Complaints Commissioner

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Dear Complainant

Complaint against the Financial Services Authority
Reference Numbers: GE-L01160

I refer to your letter of 16th July 2010 in connection with the above. I am now 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.

Your Complaint

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

1. Following a visit by the FSA's Supervision Team on 3rd September 2008 both your firm and you were referred to the FSA's Enforcement Division. You say that at the conclusion of this supervisory visit you were told, amongst other possibilities, that as a result of the referral to the FSA's Enforcement Division (Enforcement) your firm may be closed down.

2. You are unhappy that the FSA's Enforcement's investigation into both your firm and your own conduct was not concluded until November 2009 when the FSA confirmed that as a result of its investigation it would not seek to remove your Part IV permissions. You feel that due to the nature of the FSA's concerns the matter should have been resolved considerably sooner.

3. You are also unhappy that, the FSA was aware within a few days that one of the interviews which took place in your offices (on 12th August 2009) had failed to be recorded; the FSA did not inform you about this for approximately 12 week (until 6th November 2009). You feel that this delay placed you under further pressure.

4. You feel that the FSA has not been consistent when applying the financial penalty upon both you and your firm as you are aware of another firm which had similar failures and did not receive any financial penalty oo public censure. Additionally, although you settled with the FSA you say that you only did this as if you had referred the matter to the Regulatory Decision Committee (RDC) you would have lost the 30% early settlement discount. You feel that it is unfair and effectively forces firms to settle rather than having their cases heard by the RDC.

Background

A time line of the events which led to your complaint can be found in Appendix 1.

My Position

As part of my investigation into your concerns I have obtained and reviewed the FSA's investigation file. I have considered the comments you have made when corresponding with both my office and the FSA.

In this instance it is clear that following a Treating Customers Fairly (TCF) visit by your firm's Supervision Team, they were concerned by your record keeping. During the feedback session the Supervision Team had with you and your business partner at the end of the visit, I understand that they made you both aware that they had significant concerns and as a result they were intending to discuss these with Enforcement. During the discussions which then developed it appears that either you or your business partner asked what would then happen. The Supervisors have informed me that they informed you that upon their return to the FSA they explained:

- that the findings would be discussed with Enforcement regarding the next course of action;
- that it was not a pre-determined outcome from these discussions that the firm would be referred to enforcement;
- that if the firm was referred to Enforcement, it would then carry out its own independent investigation of the firm and come to its own conclusions and take action on the basis of those findings;
- the potential further regulatory action the firm may be subject to if Enforcement found against the firm could include a private warning, a request under Section 166, a Public Censure, a Fine or Prohibition of the firm and/or individuals or a combination of these tools.

The Supervisors stress that whilst they discussed these potential outcomes with you they made it clear to both you and your business partner that these were **potential outcomes** (my emphasis) and what action, if any, was taken would depend on the outcome of Enforcement's own investigation, if indeed the firm was referred to Enforcement, as this had not yet been decided. I also understand that the Supervisors reiterated all this to you and your business partner (Mr A) when they subsequently spoke to you upon their return to London.

Whilst it is clear that you felt that your firm was going to be closed down, from the information presented to me it appears that Supervisors responded fully to your question of what could happen rather than would happen. In my opinion, the only answer which the Supervisors could give to you was to explain fully the range of possible outcomes which could result if you were in fact referred to Enforcement.

As, the Supervisors provided an appropriate answer in that they explained that **if** (my emphasis) Enforcement found against you then a number of potential outcomes existed ranging from a private warning to the Prohibition of the firm, I believe that they answered the question put to them appropriately. The fact that you were made aware that a number of potential outcomes existed (including the Prohibition of the firm) if Enforcement found against you, whilst understandably upsetting, does not suggest that you were **only** (my emphasis) told that Enforcement could close down your firm.

It is also clear that you remain unhappy at the length of time the Enforcement Division's investigation took. The papers presented to me show that the original Supervision visit took place on 3rd September 2008. Subsequently you were informed by telephone that the outcome of the Enforcement Division's investigation would be that your firm (and you individually) would be subject to a fine penalty. You were not informed of the outcome of the Enforcement Division's investigation until 3rd November 2009.

