



20<sup>th</sup> September 2010

Dear Complainant

**Complaint against the Financial Services Authority**  
**Reference Number: GE-L01125**

I refer to your letter of 13<sup>th</sup> April 2010 and email of 18<sup>th</sup> August 2010 in connection with your complaint against the Financial Services Authority (FSA). I am writing to advise you that I have now completed my investigation into your complaint.

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. 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 FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. Full details of Complaint Scheme can be found on the internet at the following website; <http://fsahandbook.info/FSA/html/handbook/COAF>.

I should also make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that FSA is exempt from "liability in damages". It states:

- "(1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.*
- (2) (Irrelevant to this issue under investigation)*
- (3) Neither subparagraph (1) nor subparagraph (2) applies*
  - (a) if the act of omission is shown to have been in bad faith; or*
  - (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998."*

COAF nevertheless then goes on to provide that in paragraph 1.5.5 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.”*

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 the Commissioner considers 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.

### **Your Complaint**

From your correspondence with my office, I understand your complaint relates to the following issues:

- Although you say that your firm submitted a “Notice of Ceasing to Perform Controlled Function Form” (or ‘Form C’), following the resignation of a previous employee, to the FSA in September 2003. You say that the FSA did not action this and as a result your firm has been charged an increased annual fee for the 2004/05, 2006/07, 2007/08, 2008/09 and 2009/10 accounting years. You add that an operative from the FSA’s Firms’ Contact Centre (FCC) told you that the ‘online’ register is not the ‘definitive’ register and that this is often not correct.
- You add that the error did not come to light until 2008 as the invoice you received did not specify who the ‘approved persons’ are and that due to a reclassification of roles (which took place without your knowledge) you believed that the invoices were correct.

- You have raised this issue with the FSA and asked it to correct its records and issue you with a credit note for the 'overpayments' your firm has made. You are unhappy that the FSA has refused to do this.

## Background

From your letters and the FSA's investigation file I believe that the following timeline summarises the course of events in relation to this matter:

Date	Event
31 <sup>st</sup> August 2003	Mr X ceased working for Firm A and at this stage Firm A was required to submit a 'Form C' as this informs the FSA that the individual has ceased to perform controlled functions.
14 <sup>th</sup> July 2008	Firm A sends a fax to the FSA Firm Contact Centre (FCC) as Firm A believed that the FSCS fees were not applicable to them. Firm A requested reissue of invoice and a prompt response.
14 <sup>th</sup> July 2008	Firm A called Credit Company B as they wanted to pay their fees on monthly payments. Firm A explained that they are questioning the fees with the FSA and therefore may not be able to submit the forms before the deadline.
16 <sup>th</sup> July 2008	Firm A telephone call to the FCC asking whether their fax of the 14 <sup>th</sup> July 2008 had been received. Also requesting that this issue be dealt with promptly.
18 <sup>th</sup> July 2008	Firm A receives a letter from the FSA Revenue Department which encloses exemption forms for FSCS. This also confirmed that the exemption would not be applicable for the current year and that the invoice has been produced correctly.
18 <sup>th</sup> July 2008	Firm A calls FSA Revenue Department to explain that Firm A had always been exempt. Firm A were informed that they are required to apply for any exemptions.
27 <sup>th</sup> August 2008	Firm A receives a letter from the FSA Revenue Department explaining that there is an overdue balance on the account. This letter confirms the amount and states that this is undisputed.
9 <sup>th</sup> September 2008	Firm A sends a letter to FSA Revenue Department confirming that Firm A had investigated the situation regarding the FSCS levy and believe that this was likely to apply to them. However, the firm had used the fees calculator on the FSA website and this showed that the fees should have been lower. Firm A asked the FSA to reissue the invoice, for the correct amount.
9 <sup>th</sup> September 2008	Firm A receives a letter from the FSA Revenue department confirming the undisputed amounts and confirming that there would be a £250 admin fee applicable if the fees were not received.
10 <sup>th</sup> September 2008	Firm A sends a letter to FSA Revenue Department stating that the balance on the account is disputed. This was in relation to the £250 charge added in October 2007 and that the annual fees were also incorrect.

22 <sup>nd</sup> September 2008	Firm A receives a letter from the FSA dated 17 <sup>th</sup> September 2007. This letter confirms that there are three registered persons, that the FSA Fees would be applicable.
22 <sup>nd</sup> September 2008	Firm A calls the FSA Revenue Department confirming that Mr X had not been working at Firm A since 31 <sup>st</sup> August 2003 and that the FSA records were incorrect.
14 <sup>th</sup> October 2008	Firm A sends a letter to FSA confirms that Mr X left the firm on the 31 <sup>st</sup> August 2003 and that the FSA were informed. In this letter Firm A asks for a credit note for the amount overpaid for the previous year. In addition requesting the latest invoice be cancelled, and reissued.
13 <sup>th</sup> November 2008	Firm A receives a letter from the FSA Revenue Department dated 11 <sup>th</sup> November 2008 this explains that there is no application for this individual to be withdrawn from the FSA register. This letter asked further questions in relation to the employees of Firm A L, this letter also confirmed that unless evidence could be provided by Firm A that the FSA received documents to withdraw the individual the invoice amount should be paid.
30 <sup>th</sup> November 2008	Firm A sends a letter to FSA Revenue Department suggesting that the FSA records have become corrupted and states Firm A's position. This letter further confirms that the correct form was used to notify the FSA on the 1 <sup>st</sup> September 2003. This letter confirms that this was sent over six years ago and confirms that the firm would try and locate it. The letter then sets out what action Firm A intends to take.
24 <sup>th</sup> December 2008	Firm A sends a letter to FSA Individuals, Mutuals and Policy Department this provides a Form C for Mr X the letter confirms that this had been impossible for Firm A to detect.
31 <sup>st</sup> December 2008	Firm A receives a letter from FSA Revenue Department dated 30 <sup>th</sup> December this letter confirming the amount due and stating further administrative fee of £250.
22 <sup>nd</sup> January 2009	Firm A telephones the FSA Revenue Department chasing a response to their letter of 30 <sup>th</sup> November 2008.
29 <sup>th</sup> January 2009	FSA Revenue Department emails Firm A requesting a copy of the letter as discussed in the telephone conversation above.
2 <sup>nd</sup> February 2009	Firm A emails FSA Revenue Department confirming that they have enclosed a copy of the letter of 30 <sup>th</sup> November 2008.
23 <sup>rd</sup> February 2009	FSA Revenue Department emails Firm A requesting a further copy be sent as they have not been able to retrieve original email.
31 <sup>st</sup> March 2009	Firm A receive the FSA invoice in relation to extra levy for FSCS.
27 <sup>th</sup> April 2009	Firm A sends a letter to the FSA Revenue Department explaining that the invoice it received on 31 <sup>st</sup> March 2009 was incorrect.

5 <sup>th</sup> May 2009	Firm A sends a letter to FSA Revenue Department stating that it has not received a response to its letter dated 30 <sup>th</sup> November 2008 and that Firm A presume that the FSA is content to accept the offer.
15 <sup>th</sup> May 2009	FSA Fee Tariff Returns emails Firm A asking for fee tariff data validation.
21 <sup>st</sup> May 2009	Firm A sends a letter to FSA Revenue Department confirms that it does not agree with some of the data and assertions.
22 <sup>nd</sup> May 2009	Firm A receives a letter from FSA Revenue Department, dated 20 <sup>th</sup> May 2009, confirming Firm A's letter of 5 <sup>th</sup> May 2009 was received and it is investigating the matter.
29 <sup>th</sup> May 2009	Firm A receives a letter from FSA Revenue Department, dated 27 <sup>th</sup> May 2009, which explains that the FSA have conducted further checks and have been unable to find any evidence that forms for the withdrawal of Mr X were received in 2003 or in subsequent years. This also confirms that registered persons are shown on the FSA register. This letter confirms the outstanding balance. This letter also provides details of the FSA complaints scheme.
1 <sup>st</sup> July 2009	FSA Revenue Department emails Firm A confirming that payment for the arrears has not been received.
8 <sup>th</sup> July 2009	Firm A sends a letter to FSA Revenue Department stating that Firm A is disappointed with the contents of the letter of 27 <sup>th</sup> May 2009. This letter confirms that Firm A expect to be submitting a complaint by the middle of August.
8 <sup>th</sup> July 2009	FSA Revenue Department emails Firm A and confirms that no active debt collection shall take place, pending outcome of complaint.
21 <sup>st</sup> September 2009	The FSA Complaints Team receives a complaint from Firm A.
29 <sup>th</sup> September 2009	The FSA Complaints Team acknowledges Firm A's complaint.
15 <sup>th</sup> January 2010	The FSA Complaints Team sends Firm A its substantive response.
13 <sup>th</sup> April 2010	Firm A refers its concerns to my office, on the cusp of the limitation period within which complaints to the Office of the Complaints Commissioner need to be made.

### **My Position**

I have now had the opportunity to review the FSA's investigation file and your submissions to my office.

Before I comment on your complaint I must make you aware that I have previously made a general comment about the way in which I view complaints relating to the requirements placed upon firms by the FSA in relation to the submission of a 'Form C', following the departure of an employee, on my website under the heading of "Views of the Commissioner" (<http://www.fsc.gov.uk/documents/views/recent-issues-nov09.pdf>). I would add that as part of the authorisation process you agreed to be bound by the FSA's rules as set out in its handbook. I would add that I have not seen any evidence of your firm previously challenging the effect of the rules surrounding the payment of fees or how these were calculated.

I now come to your complaint and would draw your attention to SUP 10.13.6R of the FSA's handbook which states:

**SUP 10.13.6R Ceasing to perform a controlled function**

*A firm must submit to the FSA a completed Form C no later than seven business days after an approved person ceases to perform a controlled function*

From this it is clear that when an Approved Person leaves, it is the responsibility of a firm to **ensure the FSA receives** (my emphasis) all of the appropriate documentation (i.e. the 'Form C'). The FSA's rules state that it is the responsibility of the existing firm to submit a 'Form C' within seven business days of an approved person ceasing to undertake a controlled function (SUP 10.13.6R).

With this in mind, I appreciate that you say that, as Mr X's employment with Firm A terminated on 31<sup>st</sup> August 2003, you completed, signed and submitted the 'Form C' to the FSA on 1<sup>st</sup> September 2003. Although I do not dispute that you may well have done this, it is however clear that the FSA did not receive the 'Form C' you say you submitted.

From your correspondence with both the FSA and my Senior Investigator, you have confirmed that due to the time which has passed since Mr X left your employ you have been unable to locate a copy of the 'Form C' you submitted to the FSA. Likewise, you have been unable to provide proof that the 'Form C' was received by the FSA. In relation to the submission of documents and reports, the FSA places **the responsibility on the firm** (my emphasis) to ensure that it is **received** (my emphasis) by the FSA.

The FSA has adopted this position as firms, who have failed to adhere to their reporting requirements under the FSA's rules in a timely manner, have state that they made their submissions but these were not received by the FSA. As this creates significant work for the FSA, the FSA has adopted a position, correctly in my opinion, where it is the firm's responsibility to ensure that documentation and reports they submit are received by the FSA. As such, unless the firm receives confirmation that the FSA has received the submission, by way of an acknowledgement or action on the part of the FSA (i.e. an individual is removed from a firm's record on the register), then the firm should assume that the submission has not been received. I concur with the FSA's position on this.

It is unfortunate that considerable time has passed since you say you made the submission. However, ultimately, without proof that the documents concerned were actually received by the FSA (e.g. a copy of a 'Signed For' receipt) and in view of the FSA's adopted position, there is nothing to show that the documentation was submitted and received by the FSA. With this in mind, the FSA has, correctly in my opinion, stated that as a 'Form C' was not received charged your firm the appropriate fees based upon the information in its possession.

I can and do appreciate why you are unhappy that, despite saying you submitted the 'Form C' in September 2003, your fees between the 2004/05 and 2009/10 accounting periods have been calculated on your firm having an increased number of Approved Persons. However, although you feel the FSA has acted in an unfair manner by insisting that you pay the fee for the incorrect number of Approved Persons (and not issuing your firm with a credit note), you have not provided any evidence to demonstrate any wrong doing by the FSA. The FSA's rules clearly explain that a firm's fees are based upon the number of Approved Persons under the firm on the FSA's register on 31<sup>st</sup> December each year. In this instance, the FSA has correctly calculated your firm's fees based on the information available to it.

I have also noted from your submissions that you maintain that you were told that the FSA's register available on the internet was not the definitive record and was often incorrect. As part of my investigation into your complaint, I have asked the FSA to comment on this and for details of all of the contact you had with its Firms' Contact Centre (FCC) between September 2003 and July 2008. The FSA has indicated to me that it has no record of any telephone conversation between Firm A and the FCC during this period. I do not dispute that you may have sought advice from the FSA, but without further details of the call (such as the date when it was made and the name of the operative you spoke to), I am unable to investigate or to comment further on this particular issue.

I have also noted your comments that the manner in which the FSA's invoices are produced has meant that it was not possible for you to identify easily the number of Approved Persons you were being charged for and ultimately that the fees were being calculated incorrectly. Whilst I sympathise with your firm's position, ultimately, it is the responsibility of a firm's financial controller to ensure that any invoice that is submitted is correct. In this case, had the invoice been examined in more detail in 2004 (and again between 2005 and 2009), then it would have been clear that the 'Form C' you say you submitted for Mr X in 2003, had not been received by the FSA. Likewise, had the FSA's register been examined in 2004 (or indeed at any time between 2004 and 2009), it would have been clear that Mr X had not been removed from Firm A's records and, as a result, Firm A's fees included a charge in respect of the regulated activity the FSA believed he was undertaking for your firm.

Similarly, although you say the 'unauthorised' changes the FSA made to the controlled functions your firm's Approved Persons roles made it harder to identify the error, I disagree. The changes to the controlled functions Firm A's Approved Persons held took place on 1<sup>st</sup> November 2007 following consultation with the financial services industry (which took place in 2006 under Consultation Paper 06/15).

Some of these changes resulted from the FSA's implementation of MIFID (a European Directive) but others resulted from the FSA's own initiative to streamline the Approved Persons regime by merging similar controlled functions. Specifically CF13 to CF15 were merged into CF28, CF16 to CF20 were merged into CF29 and CF21 to CF27 were merged into CF30. Likewise, as these changes took place in 2007, three years after Mr X left Firm A, I do not believe that these changes would have, as you claim, 'masked' the fact that Mr X was still recorded against Firm A on the FSA's Register and that Firm A was still incurring charges as a result of this.

## **Conclusion**

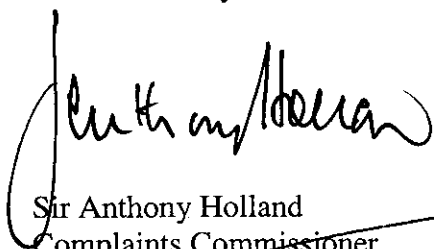
Although you feel that the FSA has acted in an unfair manner by insisting that you pay the full fees and will not issue your firm with a credit note in relation to the 'overpayments' your firm has made, in my opinion, you have not provided sufficient, if any, evidence to demonstrate any wrong doing by the FSA. It is unfortunate that the FSA did not receive the 'Form C' you submitted, but the fact that it did not is not the fault of the FSA.

In considering your comments, as I have explained above, I have had to keep in mind the requirements of FSA's rules and the manner in which you investigated the FSA's invoices **before** (my emphasis) you arranged payment.

The onus for compliance with all of the FSA's rules falls clearly upon those who are authorised. This responsibility is accepted as part of the authorisation process by the firm applying for authorisation. The FSA's rules on regulatory reporting (specifically the submission of a 'Form C') are clear and straightforward to find in the FSA handbook. Whilst I accept that you say you complied with these (by submitting a 'Form C') it is clear that the FSA did not receive it and that your firm in effect failed to ensure that it had been received for a number of years. When calculating Firm A's annual fee, the FSA has followed its documented procedures on this matter, by basing Firm A's annual fees on the number of Approved Persons recorded under it on its register on 31<sup>st</sup> December each year.

I appreciate that you will be disappointed with my findings but ultimately, from the papers presented to me there is no evidence which demonstrates any breach of the rules by the FSA. Therefore your complaint cannot be upheld and as a consequence I am unable to recommend to the FSA that it should either review the charges your firm has incurred or issue Firm A with a credit note.

Yours sincerely,



Sir Anthony Holland  
Complaints Commissioner