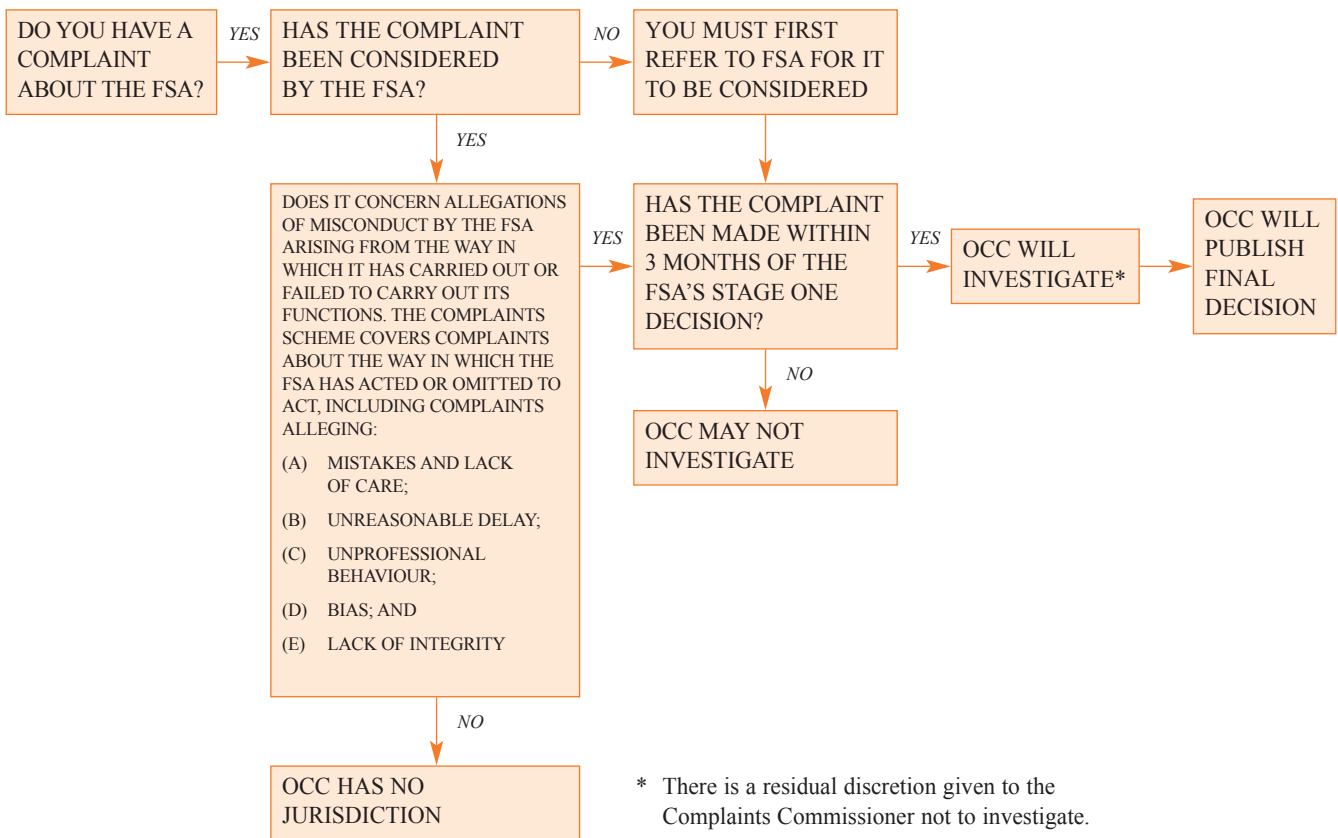




# Office of the Complaints Commissioner Annual Report for 2010/11



## 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)

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# Annual Report for 2010/11

This is the Tenth Annual Report of the Office of the Complaints Commissioner.  
It covers the period from 1 April 2010 to 31 March 2011.

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 further three year terms on 3 September 2007 and 3 September 2010. 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 industry and consumers 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, a member of the Investigatory Powers Tribunal and a member of The Speaker's Committee for the Independent Parliamentary Standards Committee.

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## 1 Overview

Since 1 April 2010, the Office of the Complaints Commissioner (OCC) received 152 allegations and complaints. Individual consumers account for 78% of overall complainants compared to 70% of complainants last year, the remainder being made up of solicitors on behalf of their regulated clients, Members of Parliament and individual firms.

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 Poyn tz

Statutory accounts have been lodged at Companies House.

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## **Current Proposal by HM Treasury to changes to the Financial Services and Markets Act 2000 (FSMA)**

The necessary legislative changes will be achieved by amending FSMA rather than by starting from a fresh blank sheet of paper. The particular issues arising in the context of the role of this office at the moment appear to be:

- (a) The proposal that the Prudential Regulatory Authority (PRA) will not have a complaints system that comes within the ambit of what replaces this office. The current proposal for consultation as described in paragraph 3.62 of the February 2011 consultation paper reads as:

“The Government believes that it is important that the PRA maintains a system for the investigation of complaints. The PRA will therefore be required to have a complaints procedure, distinct from the complaints procedure for the (Financial Conduct Authority). Legislation will provide that external scrutiny of complaints will be carried out by an independent person appointed by the Bank. This could be a non-executive director on the Court of the Bank of England, in keeping with Court’s role in challenging and holding the PRA to account on certain matters. The Government expects that the PRA will put in place arrangements to ensure that the complaints’ process is sufficiently transparent.”

- (b) The proposal in the same paper relative to the body previously described as the “Consumer Protection and Markets Authority” but now to be known as “The Financial Conduct Authority” (FCA) centres around a continuation of the complaints system as currently carried out by this office. Paragraph 4.40 states:

“Under the current structure, the FSA is required to maintain arrangements for the investigation of complaints, including a requirement for external investigation if the complainant is dissatisfied with the results of the FSA’s internal investigation. The FCA will be required to have a complaints procedure, replicating the existing provisions of FSMA. As set out in chapter 3, the FCA and PRA will maintain separate arrangements for dealing with complaints.”

- (c) The initial comment arises that as there will be an overlap between the PRA and the FCA in what those bodies are charged in the current proposals to do, there will be, in all probability, a difference of opinion at whose door the cause of a justifiable complaint will be laid. It can be foreseen now that that will not be an easy issue to resolve whether viewed from the perspective either of the Industry or the consumer.
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## 2 Statistics from 1 April 2010 to 31 March 2011

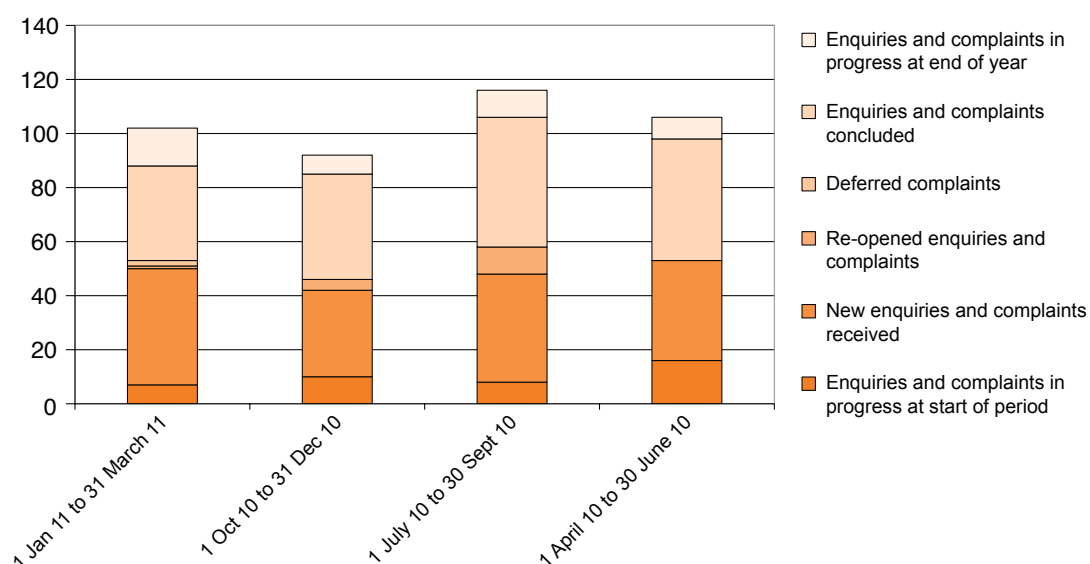
### 2.1 Enquiries and complaints received during the year

The table below shows the number of enquiries and complaints received by the Commissioner during 2010/11. The volume of new and re-opened complaints received during the year increased to 167 for the year ended 31 March 2011 as compared to 139 in the previous year. The volume of complaints received and concluded is evenly spread over the quarters with a slight peak in volume during the fourth quarter due to a group of complainants submitting formal complaints against the FSA's action against a particular firm.