Whilst the initial supervisory visit took place in September 2008, I believe that following this visit it was felt that additional files needed to be reviewed before a decision could be made upon whether the concerns needed to be formally referred to Enforcement. From your correspondence with the FSA it is clear to me that you were informed about why a decision had not been taken earlier. However, as I am sure you will appreciate, it does take considerable time to review customer files and to collate the outcome of these reviews, particularly where it could result in a referral being made to Enforcement (and that this could ultimately impact on a firm or an individual's future in the industry).

As the timeline (Appendix 1) shows, it was decided on 26th March 2009 that Supervision's concerns about your firm's record keeping warranted referral to Enforcement. The timeline also shows that following this referral Enforcement confirmed that it would conduct its own investigation to establish if any form of 'disciplinary' action was needed.

I can and do appreciate that being the subject of an Enforcement investigation is not a pleasant experience and that as a result of this you felt that you were being placed under considerable stress. Whilst this is unfortunate, it is not something which the FSA can avoid if it is to fulfil its statutory function of consumer protection. Having said this, in my opinion, it is clear that the FSA recognised that you felt you were under considerable pressure and tried to alleviate as much of this stress as possible by arranging for Enforcement interviews to carry out the required interviews in your own offices **rather** (my emphasis) than in its offices in London.

From the papers presented to me it is clear that the Enforcement Officers had tested the interview recording equipment prior to their departure from London. However, upon arrival at your firm's office it appears that the recording equipment was not working correctly. I understand that the Enforcement Officers when discovering this considered a number of other options, such as postponing the interviews (conducting them at a later date either in your own office or conducting them in London) or for the Enforcement Officers to carry out the interviews in a local police station where it would be possible for them to conduct and to record the interviews using the police's interview recording equipment. As a possibility that however was doubtless rejected as wholly inappropriate in all the circumstances

As the Enforcement Officers felt that postponing the interviews or conducting them at either the local police station or in London would place further pressure on you, it was felt they should continue their efforts to get the recording equipment to work. I understand that they managed to 'rectify' the problem and were able (as far as they believed at the time) to record the interviews they subsequently conducted.

It was unfortunate that the recording of one of the two interviews the FSA conducted that day failed. However, at the time the Enforcement Officers believed that they had been able to 'rectify' the fault and that they had recorded successfully the interviews. I also understand that it was not discovered that the recordings had failed until the Enforcement Officers returned to London and attempted to listen to the recording.

I appreciate from your submissions to me you feel that you should have been made aware the recording had failed as soon as this was discovered. Whilst this is a valid view and reasonable, I understand that initially the FSA believed a specialist may be able to 'enhance' electronically the recording so that it would be possible to hear it in its entirety. Unfortunately, the FSA's endeavours to do this were unsuccessful and it was not possible to 'enhance' the recording.

As part of the FSA's investigation into your complaint, the Enforcement Officers involved in the interviews were themselves interviewed in relation to this decision. From these interviews it is clear that consideration was given to informing you that the recording of the interview had failed. However, as it was unclear at that time whether it would be necessary to conduct again the interview, it was felt that the effect of informing you would most likely be to place further, and potentially unnecessary, pressure upon you. As such, it was decided that you would not be informed until it either became necessary to arrange for the interview to be conducted again or a decision on the outcome of the investigation (including the type of any penalty which would be applied) was made. That was a reasonable judgement call to make. I am justified in that view by the fact that clearly all that has transpired has been to impose an enormous strain upon you.

Whilst, in my opinion, I feel that the FSA should have informed you that the recording of your interview had, in effect, failed, this does not mean that the decision the FSA made was incorrect. The FSA was faced with a difficult decision and had to make a choice. However, ultimately, the decision the FSA made (and its reasons for making this decision), given the specific circumstances, does not appear unreasonable and appears to have been made with your interests in mind.

I appreciate that 14 months from the initial Supervisory visit until you being informed of the outcome of Enforcement's investigation may seem an excessive period of time. However, in my opinion, given the nature of the initial concerns, the additional case reviews Supervision wanted to conduct before it made any decision upon whether the matter should be referred to Enforcement and the fact that it felt it should attempt to try to enhance a recording of an interview (rather than simply arranging for the interview to be conducted again), I do not agree that the time scale is in any way excessive. That is not to say that I wish it had not been so long.

When conducting investigations of this nature, particularly as the outcome of such investigations can have significant consequences for those concerned, it is imperative that the FSA's findings are both accurate and thorough. Unfortunately, this often takes time, and although this may not be a pleasant experience for those who are being investigated this is something which cannot be avoided.

I have also noted your comments that it is inappropriate that should you reject an offer of early settlement and refer the matter to the RDC, you would lose the early settlement discount. The FSA offers an early settlement discount in an effort to bring investigations to an early conclusion and avoid the costs (and time) involved with referring cases to both the RDC and the Tribunal. I would add that the FSA consulted with the industry upon these proposals in Consultation Paper 05/11 (http://www.fsa.gov.uk/pubs/cp/cp05_11.pdf), prior to introducing them.

Although you may remain unhappy that an early settlement discount is offered, ultimately, if a firm is unhappy with the outcome of an Enforcement investigation and feels that the matter should be reviewed by an independent third party, then it has the right to refer the matter to the RDC. Ultimately, although the FSA may recommend a penalty (which may equate to the undiscounted penalty) **it is up to the RDC** to decide whether the penalty recommended by the FSA is appropriate and could impose a penalty which is higher or lower than that recommended. An individual and/or firm, must therefore decide whether they wish effectively to admit the offence and to accept the proposed penalty (by settling the matter) or challenge the FSA's findings and/or penalty at the RDC.

I also note that you feel the FSA has applied a higher penalty to your firm than that which it applied to another firm which had similar failures with its record keeping. As I am sure you will accept I am unable to comment specifically on the circumstances surrounding the investigation which the FSA conducted into the other firm which you mention. However, what I can say is that as part of my investigation into your complaint I asked the FSA to confirm how it arrived at the level of financial penalty it applied to both you individually and to your firm.

As a result of the information the FSA has provided to me I can confirm that when considering this matter (prior to entering to settlement discussions with you) the FSA did consider the financial penalties it imposed upon individuals and/or firms whom had similar record keeping failures. As a result of this it does not appear from the information presented to me that the FSA has been inconsistent when imposing the penalty that it did upon both you and your firm considering the record keeping failures that were discovered. I appreciate that you feel that the FSA should have provided you with evidence to show that this was the case, but this is not something which the FSA can do as it would result in it passing specific details of investigations it undertook into other firms to you. Doing this would clearly involve a breach of confidentiality between the FSA and the firms concerned.

I would add only one further point in relation to this matter. Although I have considered generally the process through which the FSA arrived at the penalty it imposed upon you, I am unable to consider the specific penalty it imposed as this is only something which can be considered by the RDC and/or the Tribunal. Although I make this point I note that by agreeing to the early settlement you gave up your right to refer the matter to the RDC and ultimately to the Tribunal.

Conclusion

When considering a complaint, I have to have regard to the rules of the complaints scheme, the conduct of the FSA and the nature of the issue the complainant has referred to my office. In this instance it is clear that you are unhappy that the FSA has taken disciplinary action against you.

I can and do appreciate that any type of investigation by the FSA will not be a pleasant experience for anyone who works within the financial services industry and will ultimately place a great deal of pressure upon them. Unfortunately, as I explained above, there is little the FSA can do to reduce this situation as it has to discharge its statutory functions and in particular to protect the interest of consumers. In this case, it is clear that the investigation took time to complete, but in my opinion there is nothing to indicate that the FSA took an excessive amount of time to bring this matter to a conclusion despite my wish that it might have been quicker in all the circumstances.

Likewise, it is unfortunate that the FSA's recording equipment failed when you were interviewed. This was particularly unfortunate and whilst the FSA could, and may be should, have informed you of this immediately when it became aware, from the information provided to me, the FSA's reasons for not informing you appear to me to be a reasonable judgement call given the particular circumstances.

Whilst it is unfortunate that the FSA felt an Enforcement investigation and a financial penalty was necessary, my office is not the correct forum for challenging this decision. I can understand why you settled, and although you feel that the loss of the early settlement discount if you were to refer the matter to the RDC is unfair, the discount is offered for a valid reason after consultation with the industry and I support the FSA's reasons for doing so.

I also note your displeasure at not being able to comment on the FSA's press release. Whilst I can understand your concerns, ultimately, the FSA is required to issue notification to the press about the Enforcement action it has taken against firms. To allow firms to comment or issue counter statements could clearly undermine the FSA's position and is not something which it can allow to happen.

I appreciate that you will be disappointed with my findings, but as I have explained above, there is nothing to indicate that the FSA has acted inappropriately throughout the Supervision/Enforcement investigation or when it considered your complaint. As such, I am unable to uphold your complaint.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner

Appendix 1

Date	Event
10th June 2008	TCF assessment.
3rd September 2008	Supervisory visit to Firm A (the firm).
4th December 2008	Letter to the firm from FSA this explains the outcome of the review of client files taken during the visit and explains that the firm was being considered for referral to the FSA's Enforcement Division.
5th December 2008	You called the FSA as you were concerned with the timescales involved for the review of client files. You were also concerned with the length of time the process had taken. You were advised that the review had taken a long time due to the length of client files and that the review had to be thorough.
5th December 2008	FSA called you and advised new deadline for the file reviews and pension transfer report was 2nd February 2009.
19th December 2008	Letter from the firm to FSA explaining what action the firm had taken since the visit to the firm.
13th January 2009	Letter from the FSA explaining the further requirements for action needed from the firm. This letter also confirms that the FSA is still considering enforcement action.
14th January 2009	You called the FSA asking for further clarification of the firm's requirements.
23rd January 2009	Letter from the firm to the FSA to update the FSA on the actions they were taking.
30th January 2009	Letter from the firm to the FSA providing a further update on their actions.
20th February 2009	Letter from the firm to the FSA proving further information to the FSA.
26th March 2009	FSA letter to the firm confirming that the case had now been passed to the Enforcement Division for further investigation.
27th March 2009	Notices and Memoranda of Appointment sent to the firm.
30th March 2009	You called the FSA following receipt of the letters, you stated that you would like to make a complaint as to the length of time the FSA had taken to conclude the matter and that it was making you and your business partner ill. It was confirmed that the case had only been referred to enforcement from Supervision the previous week.
30th March 2009	Further call to you from the FSA to carry out a scoping call which would explain what was being investigated and how the investigation would proceed.
1st May 2009	A compelled document request was sent to you by the FSA.
5th May 2009	FSA receive a call from you as you were unhappy with the contents of the compelled document request and the reference to possible imprisonment.
6th May 2009	Telephone call from you regarding the FSA request for client files, enquiring how quickly these would be returned to the firm.
21st July 2009	FSA sent you an email updating you on the progress of the investigation and asking for available dates that you would be able to attend an interview at the FSA offices in London.

23rd July 2009	FSA telephoned you, you stated that you would not be able to travel to London due to stress and panic attacks The FSA then stated that it would be prepared to conduct the interview at the firm's address.
29th July 2009	Email from FSA to you confirming that the FSA will conduct the interviews at the firm's offices and confirming that the 12th and 13th August would be convenient dates for the FSA to visit.
30th July 2009	Email sent from you to the FSA confirming that the dates should be ok however he had been unable to confirm these with Mr A.
11th August 2009	FSA sent emails to you confirming the arrangements for the interview and confirming the appointment.
11th August 2009	Emails sent from you to the FSA confirming receipt of emails.
12th August 2009	FSA conduct interview with you. The interviews continued until 7.20 pm at the request of Mr A in order to complete the interviews that day.
13th August 2009	FSA visited the offices of the firm in order to review the firm's systems and controls. At the conclusion of the visit the next steps in the process were explained to you as well as the nature of pre-settlement call and that they would only be able to provide an indication of the FSA's findings.
3rd November 2009	FSA sent an email to you arranging for pre-settlement calls with you and Mr A on 6th November 2009, this email also stated that there was no pressure on you or Mr A to settle the case.
6th November 2009	FSA held a pre-settlement call with you. The format of the call was changed from the FSA's usual format to explain earlier in the call that the FSA was not recommending cancelling firm A's permissions or prohibiting you. It was also explained that there had been problems encountered with the quality of the interview recordings. The FSA explained that they did not consider it necessary to conduct any further interviews. You were unhappy that the FSA were unable to tell you the level of the financial penalty and lack of contact since the interviews.
10th November 2009	You called the FSA to ask if they could provide you with an indication of the level of the financial penalty as he was trying to get his finances in order. You referred to the stress that both you and Mr A had been under and that they felt the FSA had not treated them fairly.
30th November 2009	FSA emailed you explaining that the settlement papers were awaiting approval.
1st December 2009	You emailed the FSA and stated that you hoped that the considerable stress that they had been put under was being taken into consideration.
4th December 2009	FSA receive a call from you enquiring as to the progress of the settlement papers.
8th December 2009	FSA receive a call from you enquiring about the progress of the settlement papers. It was confirmed that the FSA was trying to progress matters as swiftly as possible. You enquired about the timescale for considering the settlement and how the FSA decided on the level of financial penalty.
10th December 2009	FSA called you and explained that the settlement papers had been signed and would be issued that day. You enquired about the level of financial penalty. You also asked for the level of financial penalty for Mr A, it was explained that this would need to be provided to Mr A.

10th December 2009	FSA sent you an email explaining the timescales for considering the settlement documentation and the factors taken into account when settling the financial penalty.
10th December 2009	FSA emailed a copy of the settlement papers for Sett Valley, you and Mr A.
14th December 2009	You called the FSA and asked for an extension to the stage 1 settlement period. You also enquired as to why investigators were not appointed to look at Mr A conduct until 7th August 2009, why you were not informed about the problems with the quality of the tapes for your interview until 6th November 2009 in addition you asked why Mr A had not received copies of the transcripts of his interview.
15th December 2009	FSA email you explaining that a one week extension to the stage 1 settlement period had been granted and responded to the questions raised. This email also explained the FSA complaints procedure. In addition the email explained the delays in notifying you of the problems of the quality of recording from the interview.
11th January 2010	You called the FSA and indicated that they wished to settle although you considered that the financial penalties were harsh. You enquired as to what you could say if contacted by the press. You indicated that they would be submitting a complaint.
11th January 2010	FSA email to you enclosing copies of the settlement agreement and responding regarding your query regarding the press.
11th January 2010	You and Mr A signed the settlement agreements
11th January 2010	You submit a complaint to the FSA.
12th January 2010	Mr Hargreaves faxes the signed settlement agreements to the FSA.
19th January 2010	FSA email you confirming receipt of signed settlement agreements and explaining that Final Notices will be published on 27th January 2010.
25th January 2010	FSA email you copies of the signed settlement agreements, statutory notices and associated documentation.
25th January 2010	You sent an email to the FSA regarding your proposed comment to the press.
26th January 2010	FSA emailed you which explained that the proposed comments to the press were inconsistent with the tenor of the settlement. It further confirmed that, as had been made clear on a number of occasions there was no pressure on you to settle and the firm had the option for the matter to be referred to the Regulatory Decisions Committee, prior to them signing the settlement agreements.
26th January 2010	You sent an email to the FSA asking for further clarification as to what they would be able to say to the press.
26th January 2010	FSA emailed you clarifying the situation. This confirmed that it was a matter for the firm as to the exact wording of any comments to the press; however they should take into account the fact that they have agreed to the level of the financial penalty, and had an opportunity to comment on the content of the Warning Notice.
27th January 2010	You sent an email to the FSA where you state that you felt that the FSA were trying to "gag me". This email confirmed that you will restrict your reply to the press to: "We have put a complaint in to the FSA".

5th February 2010	You ask the FSA to consider your complaint under the complaints scheme.
7th July 2010	The FSA informs you of the outcome of its investigation into your complaint.
12th July 2010	You write to my office and ask me to review the FSA's handling of your complaint.
16th July 2010	You write further to your letter of 12th July 2010 and clarify why you are unhappy with the outcome of the FSA's investigation into your complaint.