

29th September 2015

Dear Complainant,

**Complaint against the Financial Conduct Authority
Reference Number: FCA00072**

Thank you for your emails. I am sorry for the delay in responding, but your complaint has raised a number of complex issues in connection with the Financial Conduct Authority (FCA)'s conduct which has taken time to investigate.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

You can find full details of how I deal with complaints at www.fsc.gov.uk. If you need further information, or information in a special format, please contact my office at complaintscommissioner@fsc.gov.uk, or telephone 020 7562 5530, and we will do our best to help.

What we have done since receiving your complaint

As the rules of the scheme under which I consider complaints can be found on our website at www.fsc.gov.uk, I do not intend to set them out fully below.

Your complaint

From your email and the papers sent to me by you and the FCA I understand that your concerns relate to the manner in which the FCA considered a Change in Controller application submitted by Partnership PQ. Partnership PQ was, I understand, a firm which was controlled predominantly by you and your son (Mr A), although other family members had an interest in the firm. The application Partnership PQ submitted was in relation to the change in controller of Firm RT. Firm RT was a subsidiary of Firm FG, which was an operator of Self Invested Personal Pensions (SIPPs).

You consider that the regulator's conduct during the assessment of your change in controller application was inappropriate as:

- the time frame given to both Firm RT and you to respond to the FCA's concerns was too short and as a result both infringed a basic rule of natural justice and undermined the entire process;

- you are unhappy that emails from the FCA's Change in Controller Team (the CiC) were not entirely drafted by the sender;
- you believe that the fact that the CiC is allowed to make a recommendation to the Regulatory Transactions Committee (RTC) allows for bias in the change in controller application process; and
- you also consider that a member of the FCA's Supervision Division used terms which were rude when discussing to the change in controller process to the two directors of Firm RT. You add that the approach adopted by the individual from the FCA's Supervision division is relevant to the charge of bias.

My assessment of your complaints

I have now had the opportunity to consider fully the papers presented to me. Although there are a number of complex technical details surrounding your complaint, which you have set out very clearly and comprehensively, at heart your complaint is that the CiC decision to recommend that the RTC should not approve the change in controller application was biased, based upon inadequate grounds, that it failed to provide adequate time to respond and that, as a result, you were effectively compelled to withdraw the application (which you did).

It is important that I explain what I can and cannot consider under the Complaints Scheme. The Complaints Scheme allows me to consider complaints about the conduct of the CiC (which in this case would include the manner in which it assessed your application) but not the recommendations which the CiC made to the RTC. The CiC's recommendations are part of the statutory authorisation/approval process: these can only be challenged through an RTC hearing or by referring the matter to the Regulatory Decisions Committee (RDC) and/or Upper Tribunal.

Within those limitations, I have looked very carefully at the manner in which the application was handled. You feel that the FCA focused excessively on the conduct and experience of your son, Mr A, and the information contained within the CV he submitted.

When assessing a change in controller application, the CiC must satisfy itself about the competency (including the experience), fitness and propriety of those looking to take control of an organisation. In this case, the CiC had a number of questions about the application and had also identified a number of discrepancies in the information provided by Mr A. As a result the CiC concluded that it needed to seek clarification from him before assessing further the application. By seeking this clarification the CiC was fulfilling its regulatory objectives.

You also believe that the FCA prejudged the change in controller application as a result of its previous comments and approach towards non-standard investments held within a SIPP. In this case, having assessed the application, the CiC had a number of concerns which led it to the conclusion that it would be 'minded to refuse' the application. The information provided to me by the FCA indicates that the CiC's concerns were significant and did not, as you suggest, simply stem from minor errors or inconsistencies within the information you and Mr A provided in late June 2014. Specifically, as the CiC indicated in its email of 11th July 2014, its concerns related to the reputation of the Partnership PQ, Mr A and you. From the papers presented to me it appears that the CiC felt that its overall concerns were significant enough for it to make a recommendation to the RTC that it was 'minded to refuse' your change of controller application.

It is not my role to assess whether or not the CiC's recommendation was the right one, and I am aware that you consider that the CiC was inappropriately swayed by past problems with SIPPs which were not relevant to the particular application; but what I can say is that, from my reading of the papers, it is clear that the CiC had concerns which it properly wished to place before the RTC to be tested, and that I can see no evidence of bias. I do not, therefore, uphold the complaint of bias.

I turn now to the question of the deadlines the FCA set. I can fully understand why you are unhappy with the deadlines you were given by the FCA to respond to the concerns it raised, as the response period was extremely short. When it considered your complaint, the FCA accepted that, due to the errors it had made, the deadline it set for you to respond to its final questions was unreasonably short. The FCA has already apologised for this shortcoming.

Nonetheless, I am concerned about the factors which led to the problem of short timescales. My analysis is as follows. Essentially, the problem arose because the CiC initially sought further information on 4th June 2014. That request arose from discussions between the CiC team and the Supervision team (which were perfectly proper discussions to have), but the information requested on 4th June was not, in fact, strictly required for consideration of the application. The fact that the 4th June request was made is indicative of an inadequately focussed and controlled process.

In itself that request would not have caused a problem had it not been for the fact that the making of the request had the effect of removing the FCA's ability to "stop the clock" at a later stage of the process. Regrettably this was a fact which the CiC team recognised too late. When they did recognise it, their response was inadequate. They wrote:

"Further to my email of 24 June 2014, I confirm that I have reviewed the case with my manager and we have concluded that the clock should not be stopped. Therefore the final date for decision on the Notification is 28 July 2014 as originally advised. In view of the above, a short timescale is required for response to my email of 24 June and this email. Please therefore respond by close of business on Wednesday 2 [July] 2014".

I find this unsatisfactory for two reasons. First, the explanation should have been more candid – the FCA had made an error, and should have apologised for it – and second, given the fact that the error was the FCA's, consideration should have been given to a more generous deadline for a response (or the reasons for not doing so clearly explained to the applicants). In the event you, as the applicants, were able to meet the deadline, but that does not excuse the handling.

However, that was not the end of the problems. On 11th July, the CiC issued their 'minded to refuse' notice, explaining to the applicants why they were proposing to recommend to the RTC that the application be refused. As I have explained above, it is not for me to assess the adequacy of the CiC's grounds for opposing the application – that is a matter for the statutory processes of approvals – but I am still concerned about the tight deadline (16th July) imposed upon you as the applicants.

On 15th July, you wrote expressing serious concerns about the process, and making a proposal to alter the application in the hope that that would meet the FCA's concerns. There followed an exchange in which the FCA explained that, in its view, the changes you were proposing amounted to such a significant alteration that a new application would be required, and giving you the opportunity to withdraw the application at any time up until the 28th July deadline (which, as you pointed out, was at odds with the notice of 11th July). In the event, you withdrew the application before the RTC made a decision.

From the information that the FCA has provided to me, I understand that the tight deadline was imposed upon the applicants due to a combination of the statutory time period by which it needed to complete its assessment of the application and the scheduling of the RTC - the application had to be considered at the RTC meeting scheduled for 23rd July. The FCA was faced with a real problem in that, if the application was not considered within the 60-day statutory limit, the application would be granted by default. However, it remains unclear to me why the CiC, given the previous error it had made, could not have provided the applicants with some leeway and extended the deadline until 18th July or even the 21st July rather than requesting a response by 16th July.

The FCA has made representations to me that it is not a requirement that they should inform applicants that a “minded to refuse” recommendation is to be made to the RTC; and I accept that the RTC decision is not the end of the process. If the RTC agrees with the recommendation and issues a Warning Notice, the RTC will inform the applicants that they may challenge its findings (as set out in the Warning Notice) and invite them to do so. Furthermore there are, of course, legal safeguards built in to the further stages of the process.

However, the FCA have explained that a reason for giving applicants notice of a ‘minded to refuse’ recommendation is to enable applicants to consider whether they wish to withdraw their application; and they accept that, while there is no requirement upon the FCA to invite representations for consideration by the RTC, in practice representations are made and considered. In those circumstances, it seems to me that, notwithstanding the limited statutory requirements at the ‘minded to refuse’ stage, it is incumbent upon the FCA to give applicants proper time.

I am mindful that the FCA has accepted that it made mistakes in relation to the deadline, has apologised, and offered you £300 in respect of the errors it made. While that apology and offer is welcome, I am not convinced that it is based upon a full recognition of the errors and their consequences. In my view, these can be summed up as follows:

- a. the 4th June request was both ill-considered and resulted in the inadvertent triggering of the statutory provisions limiting the FCA’s ability to pause the process later;
- b. that error was recognised too late, was not adequately explained to the applicants, and led to the truncation of the time given for the further information requested;
- c. the combination of the original error and the 16th July deadline led to a rushed process in which the complainant reasonably believed that she had very little time to seek a resolution, and ultimately concluded that the withdrawal of the application was the safer course.

These process errors were significant, and undoubtedly caused unnecessary stress to the complainant and the applicants. Furthermore, they made it harder to reach a sensible conclusion. In the representations you made following my provisional decision, you argued that I should draw the conclusion that the applicants had been denied natural justice.

While, as I have explained above, I am critical of the FCA’s conduct of the process, it has to be recognised that the applicants had the option of allowing their arguments to be tested using the statutory process, and chose not to do so. Furthermore, they could make a new application should they so wish.