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

	2010-11	1 Jan 11 to 31 March 11	1 Oct 10 to 31 Dec 10	1 July 10 to 30 Sept 10	1 April 10 to 30 June 10	2009-10
Enquiries and complaints in progress at start of period	16	7	10	8	16	9
New enquiries and complaints received	152	43	32	40	37	118
Re-opened enquiries and complaints	15	1	4	10	0	21
Deferred complaints	2	2	0	0	0	6
Enquiries and complaints concluded	167	35	39	48	45	126
Enquiries and complaints in progress at end of year	14	14	7	10	8	16

**Table 1: Enquiries and Complaints Received during 2010/11**



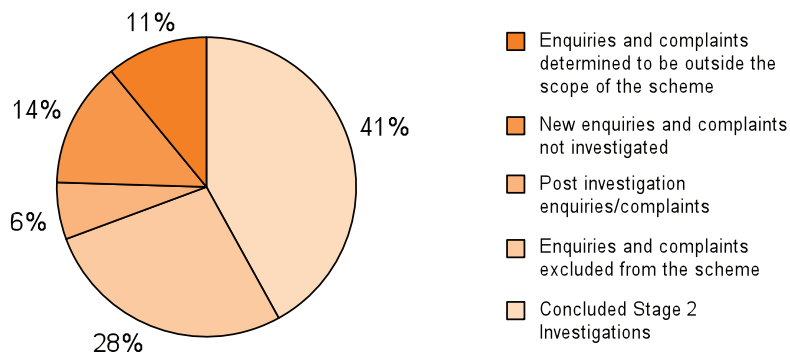
## 2.2 Enquiries and complaints concluded during the year

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

**Table 2: Enquiries and complaints concluded 2010/11**

	2010-11
Enquiries and complaints determined to be outside the scope of the scheme	70
New enquiries and complaints not investigated (after consideration of all the issues)	46
Post investigation enquiries/complaints	10
Enquiries and complaints excluded from the scheme	23
Concluded Stage 2 Investigations	18
<b>Total enquiries and complaints concluded</b>	<b>167</b>

### 2009/10 Complaint summary



The number of complaints and enquiries concluded during the year amounted to 167 compared to 126 the previous year. Complaints which were excluded from the scheme usually relate to the performance of the FSA's legislative functions under FSMA. 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.

In cases where the Commissioner deems the complaint to be outside the scope of the scheme or decides not to investigate, a detailed report is issued to both the FSA and the complainant explaining in detail the reasons for the decision taken.



### 2.3 Stage 2 investigations during the year

The table below gives information about the stage 2 investigations undertaken by the Commissioner during 2010-11.

**Table 3: Stage 2 investigations 2010-11**

Stage 2 Investigation	2010-11
at start of period	3
started during the period	23
Concluded during the period	18
In progress at end of period	8

The Commissioner tends to publish (anonymised) Stage 2 final decision letters on the OCC website except in cases where the complainant explicitly asks the OCC not to. The FSA has never asked the Commissioner not to publish a decision.

Common themes amongst the Stage 2 investigations concluded during the period centred around fee disputes between firms and the FSA, late submissions of RMAR forms and reporting issues. The Commissioner upheld a number of complaints during the period (some not published due to a request from the complainant). In one particular instance a firm's clients had received incorrect information from the FSA Consumer Contact Centre which led to the loss of those clients and business for the firm: this complaint was upheld by the Commissioner and the FSA asked to make an *ex gratia* payment to the firm.

### 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 2010-11**

Type of complainant	1 April 10 to 31 March 11
Individual Members of Public	128
Independent Financial Advisers	10
Solicitors	2
Members of Paliament	0
Firms/Groups	25
Third Parties	2
<b>Total enquiries and complaints concluded</b>	<b>167</b>

## 2.5 Subject matter of complaints

The table below provides information on the subject matter of complaints reviewed by the Commissioner during 2010/11. 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	2010/11 Number
Money Transfer firms <sup>(1)</sup>	2
Issue of shares and corporate debt	2
Boiler room scams/Ponzi schemes <sup>(2)</sup>	7
Complaint relating to Enforcement action <sup>(3)</sup>	4
Complainant seeking redress – alleged indirect loss <sup>(4)</sup>	1
Complainant seeking redress – alleged direct loss <sup>(5)</sup>	3
Fees – late returns (annual fees and regulatory returns)	8
FSA General Regulation <sup>(6)</sup>	30
Breach of Human Rights	2
FSA giving out incorrect information	2

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.

### Notes

1. Refers to firms registered with but not authorised by the FSA
2. Investors complaining about the FSA's behaviour in relation to such schemes and scams.
3. Complainant is directly involved with the regulated body (complainant is not an investor).
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.
5. There is no interim party.
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.

### 3 Themes and Issues

#### Fees issue

This issue continues to arise on an annual basis. Where a firm fails to inform the FSA of alterations to its employees who undertake controlled functions, or fail either to submit a report or pay their annual fees on time, it incurs a financial penalty. The Commissioner has received a number of complaints that the FSA is too rigid in applying this penalty, that the level of the penalty is not representative of the firm's omissions or revenue and that the FSA does not have any regard to what the firm describes as "extenuating circumstances" which resulted in the oversight. Unfortunately, the Commissioner is rarely able to find that the issue giving rise to the firm's failure is "exceptional" and therefore is able to recommend that the penalty be waived.

Firms should also be aware of their individual reporting requirements particularly when they are required to submit the RMA-J part of their GABRIEL returns. Over the last year the Commissioner's office received a number of complaints about this issue. Ultimately, if a firm fails to submit a report in accordance with the FSA's rules firms will incur a late submission penalty if a return is not submitted on time. Firms should therefore ensure that they know what their reporting requirements are and how to submit reports (particularly the RMA-J which appears often to be overlooked). Although many firms indicate that they were unaware of the reporting requirements and did not receive a reminder from the FSA, this is insufficient for the Commissioner to uphold their complaint. Ultimately firms are required to know when their reports are due and, if there is any doubt, a reporting schedule can be viewed on GABRIEL or can be obtained for the Firm's Contact Centre.

One issue is also 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. That relevant date is 31 December in each year. The Commissioner is aware that if a firm wishes to cancel its Part IV permissions the FSA must receive the appropriate cancellation form by 31 March. If the FSA does not receive the form then the firm will still be responsible for its fees for the following year. When considering complaints of this nature, many firms who come to the Commissioner's office maintain that they sent the form before the deadline, but are unable to provide evidence that the FSA received the form. As such, the Commissioner would strongly suggest that when sending cancellations form, particularly near to 31 March deadline, a firm should use recorded delivery and also retain a copy of the electronic 'signed for' notice in the event that the FSA says that it did not receive the form.

#### Compensation

Many complainants, when referring their complaint to the Commissioner are increasingly looking for financial compensation as a remedy. Although the Commissioner's report last year dealt fully with this problem the basic issues can benefit from a brief repetition. The Commissioner has considered the issue of compensation in detail. The background to this issue is that Part IV of Schedule One of FSMA stipulates that the FSA is exempt from liability in damages except where the subject of the complaint involves either "bad faith" on the part of the FSA or in relation to an "act or omission" that was unlawful within the provisions of section 6 (1) of the Human Rights Act 1998. Paragraph 1.5.5(G) of COAF also sets out that:

"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 approach of the European Court of Human Rights at Strasbourg must be considered if there is an abuse of a convention right. The European Court of Human Rights does not replicate, in its approach, the English common law approach to damages and there are no clear patterns or precedents to give any firm guidance.

Consideration must also be given to the meaning of "a compensatory payment on an *ex gratia* basis" as set out in COAF 1.5.5 (G). From statements made in the past Parliamentary debates on this issue, it is clear that the Complaints Scheme is not intended to take the place of damages, whether common law based or otherwise, to be awarded against the FSA. There also 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 and which damage must not also be too remote or unforeseeable. Any compensatory payments recommended under the complaints scheme should not to be the subject of detailed legal analysis nor considered to represent therefore the exact basis that forms even the common law test of damages.

The Commissioner, feels that each complaint should be treated on its own merits and that the scale and impact of the alleged 'maladministration' should ultimately decide upon whether a financial award should be made. A successful complaint does not attract an automatic right to compensation. The Commissioner believes he must have some regard to the basic principle of damages however when considering the issue of a compensatory payment even on an *ex gratia* basis to a successful complainant.

Where an award is considered necessary, the Commissioner will always consider whether there is a direct causal link between the action of the FSA and any financial loss suffered by the complainant. Where there is a clear break in the chain of causation then an award will either be reduced or not made at all. Contributory negligence is also a matter taken into account by the Commissioner. The Commissioner also holds the view that most awards payable from the scheme should be 'modest' and that any award should not be made to penalise or punish the FSA as the regulator particularly given that the FSA is funded by the industry.

In one case, the Consumer Contact Centre (CCC) on receiving telephone enquiry from a client of an adviser, which client was about to make a substantial investment with the help of that adviser, told that enquirer that the adviser was not an authorised representative. The potential client withdrew from the investment and the resultant potential commission was lost to the adviser. Following the Commissioner's investigation it was held that the FSA's actions were the direct cause of the adviser's loss and as a result the Commissioner was able to recommend that a compensatory payment, equal to the lost commission, should be paid by the FSA.

## **Record Keeping**

The Commissioner has received a number of complaints during the year where he has identified failings in the manner in which the FSA retains records. A number of the cases concerned relate to calls made by consumers to the FSA's CCC. Whilst the Commissioner accepts that it is not possible to retain actual recordings of all of the calls that are made to the FSA's call centres, where the FSA retains electronic written records these should be obtainable if required as part of a complaint investigation. In two complaints which have been referred to the Commissioner, it is clear that there has been difficulty in retrieving records.

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## **Confidentiality**

The Commissioner has received a number of complaints where the complainant is unhappy that the FSA will not provide them with details of what action, if any, it may have taken or is planning to take against an authorised firm as a result of information provided by the complainant. Section 348 of FSMA prevents the FSA from disclosing information it has received from or about firms other than in limited circumstances. Unfortunately, informing an individual who has passed information to the FSA about discussions which take place between the FSA and the firm in question is not one of the circumstances where disclosure is permitted. There will also be a number of circumstances in which the FSA receives information concerning firms it does not regulate (for example when it is considering whether a firm ought to be authorised). The restrictions on disclosure in section 348 of FSMA also apply to information the FSA receives relating to firms it does not regulate. Further, if the FSA is taking formal enforcement action against a firm or individual, section 391 of FSMA prevents the FSA from publishing any information about the detail of that action until it has been finally concluded.

A number of complainants have indicated that they are not third parties but are, for a variety of reasons, an interested party. Whilst complainants may feel that they have a vested interest in finding out what action the FSA had taken, in the Commissioner's opinion, in very few cases will the complainant be in a position which would enable specific information to be released about the nature of the FSA's actions, if any, and the reason why that action was taken.

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

This issue continues to produce a number of complaints from the Industry the most recent highlighting an allegation that the FSA pressurises those facing penalties into settling the matter of the appropriate penalty informally by negotiation rather than risking a worse penalty by choosing to go to the RDC. These allegations are robustly denied by the FSA who emphasise in doing so the considerable amount of time and money that is thereby saved if such an informal agreement can be reached.

It is clear to the Commissioner that there can be misunderstandings on both sides in this area. He believes that the best way to avoid that being the case is that whenever possible at the end of the informal but agreed settlement discussions, both sides agree that what has taken place is an agreed settlement freely arrived at for the convenience of both parties. That would avoid later allegations of undue pressure.

Similarly, a number of complainants who have been through the Enforcement process have, having opted to accept the FSA's early settlement proposals, referred the matter to the Commissioner as they become subsequently unhappy at the penalty they have received. The Commissioner has two observations to make about this type of complaint.

The first is that the rules of the complaints scheme exclude complaints of this nature from being considered. The correct procedure is to follow the RDC process and not to agree to any settlement in the first place. The RDC was created independently to consider the conduct of firms and decide on the appropriate penalty (if any) a firm should receive stemming from an Enforcement investigation. There is no question if a settlement is agreed of a second bite of the cherry, once a settlement is reached, by using the Complaints process.

The second point is that, even if the rules of the complaints scheme did permit the investigation of this type of complaint, by settling the matter the complainant does so on the basis of the

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FSA's terms and gives up his right subsequently to refer the matter either to the RDC or the Tribunal. As the complainant has accepted the terms set out by the FSA it would be inappropriate for the Commissioner to review the outcome of the Enforcement investigation and any penalties which have been accepted. Ultimately, before agreeing to the early settlement of an Enforcement investigation (or agreeing to any voluntary undertaking with the FSA), the individual must be comfortable with concession he is making and understand that he does so on the basis of the FSA's terms freely entered into, although it is always good practice to take legal advice before so doing. The Commissioner makes this point as by entering this agreement the matter cannot be revisited in the future no matter how unfair the penalty or undertaking may subsequently appear to be.

### **Money transfer firms**

Recently, the Commissioner has received a number of complaints relating to the regulatory status of money transfer firms. Following the implementation of the EU's Payment Services Directive (2007/64/EC) (PSD) in 2007 by way of the Payment Services Regulations (2009), all firms offering money transfer services had to be either registered with, or authorised by, the FSA. The criteria for this was set by the EU Directive which set out that all firms who conduct up to €3M per month of qualifying payment transactions in a rolling average simply need to be registered with the relevant regulator. Whereas all firms which conduct more than €3M per month of qualifying payment transactions in a rolling average have to be authorised by the relevant regulator.

Under the Directive (and the Regulations), any firm which conducts significant authorised transactions and needs authorisation will be subject to the normal authorisation and approval process. However, any firm conducting small amounts of business and which simply needs registration with the FSA, is not required to go through the normal authorisation and approval process, but simply needs to submit periodic reports to the FSA about that firm's activities.

Although the difference between registered with and authorised by the FSA may seem small to a consumer, it does have significant implications. Ultimately, the FSA is not required by law to undertake significant checks into the background of the individuals running firms which are simply registered with it. The FSA is only required simply to check that none of the people running the firm have been convicted of financial crimes, that it is based in the UK; and if (my emphasis) it is choosing to protect its customers' money ('safeguarding'), how it will do so.

However, if the firm is authorised by the FSA, it checks that the firm is properly organised and is run by suitable people who have not been convicted of financial crimes, has sufficient capital behind it; and has proper arrangements in place to protect customers' money if it gets into serious financial difficulty. If the firm also uses agents, the FSA also makes checks on them.

There are also differences in relation to the safeguards which are in place regarding customers' money. As indicated above, there are no requirements for registered firms to put in place any arrangements to safeguard customers' money, whereas an authorised firm must safeguard customers money while it is holding it (if overnight or longer). This applies if the amount of the transaction is more than £50, in which case they must safeguard the full amount and not just the amount of money over £50. The safeguarding arrangements must be kept separately (for example in a different account) to their own funds, so that if the firm ran into financial difficulties customers' money would still be safe.

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However, although authorised firms have to put in place safeguarding arrangements these arrangements only apply to money it has received for making a payment transaction. Money a firm receives for other business activities, including that passed to it for a future purchase of foreign currency (whether or not this will then be transferred) would not be covered by these safeguarding arrangements. This means that money a consumer may 'deposit' with an authorised money transfer firm for a future foreign exchange transaction will not be covered by the mandatory safeguarding arrangements.

After discussions with the FSA I have concluded that, having regard to the way in which the PSD has been implemented into UK law, while the FSA will investigate complaints in this area, complainants do not have access to my office if they are dissatisfied with the FSA's initial investigation. I will consider the FSA's views further depending on the volume of complaints received under the PSD.

### **Complaints which the Commissioner cannot investigate**

The Commissioner has received a number of complaints from firms who are unhappy with either their annual fees or additional levies which they must pay. The Commissioner is unable to consider complaints of this nature as they fall outside of his jurisdiction as intended by Parliament. Likewise, the additional levies the FSA collects on behalf of the Financial Ombudsman Service (FOS) and/or Financial Services Compensation Scheme (FSCS) are not set by the FSA but are set by the FOS and/or FSCS and simply collected by the FSA.

The Commissioner continues to receive significant correspondence from consumers about authorised firms and alleged failings on the part of the FSA in supervising a firm as a result of alleged incorrect advice received from the firm. Clearly, as the FSA cannot supervise each and every piece of regulated activity (as this is the role of the firm's or network's Compliance Officer), and as the Commissioner cannot intervene in disputes between consumers and the authorised firms, the consumers are advised to complain in the first instance to their financial adviser and thereafter if necessary to the FOS.

Similarly, the Commissioner also receives a significant amount of correspondence from firms who are unhappy with decisions reached by the FOS. Complaints of this nature fall outside of the Commissioner's jurisdiction and any firm which is unhappy with a FOS decision should either request that the matter be considered by an Ombudsman, where the decision has been made by an adjudicator, or consider referring the matter to the FOS' Independent Assessor where the decision was made by an Ombudsman. Thereafter, where the decision has been made by an Ombudsman the only option is to apply for leave to have the FOS' decision judicially reviewed (although any firm considering this should seek legal advice due to the potential costs involved).

### **Unfair Contract Terms and Legal Expenses Insurance**

The Commissioner has received a number of complaints relating to what are alleged to be terms within an authorised firm's documentation which the complainant claims are breaches of the Unfair Terms in Consumer Contract Regulations (1999). When bringing these complaints to the Commissioner the complainant suggests that the Commissioner can instruct an authorised firm to amend its contract terms. When considering claims such as these, the Commissioner has to base his views on whether the decision the FSA took, when reviewing the terms, is reasonable based upon the explanations given at the time.

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Similarly, the Commissioner has also received a number of complaints relating to firms providing Legal Expenses Insurance (LEI). In one of the cases the Commissioner received during the past year, the complainant claimed that the FSA was not regulating the industry as the LEI provider would not allow, immediately, the consumer (or subsequent complainant) to select his or her own lawyer. In the Commissioner's opinion, the issue giving rise to the complaint is a misunderstanding of the EU Directive and relates to a dispute about the timing of when the consumer can select and appoint the lawyer of his or her choice. The EU's Legal Expenses Insurance Directive (87/344/EC) is clear in that, unless there is a conflict of interests, until the LEI provider has assessed the claim and feels that there is a reasonable chance of success consumers are not entitled to appoint their own lawyer. Inevitably when the complaints of this nature reach the FSA, or indeed the Commissioner, there is a great deal of anxiety on the part of the consumer (who is looking to claim under their LEI policy) together with considerable displeasure with the LEI provider. Nevertheless, the fact that the FSA's involvement may simply be to ensure that the LEI provider is complying with the rules, does not mean that the FSA is not regulating correctly the industry.

### **Issue of shares and corporate debt**

The Commissioner has received a number of complaints about the FSA's role when checking prospectuses in relation to share and/or corporate debt (loan) issues. A number of complainants have complained that the issue has excluded one or more types of private holder, particularly those which do not have electronic holdings.

The Commissioner would initially point out that the issue of shares and/or corporate debt by a listed organisation is not, under the terms of FSMA, a regulated activity and therefore falls outside of the FSA's jurisdiction. However, the FSA does have jurisdiction to consider any prospectus which is issued by the firm.

However, when approving a prospectus, the FSA's role is limited to ensuring that the prospectus complies with the relevant regulations (Prospectus Directive Regulations and the Listing Rules). If the prospectus complies with these requirements then the FSA is compelled to approve it. The Commissioner would add that it is the role of the issuing firm and/or its advisers (rather than the FSA) to ensure that the prospectus complies with any other legislation (such as the Companies Act).

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**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, it is decided 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.

## **APPENDIX A**

### **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 a 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.

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.

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**APPENDIX A****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)

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**APPENDIX B****Expenditure**

**Profit and Loss Account**  
**For the year ended 31 March 2011**

	<b>2011</b>	2010
	<b>£</b>	£
Administrative expenses	(472,665)	(479,514)
Other operating income	472,665	479,514
<b>Operating loss</b>	—	—
Interest receivable	—	—
		<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>	—	—
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All amounts relate to continuing operations.

There were no recognised gains and losses for 2011 or 2010, other than those included in the profit and loss account.

The audited accounts for the period ending 31 March 2011 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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8th Floor City Tower 40 Basinghall Street London EC2V 5DE