the appointment or dismissal of the Commissioner.

During his varied career Sir Anthony has served as the Chairman of a Social Security Appeals Tribunal, President of The Law Society (1990-91), Governor of the College of Law (1991-97), on the Council of JUSTICE (this is the British Section of the International Commission of Jurists) 1991-2001, as Chairman of the Executive Board of JUSTICE (1996-99), a member of the Council of the Howard League for Penal Reform (1992-1999), a member of the Criminal Injuries Compensation Appeals Panel (2000-2005), Chairman of the Northern Ireland Parades Commission (2000-2005), Chair of the Northern Ireland Legal Services Commission (2004-2007), Chairman of the Standards Board for England (2001-2008), and was a lay member of the International Governing Council of the Royal Institution of Chartered Surveyors (2002-2008). His appointments in the financial services industry include a period as a first instance Chairman of the Securities and Futures Authority (1993-2000) and Principal Ombudsman to the Personal Investment Authority Ombudsman Bureau (1997-2000).

In addition to his position as Complaints Commissioner he is also a member of the Board of the Pension Protection Fund and a member of the Investigatory Powers Tribunal.

## 1 Overview

Since 1 April 2009, the Office of the Complaints Commissioner (OCC) received 139 allegations and complaints. Individual consumers account for 70% of overall complainants compared to 86% of complainants last year, the remainder being made up of solicitors on behalf of their regulated clients, Members of Parliament and individual firms. Some common themes amongst the individual consumer complaints centred around dissatisfaction with how the FSA had regulated various financial institutions, including the FSA authorisation of rights issues of a number of banks and building societies. A large proportion of complaints also involved serious fraud allegations where consumers had suffered considerable financial loss due to unscrupulous ‘scams’ where firms were purporting to be authorised by the FSA.

This year the OCC received relatively more complaints from the industry, of which a high proportion were related to late submission of RMAR returns as well as other regulatory reporting issues resulting in fines imposed on the firms by the FSA.

### *Background to the Complaints Scheme*

The FSA is required by Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (FSMA) to operate a Complaints Scheme for investigation of complaints against itself. The Scheme came into operation on 3 September 2001. The relevant rules are set out in Complaints against the FSA (COAF) and which are made pursuant to Paragraph 7 of Schedule 1 to FSMA. The Complaints Scheme is essentially reactive (as opposed to proactive) in that the Commissioner’s powers derive from receiving a complaint. To be eligible to make a complaint the complainant must be seeking a remedy, which may include an apology, in respect of some inconvenience, distress or loss which has been suffered as a result of being directly affected by the FSA’s actions or inactions. It should be noted that the FSA under FSMA is immune from liability in damages for any negligent act. That immunity does not apply if bad faith is proven or if the FSA acted in a way which is incompatible with a convention right under the Human Rights Act 1998. Appendix A contains more details of the Complaints Scheme. As part of the complaints arrangements there must be a Complaints Commissioner (the Commissioner) who is independent of the FSA and able to conduct impartial investigations.

### *Statutory Information relative to Office of the Complaints Commissioner, a company limited by guarantee*

Chairman and Director Sir Anthony Holland

Company Secretary Ivona Poyntz

Statutory accounts have been lodged at Companies House.

## 2 Statistics from 1 April 2009 to 31 March 2010

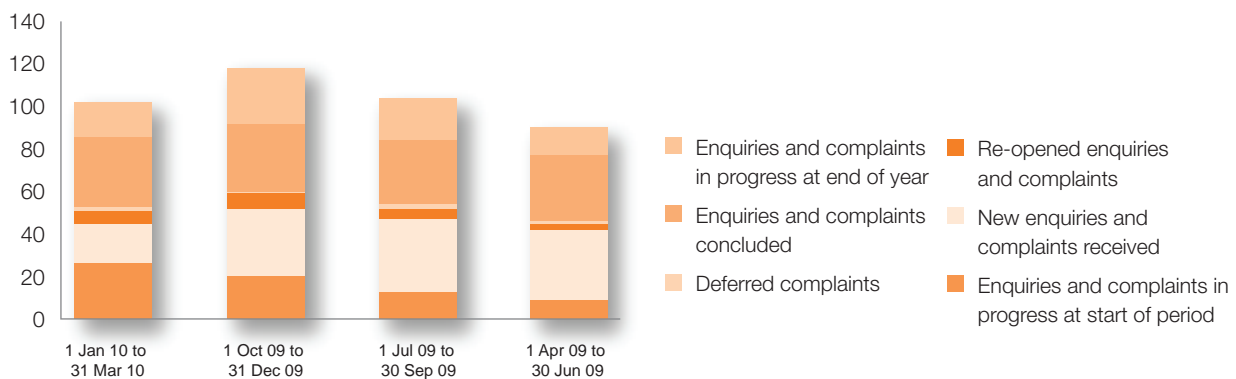
### 2.1 Enquiries and complaints received during the year

The table below shows the number of enquiries and complaints received by the Commissioner during 2009/10. The volume of new and re-opened complaints received during the year decreased to 139 for the year ended 31 March 2010 as compared to 163 in the previous year. The volume of complaints received and concluded is evenly spread over the first three quarters, with a noticeable downward trend in the final quarter, when complaints decreased by 40% from the previous quarter. It is noteworthy that fewer complainants approached the Commissioner despite the fact their complaint was not upheld by the FSA.

**Table 1 Enquiries and complaints received during 2009/10**

	2009-10	1 Jan 10 to 31 Mar 10	1 Oct 09 to 31 Dec 09	1 Jul 09 to 30 Sep 09	1 Apr 09 to 30 Jun 09	2008-09
Enquiries and complaints in progress at start of period	9	26	20	13	9	10
New enquiries and complaints received	118	19	32	34	33	149
Re-opened enquiries and complaints	21	6	7	5	3	14
Deferred complaints	6	2	1	2	1	6
Enquiries and complaints concluded	126	33	32	30	31	158
Enquiries and complaints in progress at end of year	16	16	26	20	13	9

### Enquiries and complaints received by quarter, 2009/10



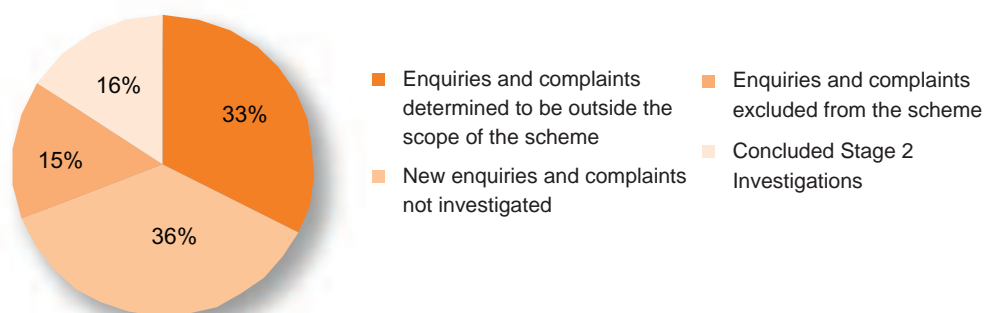
## 2.2 Enquiries and complaints concluded during the year

The table below shows the enquiries and complaints concluded during the year.

**Table 2: Enquiries and complaints concluded 2009/10**

	2009-10	1 Jan 10 to 31 March 10	1 Oct 09 to 31 Dec 09	1 July 09 to 30 Sept 09	1 Apr 09 to 30 June 09
Enquiries and complaints determined to be outside the scope of the scheme	41	9	13	9	10
New enquiries and complaints not investigated	46	11	9	14	12
Enquiries and complaints excluded from the scheme	19	4	7	3	5
Concluded Stage 2 Investigations	20	9	3	4	4
<b>Total enquiries and complaints concluded</b>	<b>126</b>	<b>33</b>	<b>32</b>	<b>30</b>	<b>31</b>

### 2009/10 Complaint summary



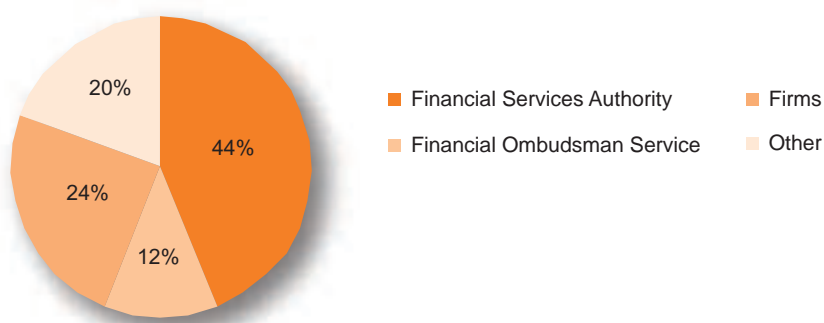
The number of complaints and enquiries concluded during the year amounted to 126. Of these, 41 were enquiries/complaints which related to other organisations, and further information on this is given below. Complaints which were excluded from the scheme related in general to the performance of the FSA's legislative functions under FSMA, although a few sought to challenge the Financial Ombudsman Service (FOS) decisions. However, complaints about the actions, or inactions of the FOS or the Financial Service Compensation Scheme (FSCS) are excluded from the complaints scheme. Non-investigated complaints include cases where the complainant has not been directly affected by the way in which the FSA has carried out its functions (COAF 1.2.1 (G)) as well as instances where the FSA has upheld a complaint at stage 1 investigation, and offered a sufficient remedy (for example an apology), but the complainant has chosen to escalate the complaint to the Commissioner without a clear reference to the intended outcome. In circumstances where the FSA has addressed outstanding issues in its stage 1 investigation in a satisfactory matter, there is no benefit to be gained from a secondary investigation of the same issue.

### 2.3 Organisation to which the complaint relates

The table below gives information about the organisation(s) that were the subject of enquiries and complaints during the year.

**Table 3: Organisation to which the enquiry or complaint relates 2009/10**

Organisation to which enquiry or complaint relates	2009/10	Percentage
Financial Services Authority	18	44%
Financial Ombudsman Service	5	12%
Firms	10	24%
Other	8	20%
<b>Total</b>	<b>41</b>	<b>100%</b>



A number of complainants continue to approach the OCC for an investigation whereas in fact their complaint should be directed to the firms with which they have a dispute or the FOS. Individual consumers more so than firms are not differentiating between the functions of the FOS and OCC and mistakenly believe that the two organisations are interchangeable and either one can investigate complaints against financial institutions.

The majority of new enquiries/complaints however were, as in previous years, in relation to the FSA. Of these, nearly half were complainants who had approached OCC first without having had a FSA stage 1 investigation conducted. In these cases, the Commissioner usually directed the complainant back to the FSA for a stage 1 investigation. Where the complainant is not satisfied with the outcome of that investigation, then an approach can be made to the OCC for a stage 2 investigation.

### 2.4 Type of complainant

The information below highlights that enquiries and complaints have predominantly come from individual members of the public rather than from organisations during the year.



**Table 4: Type of complainant 2009/10**

Type of complainant	1 Apr 09 to 31 Mar 10
Individual Members of Public	109
Independent Financial Advisers	4
Solicitors	1
Members of Parliament	1
Firms/Groups	11
Third Parties	0
<b>Total enquiries and complaints concluded</b>	<b>126</b>

## 2.5 Subject matter of complaints

The table below provides information on the subject matter of complaints reviewed by the Commissioner during 2009/10. A further breakdown of common themes emerging across the spectrum of complaints is provided in section 3 below.

**Table 5: Subject matter of complaints**

Complaint topic	2009/10 Number <sup>(7)</sup>	Notes
'Passporting' <sup>(1)</sup>	2	1 Refers to 'inward services passports' granted by EEA member states to their firms to operate, under certain conditions, in the UK.
Bank/Building Society Rights Issues	3	2 Investors complaining about the FSA's behaviour in relation to such schemes and scams.
Boiler room scams/Ponzi schemes <sup>(2)</sup>	8	3 Complainant is directly involved with the regulated body (complainant is not an investor).
Complaint relating to Enforcement action <sup>(3)</sup>	5	4 There is an interim party, e.g. an investor invests with a firm and the firm fails, and the investor seeks redress from the FSA for alleged failings in its regulation of the firm.
Complainant seeking redress - alleged indirect loss <sup>(4)</sup>	8	5 There is no interim party.
Complainant seeking redress - alleged direct loss <sup>(5)</sup>	3	6 Complaint is unspecific or in general terms, or relates to FSA behaviours which it cannot exclude, or not investigate. Examples include the authorisation and supervision of specific firms and issues relating to unfair contract terms.
Fees - late returns (annual fees and regulatory returns) and the number of approved persons (includes requests for pro-rata rebates)	9	7 Includes cases where a stage 1 investigation may or may not have been carried out or where the FSA may have deferred an investigation and the OCC agree with the decision to defer the investigation, or where the Complaints Commissioner has used his discretion not to investigate.
FSA General Regulation <sup>(6)</sup>	20	
Breach of Human Rights	2	
Pensions/AVC Review/Equitable Life/Endowments	3	

The figures shown in the table above only relate to complaints which were considered under the complaints scheme and do not include cases which were treated as enquiries and referred to other bodies (e.g. a firm, the FSA, the FOS or the FSCS) for consideration. Similarly, the figures shown in the table above relate to topics raised in the complaint. As some complaints relate to more than one topic, they may be included more than once in the table.

### 3 Themes

The Commissioner has dealt with a variety of complaints during the course of the last year. Some fell within his jurisdiction while others that were not ones that he could investigate were re-directed to the appropriate organisation. A number of recurring themes emerged during the course of the year, which are listed below:

#### **Fees issue**

This issue arises on an annual basis. Many less organised members of the industry frequently miss dates for notifying the FSA of changes to their personnel; or alternatively submitting reports or paying their fees late thus incurring a penalty. In each case additional financial obligations arise. The Commissioner then receives a complaint that the FSA is too rigid in not having regard to what are described in the complaint as “extenuating circumstances”. Rarely is the Commissioner able to find that that is the case.

One issue in particular is worthy of note by the Industry. The FSA has to set a date upon which it calculates the fees that firms must pay for the accounting year starting the following April. The relevant date is 31 December in each year. The Commissioner is aware that if an individual, conducting a controlled function for an authorised firm, is a member of that firm on 31 December but nevertheless leaves between 1 January and 31 March, and is not replaced by the firm, nevertheless the firm’s fees will still include that individual’s presence as a determining factor in the calculation of the fees due for the following year which starts on April 1.

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

A number of complainants have commented in their submissions to the Commissioner that they have chosen not to make either written or oral representations to the RDC or allege that they have been advised (wrongly in the Commissioner’s view if it were true) not to make such representations by their legal advisers. It is the Commissioner’s view that individuals or firms who are going through the Enforcement and the RDC process should take full advantage of the opportunities made available to them through the statutory process to make representations to the FSA and RDC. This includes the opportunity to make oral representations to the RDC when given the option. The Commissioner’s reasons for this stance are set out below.

- 1) Representations made throughout the process remove the opportunity for the FSA or RDC to state that by not making representations the individual or firm in question had accepted the FSA or RDC position in its entirety if this is not in fact the case. This can have significant implications with regard to costs awards later in the process.
- 2) It is quite conceivable that during the course of an oral representation and the consequent interaction between the RDC and the firm or individual concerned that important matters which might affect the decision of the RDC could come to light, which the firm or individual may not have realised were significant and hence had not been mentioned or given proper weight in earlier written submissions.

- 3) If the firm or individual believes it has nothing to hide and demonstrates this position by its willingness to engage fully with the Enforcement and RDC process this can only be to its benefit in relation to the subsequent FSA action. If a firm is unwilling to engage fully with the regulatory process, and relevant information is withheld from the FSA, this may put the firm or individuals integrity into question and possibly lead to the RDC taking a harsher stance than it might otherwise have done.
- 4) It is not the case, nor should it be that by exercising this right to make representations to the FSA that the position of the alleged offending firm or individual is thereby prejudiced in any way.

There is a further point worthy of note that should be made at this juncture. Some complainants in presenting their complaint under the scheme provided by the Commissioner appear to take the position that matters that were not raised at the RDC stage can now be raised in some detail with the Commissioner. That is not the case. The Commissioner's jurisdiction is not one that can be used as a procedure whereby it effectively becomes a rehearing or a reconsideration of the RDC process.

### **Court orders to freeze company assets**

It is unfortunate that the Commissioner receives 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 normal consumers it is far more palatable to believe that the FSA is acting wrongly than to consider the possibility that such consumers have been the victim of some sort of illegal enterprise and have lost substantial amounts 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 realise 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 open 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.

### **Equitable Life**

Complaints about the failure of the Equitable Life Assurance Society (ELAS) have been a common referral. 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 an extended period between April 1988 and November 2001. It must be clearly understood 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 January 1999 and 30 November 2001.

The period of time covered by the PHSO's report is important as, the reported failings occurred prior to 1 December 2001, which is the date when FSMA came into force. This means that if the Commissioner considers that a complaint about this matter can be investigated by the FSA and his office, then it would fall under the *transitional complaints scheme*. Effectively that means that whatever the Commissioner's views or no matter how much he may sympathise with a complainant's position he is not able to recommend any financial award. Parliament has not given him that power.

Although the PHSO 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. It is therefore down to the Government (through HM Treasury) to address or respond to the PHSO's recommendations. Currently it has instructed Sir John Chadwick, a retired Court of Appeal Judge, to consider the issue of any compensation in more detail. The final compensation position therefore remains extremely fluid. In addition, it is a matter that has attracted conflicting political approaches. Further, a recent claim for judicial review which raised concerns about the limitations of Sir John Chadwick's mandate from the government and brought by the Equitable Members Action Group, was partially successful. However, precisely what impact that judgment will have upon Sir John's eventual conclusions remains to be seen. Currently the overall and final outcome has still to be determined but the third interim report of Sir John's indicates that his final report will shortly be published. That is the target date stated in the third interim report.

### **Banks**

There have been a number of complaints to the Commissioner's 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. However some are more specific and relate to the actions of the FSA when approving documentation for rights issues and/or mergers. In these cases the Commissioner has to consider the role of the FSA and the bank's advisers together with the information the FSA held and the additional information given to it by the firms.

Many of the complainants who have contacted the Commissioner have indicated that the decisions the banks took (which were supported by the FSA) were often incorrect. Whilst, with the benefit of hindsight, this may have been shown to be the case, particularly in the case of a number of rights issues, this does not mean that the decisions the banks and the FSA took, at the time, were incorrect. When considering claims such as these, the Commissioner has to base his views on whether the decisions the FSA took at the time were reasonable based upon the information in its possession and that any future assumptions it made again seemed reasonable based upon the situation at the time.

### **Searches**

The Commissioner identified potential deficiencies in the training and or knowledge of the FSA's Enforcement staff in relation to search procedures. Particularly this related to an understanding that, the warrants issued to the FSA authorising a search of premises require a police presence throughout the duration of the search rather than just at the time when the warrant is served on the

individual(s) or the firm. The Commissioner recommended that all Enforcement staff involved in the execution of searches should be aware of the detailed requirements set out by the warrant to ensure that the searches remain legal and that the FSA is not subject to complaints stating that there has been a breach of a complainant's human rights. Having adopted this recommendation, the FSA will also ensure that any evidence obtained during a search cannot be challenged by the individual or firm concerned at an RDC or Tribunal hearing.

## Compensation

The Commissioner has identified that over the last 12 months complainants are increasingly looking for financial compensation as a remedy for their complaint. The Commissioner has considered the issue of compensation in detail and in particular has considered Parliament's intention, as manifested in the debate that took place in Parliament before FSMA was enacted, of how the Complaints Scheme was to operate, the consultation subsequently conducted by the FSA board and the implications of the contents of Schedule One of the Human Rights Act of 1998.

The Act stipulates in Part IV of Schedule One that the FSA is exempt from liability in damages. It does however also state that the exemption does not apply if a relevant act or omission, that is the subject of a complaint involves "bad faith" on the part of the FSA which can be proved; or the complaint about the behaviour of the FSA stems from an "act or omission" that was unlawful within the provisions of section 6 (1) of the Human Rights Act 1998. The exemption from liability depends therefore upon the FSA not acting in a way incompatible with a convention right. These rights are set out in Schedule One of the Human Rights Act 1998.

Apart from that exemption the only other relevant reference to monetary awards arises in paragraph 1.5.5 (G) of COAF which states:

*"Remedying a well founded complaint 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 the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."*

The above summary effectively poses two questions. First what is the approach of the European Court of Human Rights at Strasbourg if there is an abuse of a convention right? The Court in question it must be pointed out does not replicate in its approach the English common law approach to damages and there are no clear patterns or precedents to give any guidance. In a case in 2002, for example, the House of Lords stated in a judgment reinforcing that:

*"The practice of the European Court is therefore inconsistent with an award of either modest or nominal damages in a case where neither pecuniary nor non-pecuniary damage is established. It follows that such an award cannot be justified by a supposed need to deter the authorities of the state as to vindicate a Convention right".*

The second question arises out of COAF 1.5.5 (G). What is meant by a compensatory payment on an ex gratia basis? The first point to make in answering this question is that it is clear from statements made in the Parliamentary debates at the time the passing of FSMA that the Complaints Scheme is not intended to take the place of damages to be awarded against the FSA. Secondly, there has to be a causal connection unbroken by intervening events between the act of the FSA and the

complainant's allegation of direct damage suffered. Thirdly, a compensatory payment is not akin to, nor meant to replicate, an award of damages.

Butterworths Financial Regulation Service in paragraph 46 supports the view that the compensatory payments under FSMA are very different to formal awards of compensation and/or damages. It states

*“payment on an ex gratia basis is consistent with legislative provisions which, as noted, do not involve any formal finding of liability on the part of the FSA or the making of any formal award of compensation”.*

When FSMA was at the Report stage, the Minister commented that:

*“It is important that the complaints scheme is not seen as a means of circumventing the FSA's statutory immunity.”*

It is also apparent that Parliament did not intend for compensatory payments under the FSA's complaints scheme to be the subject of detailed legal analysis or the common law test of damages. The Commissioner therefore concludes that Parliament did not intend any Complaints Commissioner to apply strictly common law principles of damages in deciding whether (and at what level) to recommend any compensatory payment to be made. However, it does appear sensible for the Commissioner to have some regard to the basic principle of damages when considering compensatory payments in a given case.

The Commissioner, in summary, is of the view that a successful complaint does not, and should not, give an automatic right to compensation. In arriving at this decision the Commissioner feels that each complaint should be treated on its own merit and that the scale and impact of the alleged 'maladministration' should ultimately decide upon whether a financial award should be made. The Commissioner holds the view that most awards payable from the scheme should be somewhat 'modest' and that any award should not be made to penalise or punish the FSA as the regulator. The Commissioner would also point out that where an award is requested consideration will always be given to 'causation' and where there is a clear break in causation then an award will either be reduced or not made at all.

### **Statutory aims and objectives of the FSA**

A number of complainants in their submissions to the Commissioner have tried to rely upon a limited construction of the statutory objectives or aims of the FSA as contained in FSMA. 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 the Commissioner's 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 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. 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 and 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 probably a better situation than losses inevitably being suffered by all classes of consumer.

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

The Commissioner has 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. It is hoped that FSA will give consideration to how it can make firms make these distinctions clearer to the consumer.

### **Land-banking schemes**

The Commissioner has 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. Above all take advice from an independent source.

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

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. 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 in place, the liability remains in place and assets of a personal nature are at risk.

## **APPENDIX A**

### **The Complaints Scheme**

#### **Extracts from the Office of the Complaints Commissioner Booklet**

##### *Bringing a complaint against the Financial Services Authority*

#### **What is the Financial Services Authority?**

The FSA is the single statutory regulator for the financial services, general insurance and mortgage industry. Its existence and remit are set out in the Financial Services and Markets Act 2000 (FSMA).

#### **The FSA Complaints Scheme**

The scheme was set up in September 2001. It provides the arrangements required under FSMA for the FSA to investigate any complaints in connection with the FSA exercise of, or failure to exercise, its functions under FSMA, other than its legislative functions. The scheme is available on the FSA website (see end of leaflet for website address). The scheme provides an important source of information for the FSA to assess its performance as regulator and provides a system of checks and balances for its stakeholders. The FSA complaints handling arrangements are explained in a separate leaflet 'Bringing a complaint against the Financial Services Authority'.

#### **How a complaint will be treated**

A complaint should be referred to the Commissioner where you are dissatisfied with the decision of the FSA investigation into your complaint or where you are not satisfied with the progress made by the FSA in its investigation of your complaint. The Commissioner has complete discretion to decide whether the complaint falls within his jurisdiction, and if so, whether or not he will investigate the complaint. Furthermore if the complaint has not already been put to the FSA, the Commissioner may decide not to investigate until the FSA has had opportunity to investigate the complaint.

If, on the conclusion of the Commissioner's investigation, he decides that the complaint is well founded, recommendations may be made to the FSA and the complainant about how things might be put right. If the Commissioner does not uphold your complaint he will explain the reasons to you.

The Commissioner provides an independent review of complaints against the FSA and consequently aims to provide finality to the process. On occasion complainants' views differ from the Commissioner substantially and they persist with contacting the Commissioner after the issuance of his decision. However, the Commissioner is also accountable for the budgeting of his office and thus must ensure that this is spent wisely and achieves value for complainants and the wider public. Consequently there are occasions where the Commissioner has to use the discretion available to him not to investigate a complaint further. Where this happens a letter will be issued to the complainant explaining the Commissioner's stance. If the Commissioner's office is minded not to respond to any further contact from the complainant this will also be explained within the letter.

#### **Complaints the Commissioner can deal with**

The Commissioner can deal with any complaint about the way in which the FSA has carried out, or failed to carry out, its role. This includes complaints about mistakes or lack of care, unreasonable delay, unprofessional behaviour, bias or lack of integrity by the FSA and its staff. The Commissioner will investigate your complaint with a view to completing it within 20 working days. If the investigation is going to take longer than that he will write to inform you and keep you updated.



**APPENDIX A**

The Commissioner draws his conclusions from the evidence available to him and provides them to both the FSA and the complainant for any further submissions that either party wish to make. Once such submissions have been reviewed a final decision is published, although not in all cases. As the Commissioner provides conclusions to his independent investigation, which must be based upon the evidence available to him, unsubstantiated allegations are unlikely to be successful.

**Complaints the Commissioner cannot deal with**

The Commissioner does not investigate complaints about firms. Complaints about firms should be directed to the firm in question. If dissatisfied with the decision or complaint to the firm is not possible, the complaint should be directed to the Financial Ombudsman Service (FOS).

The Commissioner does not investigate complaints about firms who no longer exist or cannot meet their liabilities. Such complaints should be directed to the Financial Services Compensation Scheme (FSCS).

The Commissioner cannot investigate complaints about the legislative functions of the FSA under FSMA. This includes the making of rules, issuing codes and general guidance.

If you have a general enquiry about the financial services industry this should be addressed to the Consumer Contact Centre at the FSA.

**Is there a time limit for making a complaint?**

Yes. Your complaint should be made to the FSA within 12 months of your becoming first aware of the circumstances giving rise to your complaint. If the complaint is made later than this you will need to demonstrate reasonable grounds for the delay. Complaints made to the Commissioner should be made within 3 months of the FSA decision.

**How can I make a complaint?**

Firms must make their complaint in writing to the FSA (email, fax or letter) and in turn the Commissioner. Individuals can make their complaint in any format, however, a written complaint is preferred (email, fax or letter). If you are in any doubt as to whether you have a complaint, approach the Commissioner via the contact details provided.

**Does it cost anything?**

Making a complaint to the FSA and the Commissioner does not incur any charge. However if you take specialist or legal advice you must meet these costs yourself, even if your complaint is successful.

**Contact details**

Office of the Complaints Commissioner  
8th Floor City Tower  
40 Basinghall Street  
London EC2V 5DE

Email: [complaintscommissioner@fsc.gov.uk](mailto:complaintscommissioner@fsc.gov.uk)  
Telephone: 020 7562 5530

Website: [www.fsc.gov.uk](http://www.fsc.gov.uk)

**APPENDIX B****Expenditure**

**Profit and Loss Account  
For the year ended 31 March 2010**

	<b>2010</b>	2009
	<b>£</b>	£
Administrative expenses	479,514	(489,372)
Other operating income	479,514	487,794
<b>Operating loss</b>		(1,578)
Interest receivable		1,578
		<hr/>
<b>Profit on ordinary activities before taxation</b>	–	–
Tax on profit on ordinary activities	–	–
	<hr/>	<hr/>
<b>Profit on ordinary activities after taxation</b>	–	–
	=====	=====

All amounts relate to continuing operations.

There were no recognised gains and losses for 2010 or 2009, other than those included in the profit and loss account.

The audited accounts for the period ending 31 March 2010 are available from the Registrar of Companies, Companies House, Crown Way, Maindy, Cardiff, CF14 3UZ. The company's auditors are Bishop Fleming.



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Office of the Complaints Commissioner  
8th Floor City Tower 40 Basinghall Street London EC2V 5DE