Taking all those factors into consideration, I consider that the compensatory payment should be increased to £750. This is higher than my usual recommendations for simple administrative error, and reflects the series of errors and the FCA's failure to give proper consideration to extending the deadline in the light of those errors.

Looking forward, the FCA needs to review its CiC procedures to ensure that its staff are properly focussed upon the management and purpose of the process, are trained to understand when deadlines should be adjusted to avoid unnecessary stress and potential unfairness, and are fully aware of how and when it is possible to 'stop the clock' to allow firms to provide further information.

I know that you continue to feel aggrieved that correspondence you received from the CiC was not entirely the work of the person who wrote to you. You feel that this is deception. The FCA has explained that often, when drafting a letter, views may be sort from a lawyer, a manager or a technical specialist and that their contributions may be incorporated. Given the nature of the CiC's role, this approach is not, in my view, inappropriate nor does it amount to deception; and it is unclear to me how the fact that an opinion may have been sought from a third party during the drafting process of an email or letter has adversely affected you. I do not, therefore, uphold that part of your complaint.

You have complained about the relationship between the CiC and the RTC. As the FCA has explained the CiC is, itself, unable to refuse a change in controller application. Under the change in controller process the CiC is only able to make a recommendation based upon its assessment of the application and any additional information it has obtained. Ultimately, to ensure that all applications are assessed impartially, it is the RTC which will make a decision upon whether an application should be approved or refused. The RTC will only do this following a further (and independent) assessment of the application which, where it has received a 'minded to refuse' recommendation will include the assessment of any additional information and/or oral representations from the applicants. Furthermore, applicants have further statutory rights to appeal against RTC decisions. While it is true, as you point out, that the CiC and the RTC are both part of the same organisation, it seems to me that there are adequate safeguards and appeal mechanisms.

Finally I come to your concerns over the comments made by Ms X, a member of the FCA's Supervision division, during a conference call to Firm RT's directors, Mr B and Mr C. I know that the directors feel that Ms X used inappropriate terminology, describing investments as "crappy", when discussing the nature of investments which were held in Firm FG SIPPs (and formed part of the client data which Firm RT was considering purchasing). You consider that this cast doubt upon the good faith of the applicants.

I have two points to make in relation to this allegation. The first is that, if the term "crappy" was used, it was clearly inappropriate, though I do not think that it was inappropriate for Ms X to explore the nature of the potential investments. Following the comments made in my Preliminary Decision about my concern that the allegation had not been thoroughly investigated, the FCA's Complaints Team has now investigated the alleged comments which were made by Ms X. Although Ms X does not specifically recall using the term "crappy" and does not think it is likely she would use the term, she has admitted it is not outside the realms of possibility that the term was used. Ms X has added that, if she did use the term "crappy" then she is very sorry and that it was unfortunate that she caused offence to the firm. I will therefore invite the FCA to make an apology to you for any offence that was caused.

Conclusion

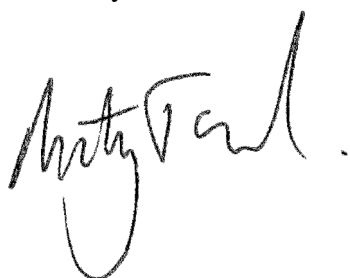
The FCA has already apologised for errors it made and offered you an ex-gratia payment of £300 to reflect its errors. For the reasons stated above, I consider the errors in the way the application was handled to have been more serious, and recommend a payment of £750. I have also recommended changes to the way in which staff are trained in handling applications of this nature. The FCA has confirmed that this has already been instigated.

I do not consider that there is evidence of bias in relation to the CiC's recommendation or that the CiC process (including the making of a recommendation to the RTC) was inherently unfair. The proper way of testing the CiC's recommendation and the RTC's decision would have been through the statutory process, from which you withdrew. It is open to you to submit a new application.

I know you are concerned that the CiC's recommendation to the RTC has resulted in a 'black mark' being placed against your name. That is not the case. The FCA views each application it receives on its own merits and on a case by case basis. Although the FCA will retain details of your withdrawn application on its intelligence system, all applicants are required to disclose their previous applications (including those which have been withdrawn). Whilst the FCA requires applicants to do this, the FCA's assessment of an application is based upon the specific nature of the applicant's submission.

In this case, although the CiC reached a view that it was to recommend it was 'minded to refuse' your application, the FCA's records show that the application was withdrawn and that, as the RTC did not issue a Warning Notice, there are simply unanswered questions resulting from the application. The fact that the CiC made a 'minded to refuse' recommendation to the RTC (which ultimately resulted in the application being withdrawn) does not mean that the FCA will automatically adopt a similar position should a future application be made (although the FCA may raise similar questions when assessing any future application).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner