

3<sup>rd</sup> April 2014

Dear Complainant,

**Your complaint against the Financial Services Authority**  
**Reference Number: FCA00006**

I write with reference to your email of 12<sup>th</sup> March 2014 addressed for the attention of my Senior Investigator.

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.

The complaints scheme goes on to provide that there are two distinct stages which I refer to hereafter as Stage One and Stage Two. Stage One is the investigation carried out by the FCA itself and Stage Two is the investigation that I carry out when the complainant is dissatisfied with the outcome of Stage One or where the FSA has refused to carry out the Stage One process.

The Stage Two investigations I undertake are conducted under the rules of the Complaints Scheme (as provided in the publication entitled Complaints against the regulators). I have no power to enforce any decision or action upon the regulators. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the regulators. Such recommendations are not binding on the regulators and the regulators are at liberty not to accept them. Full details of the Complaint Schemes can be found on the internet at the following website; <http://www.fca.org.uk/your-fca/complaints-scheme>.

## **Your complaint**

From your recent email, I understand that you are unhappy with the conduct of the Financial Conduct Authority (FCA) and have stated that the:

- *“initial complaint was with regard to the unprofessional and pejorative wording of a statement made by the FCA to ITV in which they repeated the use of the slang words ‘Death Bonds’ and described them as ‘a bet on when people will die’”.*
- *“complaints manager (sic) asserted that the term ‘Death Bonds’ is in ‘common usage’ which, in relation to the general public audience of ITV, clearly it is not. No reference was made to Life Assurance or Pension funds, the performance of which are equally dependent upon mortality”.*

## **Coverage and scope of the transitional complaints scheme**

The Complaints Scheme provides as follows:

### **3 Coverage and scope of Scheme**

- 3.1 The Scheme covers complaints about the way in which the regulators have 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.
- 3.2 Complaints can be made by anyone who is directly affected by the way in which the regulators have carried out their functions, or anyone acting directly on such a person’s behalf, provided that the complaint meets the requirements of the Scheme. To be eligible to make a complaint under the 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.
- 3.3 Complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. Complaints made later than this will be investigated under the Scheme only if the complainant can show reasonable grounds for the delay.

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. I would specifically draw your attention to Section 25 of Part 4 of Schedule 3 of the 2012 Act where it states:

*“Exemption from liability in damages*

- (1) *None of the following is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the FCA’s functions—*
  - (a) *the FCA;*
  - (b) *any person (“P”) who is, or is acting as, a member, officer or member of staff of the FCA;*
  - (c) *any person who could be held vicariously liable for things done or omitted by P, but only in so far as the liability relates to P’s conduct.*
- (2) *Anything done or omitted by a person mentioned in subparagraph (1)(a) or (b) while acting, or purporting to act, as a result of an appointment under any of sections 166 to 169 is to be taken for the purposes of sub-paragraph (1) to have been done or omitted in the discharge, or as the case may be purported discharge, of the FCA’s functions.*
- (3) *Sub-paragraph (1) does not apply—*
  - (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 Human Rights Act 1998”.*

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 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 FCA which is incompatible with the Human Rights Act 1998. My rationale for arriving at this decision is set out below.

### **My Position**

As part of my investigation into your complaint I requested a full copy of the FCA's complaint investigation file. I have also reviewed the statements the FCA issued to ITV in response to the press release you issued.

Having reviewed fully the Regulator's complaint file I understand that it felt that the issues you had raised were not ones which it could consider under the rules of the Complaints Scheme. I believe that it held this view as it felt that your comments amounted to "*no more than dissatisfaction with the regulator's general policies*". In deciding that it could not investigate your concerns the Regulator relied upon paragraph 3.5 of the Complaints Scheme which states:

*"3.5 Circumstances where the regulators will not investigate*

*The regulators will not investigate a complaint under the Scheme which they reasonably consider amounts to no more than dissatisfaction with the regulators' general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged".*

When considering your complaint, it is clear to me that whilst your complaint relates to the FCA's recent press release the gravamen of your complaint ultimately relates to the views and guidance which the FSA, as the relevant regulator, issued to the financial services industry in November 2011 in respect of the sale of Traded Life Policy Investments (TLPIs) to retail investors. Whilst you are clearly unhappy with the terminology the FCA used in this press release, given that the terminology used is prevalent within the financial services industry in relation to the underlying nature of TLPIs (a view which is supported by a quick search of the internet), I concur with the FCA's decision that the provisions contained within paragraph 3.5 of the rules of the Complaints Scheme (which I have set out above) prevent it from considering your concerns.

However, although I concur with the FCA's view that this is not something which can be considered under the rules of the Complaints Scheme, for the sake of completeness I would add that I understand that FCA issued its press release as a result of an approach it received from ITV who asked it to respond to your press release entitled "*Group formed to take on UK Government following Suspension of Guernsey Investment Fund*" (<http://investoraction.files.wordpress.com/2014/02/press-release.pdf>). As a result of this approach the FCA issued ITV with two statements. The first was a short statement, which set out its key concerns, regarding the sale of TLPIs, with the other being a longer and more detailed statement which set out its concerns in much more detail.

I have set out both of the statements the FCA issued to ITV below:

### **Shorter statement**

*“FCA spokesman*

*In 2012, we strongly recommended that Traded Life Policy Investments should not reach the vast majority of retail investors. This was not the first time we have warned the industry about these products. We took action because we found significant problems with the way in which these products were designed, marketed, and sold. These products are complex and high risk, and simply not suitable for the average retail investor.*

*The threat to new customers was significant and growing as more products were about to enter the market. We acted to protect consumers.”*

### **Full Statement**

*“FCA spokesman*

*Traded Life Policy Investments are sometimes called ‘death bonds’ because the ultimate investment is in second-hand life assurance policies, typically insuring the lives of US citizens. Basically, these products’ investment strategy is to bet on when a particular set of US citizens will die. If these people live longer than anticipated, the investment may not function as expected.*

*In 2012, we strongly recommended that Traded Life Policy Investments should not reach the vast majority of retail investors. This was not the first time we have warned the industry about these products. Later, we placed strict rules on the promotion of these products.*

*We took action because we found significant problems with the way in which these products were designed, marketed, and sold. These products are complex and high risk, and simply not suitable for the average retail investor. At the time that we published our recommendation, over half of existing death bond products were in financial difficulty.*

*The threat to new customers was significant and growing as more products were about to enter the market. We acted to protect consumers.”*

Whilst I appreciate that you are unhappy with the statement the FCA issued, the statements are, in my opinion, both factually correct. I would also add that the FCA’s full statement also clearly sets out the full nature of the underlying investments which make up a TLPI. The statement also clarifies how a TLPI contract works, namely that the returns from the underlying investment are dependent upon the mortality assumptions being borne out. Should the mortality assumptions be incorrect (with the lives assured living longer) then the contracts may not function as expected with lower returns and higher servicing costs (as the fund is responsible for maintaining the premiums on the underlying life assurance contracts).

With this in mind, the view expressed by the FCA that TLPis are death bonds (as they are bonds based upon second hand US life assurance contracts) and that they are a bet upon when a particular set of US citizens will die (which is the mortality calculation) is correct. I would also add that, in my opinion, given that the Regulator had previously issued guidance to the industry that TLPI contracts are *generally not suitable* (my emphasis) for retail investors the manner in which it issued the press release was appropriate.

I must also add that, although I have noted your concerns regarding the use of this terminology in light of target audience (ITV viewers), this is a view I do not share. As I have indicated above, the FSA as the regulator had previously issued guidance to the industry, on two occasions, that it felt that TLPIs *generally were not* (my emphasis) suitable investments for retail investors. As the majority of ITV viewers would be classified as retail investors and the FCA's views on the suitability of these investments for this class of investor, the terminology used in the press release would not, in my view, have had an adverse impact upon the way such viewers would view TLPI contracts.

I have also noted your comments regarding the fact that in the press release no "*reference was made to Life Assurance or Pension funds, the performance of which are equally dependent upon mortality*". When assessing your comments, I believe that when referring to life assurance you are referring to what is commonly referred to as term assurance and when referring to pension contracts I assume that you are referring to annuity contracts. Whilst I have noted your comments I feel that you do not appreciate fully the manner in which these contracts work.

The underlying investments in a TLPI investment are second hand life assurance contract which generally only provide a capital or cash value upon the death of the life assured. As such when setting the returns (which include the servicing costs of these contracts) mortality rates have a significant impact on the investment particularly if the assumptions the fund manager has used are incorrect or are not borne out (as should people living longer the fund can have liquidity problems).

Unlike TLPIs life assurance and pension funds do not directly rely upon mortality rates for their overall performance. Whilst attention is paid to mortality rates when setting the premium and annuity rates for both of these contracts, once the premium or annuity rates is set mortality rates have no further impact upon the contracts. The future sustainability of the contract is then reliant upon the underlying life or annuity funds which generally are made up of a variety of different asset classes (which can generally be classified as equities, bonds, property and cash). As such, incorrect mortality rate assumptions, will only have an impact on the premium payable for a life assurance contract and the level of income which a consumer will receive from their annuity (be it a purchased life or compulsory purchase annuity). Whilst an incorrect assumption will have an impact upon the underlying life or annuity fund this will have considerably less of an impact on the fund (and its long term sustainability) than would result from adverse market movements.

## **Conclusion**

When arriving at my Decision I have to consider the FCA's actions and the rules of the Complaints Scheme. In this situation, the FCA has explained that it believed that your complaint was not something which it could consider under the rules of the Complaints Scheme. Whilst I concur with this view, I have provided you with some additional background information in the hope that it will provide you with additional clarification and help you understand why the FCA (and the FCA before it) believe that TLPI based investments are generally not suitable investments for retail investors.

However, I would also specifically draw your attention to paragraphs 6.14 and 6.8 of the Complaints Scheme which states:

- 6.14 The Complaints Commissioner will not investigate any complaint which is outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with the Complaints Commissioner.

In my view, your complaint relates to your continuing displeasure that the FCA (together with its predecessor the FSA) has adopted the view that TLPIs are not suitable investments for retail investors and have issued guidance to the industry (on a number of occasions) to reflect that view. In my opinion, the press release about which you are now unhappy simply reiterates this guidance. As I have explained the fact that you are unhappy with a position adopted by the FCA *does not* (my emphasis) bring the issue into the Complaints Scheme.

I should also point out that whether a complaint is within the Complaints Scheme is at my sole discretion. For the reasons explained above, I do not believe that this case justifies an investigation by me.

- 6.8 Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the relevant regulator(s)' progress in investigating a complaint, may refer the matter to the Complaints Commissioner, who will consider whether to carry out his own investigation.

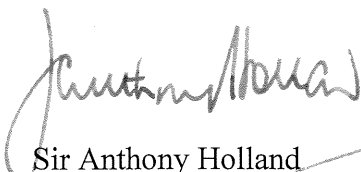
This is a relevant provision as, although I can appreciate your position, it gives me an unfettered discretion as to whether or not I carry out an investigation. In this case, it is clear that you continue to remain unhappy with the guidance the FCA (and the FSA before it) has issued. As my Senior Investigator has set out, as I have previously expressed my views in relation to this issue in the Decision Letter I sent to you, under reference GE-L01369, on 12<sup>th</sup> January 2012, I am unable to comment further on this. Likewise, as, in my opinion, the press release simply reiterates that guidance I do not feel that the matter requires further comment from either me or the FCA.

For the avoidance of doubt, it is my Decision that I am unable to reach a conclusion that the FCA has acted inappropriately or, as a result, that it has failed to handle both your enquiries and complaint appropriately.

In closing there is one further point I feel that I should make. My Senior Investigator has set out to that the powers granted to my office stem from the Financial Services Act 2012 and that this statute also sets out the types of complaints which cannot be considered under the rules of the Complaints Scheme. I have set out above that your complaint falls into this category.

I appreciate that you are likely to remain dissatisfied with the overall position but, and I can put it no other way, finality must now be reached. The role of the Complaints Commissioner, under the Complaints Scheme, is to provide an independent view on his findings into complaints against the Regulator. Once I have issued my Decision Letter my role in the process is complete. For the avoidance of doubt this letter is my Decision letter. You will understand therefore if neither I, nor my office, enter into any further correspondence following this letter. This is not because I wish to be unhelpful but such is the number of cases I receive that my Decision Letter cannot be the subject of debate after it has been issued.

Yours sincerely



Sir Anthony Holland  
Complaints Commissioner