Complaints Commissioner

Office of the Complaints Commissioner
8th Floor, City Tower
40 Basinghall Street
London EC2V 5DE

Tel: 020 7562 5530
Fax: 020 7562 5549
E-mail: complaintscommissioner@fscc.gov.uk
www.fscc.gov.uk

7th June 2011

Dear Complainant,

Complaint against the Financial Services Authority
Our Reference Number: GE-L01233

I refer to your letters to my office of 25th January and 15th March 2011 in connection with your complaint against the Financial Services Authority (FSA) and your subsequent response to my Preliminary Decision dated 8th April 2011. 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.

Your Complaint

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

- You say that you that in May 2010 you were looking to transfer a large amount of money (£20,000) into US Dollars (USD) and thereafter to send this electronically to your US bank.
- You became aware of a money transfer firm called Firm A and were considering using it to facilitate your intended transaction. As you had not used them before, and as the amount you were looking to exchange and transfer was not inconsiderable, you wanted reassurance about the firm. As a result, before entering into an agreement with Firm A, you contacted the FSA, by telephone, to establish if Firm A was reputable.
- As a result of the information you allege the FSA provided to you, you say you proceeded to engage the services of Firm A. Unfortunately, before the transfer was completed, Firm A went into administration and as a result you say you have lost £20,000.
- You say that as a result of the assurances given to you by the FSA, you believed that the £20,000 you passed to Firm A, with a view to it being exchanged for USD and remitted to the US, was safe (by which I assume you mean that you had recourse to the Financial Services Compensation Scheme if the firm (Firm A) was to fail).

- As you feel that you were provided with incorrect information by the FSA you are looking for it to offer you redress for the money you have lost.
- You are also unhappy that the FSA, during its initial investigation, was unable to locate the telephone call you made to it in May 2010 and that it was only able to do this once the matter was referred to my office. As a result you feel that the FSA did not complete an adequate investigation into your complaint.

Background

When considering your complaint I should also at this point make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. Your member of Parliament will of course be aware of this factor. 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 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 [1998 c.42] Human Rights Act 1998."

COAF nevertheless then goes on to provide 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 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.

My Position

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

From this it is clear that you were looking to convert a considerable amount of money into USD and then transfer this electronically to your bank in the US. As a result of what I understand was an advertisement, you identified Firm A as a firm which offered the facilities (foreign exchange and subsequent electronic money transfer) that you required and were considering using it. However, as you had never used Firm A before, before entering into an agreement with it, you wanted some reassurance about the firm and contacted the FSA to establish what you describe as the "*reliability and good-standing*" of Firm A. I would add here that from the papers presented to me it appears that although you contacted the FSA in May it appears that the money you say you have lost was not transferred to Firm A until August 2010. I am not able to ascertain any particular reason for this delay.

You add that it was "*on the basis of the information given to [you] by the person to whom [you] spoke [you] decided to exchange [your] money with Firm A*". You accept that the FSA cannot give financial or legal advice, you say that you were not looking for this and say that you were simply asking about Firm A's reputation and reliability as you were aware that Firm A was registered with the FSA.

By this I understand that you were looking for confirmation that the firm was known to the FSA (i.e. registered or authorised by it), that the FSA was not aware of any significant problems with the firm and, at the time, did not have significant, if any, concerns about the firm (in relation to its conduct with consumers and/or with it as the UK's financial services regulator).

I must immediately address a fundamental issue that arises at the onset of your problem and that relates to your expectations of what the FSA can do and what it cannot do. If a body is authorised the FSA does have a considerable input into the way that body conducts its affairs and there is a clear regulatory input. If it is not authorised then the FSA's input is limited to monitoring how a firm conducts its payment services activities (for example, that it transfers funds in a timely manner and that it discloses its charges clearly to customers. The FSA has no power to check other aspects such as a firm's solvency. The mere fact that it is "registered" with the FSA as a result of European legislative input does not bring with it any regulatory benefit nor the kind of safety reassurances that you were seeking.

From the information you provided to me, I understand from your account that the FSA operative, to whom you spoke, explained that Firm A was registered with the FSA. That person also explained that Firm A appeared on the FSA's register of firms which were conducting activity governed by the Payment Services Regulations 2009 (the Regulations). I also believe, from your letter of 9th October 2010, that the operative clarified that Firm A's entry on the FSA register could be found under the 'tab' entitled "*Payment Services Firm Search*" (http://www.fsa.gov.uk/register/psdFirmSearchForm.do). You also say that, based upon the information provided to you by the FSA, you decided to use Firm A.

On 16th August 2011, you entered into an agreement with Firm A for £20,000 to be converted into c. $32,000 on 29th October 2010 and for this then to be transferred to your US bank account. To complete the agreement (and order), on 19th August 2010, you completed an electronic transfer of the money from your UK Bank account to Firm A. However, as the money had not been transferred to your US bank (because the transfer was not due to be carried out until 29th October 2010) when Firm A went into administration on 4th October 2010 you say that you have lost most, if not all, of the £20,000 you transferred to it. I am not sure why you allowed the money in question to remain in the hands of a body such as Firm A for so long.

When the FSA considered your complaint in January 2011, despite the information you provided to it, it was unable to locate any details of the call you made to it in May 2010. It was able to locate the call you made on 5th October 2010 but did not attempt to recover this call as this call was made after Firm A had collapsed and clearly could not have influenced your decision to use the services of Firm A. However, as a result of asking me to consider your complaint (and my subsequent request for a copy of its papers) the FSA was able to locate a record of the call. I am extremely disappointed that the FSA was unable to locate any details whatsoever of your calls before the matter was referred to me. I do not believe that this is an acceptable situation and it is something to which I will return to in my recommendations.

However, once these details came to light I feel that the FSA correctly asked for time to review these details and to revert back to you. As a result of this information, I understand that the FSA asked you to confirm, in more detail, what information you were given by the FSA operative when you called it in May 2010. You did this by letter dated 15th February 2011.

In your reply to the FSA, and indeed the complaint you have made to my office, you have indicated that the FSA operative confirmed that the firm, Firm A, was registered (my emphasis) with it, that your money would be safe and that Firm A was free from any complaints and negative factors. The FSA can only confirm factual information about a firm in respect of its requirements under the Regulations (my emphasis). In this respect that FSA has correctly indicated that the firm, Firm A, was as you state registered with it and as such you would have the security of dealing with a legitimate firm.

Additionally, the FSA can only provide factual information about the firms authorised and/or registered with it. It cannot offer any guarantees of continuing solvency. The FSA also has to be extremely careful when answering questions posed to it by consumers. Clearly, when a consumer asks about a firm, the consumer is looking for reassurance about using the firm and any comment a FSA operative may make is likely to influence the consumer's decision in relation to whether or not to use the firm in question. Any comment which influences a consumer's decision could be regarded as effectively providing advice or a recommendation and this is clearly something which the FSA, as the UK's financial services regulator, cannot do. Parliament has simply not given the FSA that power. Nor has it given it the power effectively to guarantee solvency.

I now turn however to the notes of the call identified by the FSA which record that you did contact it on 6th May 2010 at around 9.20 am. The note in question records tersely that:

> "[The complainant] called to check the authorisation of [Firm A]. They are authorised (sic)"

When considering this matter, it is clear that the FSA notes differ slightly from what you have stated in your letter in relation to the status of Firm A. The note of your conversation with the FSA is, in my opinion, poor considering that you have confirmed that the call lasted over five minutes. This is something which I am concerned about and is an issue I will return to in my recommendations. Whilst you have indicated that you were told the firm was registered, the FSA's operative indicated that the firm was in fact authorised. Notwithstanding what the FSA operative has recorded, the information you indicate you yourself were told appears to be correct in that Firm A was registered and not authorised (my emphasis).

I feel it may be useful at this point if I also provide briefly some background information relating to why firms like Firm A are now either registered with, or authorised by, the FSA because the distinction is both crucial and fundamental in its impact both your case and generally. Following the implementation of the EU's Payment Services Directive (2007/64/EC) 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 relevant financial services regulator (in the UK this is the FSA).

The criteria for this was set by the EU Directive which set out that all firms who conducted up to €3M per month of qualifying payment transactions in a rolling average simply needed to be registered with the relevant regulator . Whereas all firms which conducted more than €3M per month of qualifying payment transactions in a rolling average this amount had 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 and even appear to be a distinction without a difference, it does have significant safety 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 to simply 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 the safety of customer's money. As indicated above, there are no requirements for registered firms to put in place any arrangements to safeguard customers' money. However, an authorised firm must safeguard a customer's money which it has received in respect of a payment transaction (transfer) while it is holding it (whether this is overnight or for a longer period).

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 customer money would still be safe.

However, although authorised firms have to put in place safeguarding arrangements there is a further complication. These arrangements only apply to money it has received for making a payment transaction (my emphasis). Money a firm receives for other business activities, including that received by it for a future purchase (my emphasis) of foreign currency (whether or not this will then be transferred) would not (my emphasis) be covered by these safeguarding rules even if the firm was authorised.

I appreciate that you have specifically indicated that you were led to believe that your "*money would be safe with Firm A*", but it is unclear what you mean by this. You have indicated that the FSA operative confirmed that the firm was shown on the FSA website and that you were looking under the incorrect 'tab'. The FSA's website also clearly indicates that "*[p]ayment services are not covered by the Financial Services Compensation Scheme*" and as such there would not be any guarantee that in the event of a firm such as Firm A getting into financial difficulty (whether registered or authorised) that your money (if retained by the firm as part of a pending currency exchange) would be protected. In this case as you transferred money to Firm A for a future currency (my emphasis) exchange (and subsequent transfer) irrespective of whether the firm was registered or authorised by the FSA (in respect of Payment Services Activities), under the Regulations your money would not have been protected.

Your recollections of the call you had with the FSA differ from those recorded by the FSA. Given the nature of your complaint, it would have been useful to have had the opportunity to listen to a recording of your telephone conversation with the FSA. Unfortunately, as the FSA has explained in its letters, it only holds recordings for a relatively short period of time (around two to three months) and regrettably by the time it received your complaint a recording of the conversation you had in May 2010 was no longer available.

Without being able to listen to the call, it is difficult for me to comment, with any great deal of certainty, what was said by both you and the FSA's operative and more importantly in what context any comments were made. However, from your complaint, it appears that your questioning surrounded the 'legitimacy and conduct' of Firm A and the information provided by the FSA's operative appear to me to have been provided in good faith and been factually correct in relation to Firm A's activities and (believed) conduct at that time under the Regulations (which is all that the FSA was able to consider). Firm A was registered with the FSA, the FSA had not taken any disciplinary action against Firm A and, at the time of the call, there does not appear to have significant, if any, concerns about the organisation.

Additionally, given that the firm was registered with the FSA there is insufficient, if any, information to suggest that it would not have been able to fulfil any transaction you entered into with it at that point in time. I would add here that it is also unclear to what exact question and in what exact context the comments made by the FSA operative related or indeed the FSA operative's understanding of the question you were asking.

As I have explained above, the FSA is only able to comment upon a firm's conduct in relation to activities which fall within the FSA's monitoring jurisdiction (in this case the Regulations). Specifically, in relation to Firm A, the FSA is only able to comment upon its conduct in relation to activities connected with the transfer of money and not (my emphasis) activities related to the holding of money for a future foreign exchange transaction.

Firm A was registered with the FSA in relation to its money transfer activities (as required by the Regulations). As foreign exchange transactions are not regulated activities (under either the Act or the Regulations) the FSA is unable to monitor or indeed comment upon the firm's activities in relation to this. Although I make this point, the fact that firm was registered by the FSA should reassure consumers that a firm is at least reputable and will act responsibly towards consumers (at least in relation to the activities which the FSA monitor) although this does not guarantee that a firm will not get into financial difficulties and fail.

I must add here that, whilst there is some uncertainty over what you were told the status of the firm was, even if you had been told that the firm was authorised, in the event of the failure of the firm your money would only have been protected (my emphasis) if it was being held by Firm A in respect of a transfer. Under the EU's Payment Services Directive money passed to a firm and held for a future (my emphasis) foreign exchange transaction (and subsequent transfer) would not be safeguarded in the event of the firm's failure.

From your letters, it appears that the questions you say you raised with the FSA in relation to Firm A may appear to have related to all of its activities (money transfer and foreign exchange). However, without a recording of the call it is unclear whether the FSA operative was fully aware of this, appreciated that the money was to be deposited with Firm A in advance and that the exchange and transfer was to be conducted a future date or simply believed from the way in which the question was posed, that it related purely to the activity covered by the Regulations.

Regrettably without a recording of the call it is not possible to answer this question with any degree of certainty. However, from the extremely brief notes the FSA has of the call and the information you have provided, in my opinion, it appears that the answers provided related purely to the activities Firm A was undertaking under the Regulations and did not relate to those which it undertook which fall outside of the Regulations. I must also point out that the FSA is only (my emphasis) able to comment on a firm's conduct which falls within in its jurisdiction. As the FSA's involvement with the firm was limited to 'supervising' its conduct under the EU's Payment Services Directive, the FSA can only comment on matters which fell within this type of activity.

I would also add here that as money was in effect transferred to Firm A for a future foreign exchange transaction (and later transfer), irrespective of whether you had used Firm A or another firm, as Firm A was not at that time (my emphasis) holding the money as a transfer (instead being held for a foreign exchange transaction) irrespective of whether you had used Firm A or another firm the safeguards which were in place for money transfer transactions would not have applied and in the event of any firm's failure your money would not have been protected. I have tried to make this point clear so that you can understand that in the circumstances of your transaction there was never a possibility of your money being secure because of the future (my emphasis) nature of what you were doing.

Conclusion

It is clear from the information that you have provided and that which the FSA has belatedly found that you did contact it on 6th May 2010 in connection with Firm A. It is also clear that during this call you attempted to establish whether Firm A was known to the FSA (specifically whether it was registered/authorised by it) and whether there were any reasons why you should not use it as a means of transferring money to the USA (I have paraphrased this from your comments about Firm A's reputation, reliability and whether it was free from any negative factors).

Nevertheless, in summarising what has gone on before I feel I must specifically deal with the FSA's telephone note of the call you had with it on 6th May 2010. As I have indicated above (and discussed at length) the note refers to the term "authorised" when in fact Firm A was simply "registered" with the FSA. It is not clear whether or not the telephone note correctly reflects the wording used by the operative in relation to the manner in which the firm was recorded on the FSA's register of firms conducting activity under the Payment Services Directive. There are therefore three matters which I must address to avoid confusion regardless of what I may have said above.

1. You have consistently referred to the term "registered" in all your correspondence with both the FSA and my office. Indeed when the FSA asked you to clarify exactly what you were told by the FSA's operative you confirmed that you were informed the firm, Firm A, was registered with the FSA. I therefore believe that, regardless of what was recorded on the FSA's computer systems, that you were informed the firm was simply registered with it.

2. Even if my understanding is incorrect, even if the FSA's operative informed you that the firm was "authorised" by it, the nature of the of the transaction you were entering into with Firm A is of importance here. Although you had sent money to Firm A, Firm A was holding this for a future foreign exchange transaction (and subsequent transfer to your US bank account) and not purely in regard to a money transfer. As a result of this regardless of how the status of the firm was described to you, your money would not have been protected in the event of the firm's failure (whether you had used Firm A or another firm offering a similar arrangement).

3. When providing information to consumers, the FSA is only able to comment upon matters which fall within its jurisdiction (i.e. activities covered by either the Act and/or the EU's Payment Services Directive (2007/64/EC) in 2007 implemented by way of the Payment Services Regulations (2009). The FSA is, unfortunately, unable to offer any opinion on the conduct of a firm in relation to activities which fall outside of its jurisdiction. As the holding of money for a future foreign exchange and transfer transaction is an activity which is neither covered by the Act nor the EU's Payment Services Directive/Payment Services Regulations, the FSA is unable to make any comment upon a firm's conduct.

I appreciate that as a result of the collapse of Firm A you have lost a significant amount of money which you had sent electronically to Firm A and which it was holding for a future foreign exchange transaction (and subsequent transfer). Although I have considered your complaint and have concerns about the FSA's record keeping, on the balance of probabilities, I hold the view that the information provided to you during the telephone call which took place on 6th May 2010 was in relation to the activities which the FSA was able to monitor under the Regulations. Whilst you may have required information about the firm in relation to activities which were and were not covered by the Regulations it is unclear whether this distinction was made to and understood by the FSA's operative. Notwithstanding this, I am satisfied from the information provided to me that the answers the FSA operative provided were factually correct and were the only ones that the person could provide (in that they related purely to the activities that fell under the Regulations and therefore within the FSA's jurisdiction).

Regrettably, although I appreciate that the money you may well have lost (subject to you receiving any payment from the administrators) is not insignificant, ultimately I am unable to uphold your complaint and as a result I will not be recommending that the FSA alters the decision it set out in its letter of 24th January and 10th March 2011.

Finally, you may wish when corresponding with your Member of Parliament to discuss with him the details of the legislation changes that the Government is considering in the financial services area as you may wish him to take account of your views and the difficulties you have encountered with such unfortunate consequences.

Recommendations

1. The FSA should review its procedures for retrieving records of calls made to its Consumer Contact Centre (CCC). In this case, a call was clearly made to its CCC and the operative recorded notes of the call recorded on its central system. It is unclear why when the Complaints Team asked for details of the call (on numerous occasions) it was not possible to retrieve these notes. This is clearly an unacceptable situation. The FSA must take steps to improve its ability to retrieve call records.

2. The notes of the call taken by the CCC operative are in my opinion wholly inadequate. Whilst I accept that a five minute conversation could be summarised briefly (and indeed notes should be succinct), the notes in this case do not appear to record accurately the whole or indeed the nature of what was discussed. This is unacceptable and the FSA should take steps to improve its record keeping.

3. The issue of the protection given to consumers when dealing with firms conducting activities falling under the Payment Services Directive (and associated regulations) appear unclear, particularly given the differing levels of protection advanced by registered and authorised firms. The CCC, when dealing with queries from consumers should clearly set out to consumers what protection is given and emphasise when this protection applies (i.e. it only (my emphasis) applies to money held by authorised firms in relation to pending transfers and not (my emphasis) in relation to money held in relation to pending foreign exchange transactions which may later be transferred).

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner