



19<sup>th</sup> August 2011

Dear Complainant,

**Complaint against the Financial Services Authority (FSA)**  
**Reference Number: GE-L01273**

I refer to your letter of 7<sup>th</sup> April 2011 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 that comes within the complaints scheme. 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 your firm is not and has never been authorised to provide advice to clients who would be eligible to receive compensation from the Financial Services Compensation Scheme (FSCS). As such you do not feel that you should ever have been required to pay any of the FSCS' levies which have been applied to your firm.
- You add that when you questioned the FSA about this you were incorrectly told that the only way to reduce your firm's FSCS levies was to reduce the number of approved persons your firm had recorded on the FSA's register.
- You subsequently found out that this guidance was incorrect as an exemption was available should you have applied for it.
- You are unhappy that you have had to pay FSCS levies and feel that, as your firm has now been granted the exemption you applied for, you have been treated unfairly by the FSA.

- In your response to my Preliminary Decision you added a further element to your complaint which can be best described as you challenged the FSCS levy applicable to your firm between 2002 and 2009 and were not told that you could apply for an exemption.

## Background

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

Date	Event
9 <sup>th</sup> July 2009	You telephoned the FSA. The record indicates that the firm wanted to know how to remove an Approved Person. You were referred to a Form C. The call handler informed caller that the number of CF30s in a firm as at 31 December 2008 is used to calculate 09/10 fee invoice (and therefore number of CF30s covered up to 31 <sup>st</sup> March 2010).
5 <sup>th</sup> March 2010	The FSA receives your application for exemption from future FSCS levies.
20 <sup>th</sup> May 2010	You write to the Manager of Revenue, disputing the FSCS levy and requesting 2009 charge be refunded and current invoice waived.
27 <sup>th</sup> May 2010	The FSA responds and confirms that your application for exemption was approved and will take effect for the 2010/11 levy period but will not be applied retrospectively. This letter also apologises for the incomplete and misleading information provided in July 2009.
7 <sup>th</sup> June 2010	Your firm emails the FSA's Revenue department (Revenue) indicating you want to discuss the FSA's letter of 27 <sup>th</sup> May 2010 with your firm's Chairman.
16 <sup>th</sup> June 2010	A member of your firm emails Revenue to provide an update and indicates that you will hopefully revert to Revenue early the following week.
25 <sup>th</sup> June 2010	The FSA emails a member of your firm as it has not heard anything about the outstanding debt which is now overdue, and asks you to confirm if there are any further issues.
25 <sup>th</sup> June 2010	A member of your firm provides an update and asks what the appeal process is as you do not feel your firm is being treated fairly.
25 <sup>th</sup> June 2010	The FSA emails a member of your firm providing a link to the relieving provisions, an explanation that a letter has to be provided outlining how the relieving provisions criteria has been met and a link about how to make a formal complaint if the relieving provisions criteria cannot be met.
8 <sup>th</sup> July 2010	A member of your firm emails Revenue enclosing the letter of 28 <sup>th</sup> June 2010 from you explaining that payment of FSCS levy is inequitable as per the Relieving Provisions 2.3.1.
19 <sup>th</sup> July 2010	Revenue emails a member of your firm confirming that it is dealing with the request.
16 <sup>th</sup> September 2010	Revenue emails a member of your firm chasing payment of invoices.
16 <sup>th</sup> September 2010	A member of your firm emails Revenue as she is still awaiting a response to her earlier of 8 <sup>th</sup> July 2010 (enclosing your letter dated 28 <sup>th</sup> June 2010)

16 <sup>th</sup> September 2010	Revenue emails a member of your firm apologising for not getting back sooner and providing details about how to meet the relieving provisions.
28 <sup>th</sup> September 2010	A member of your firm emails Revenue referring to your letter of 28 <sup>th</sup> June 2010 setting out your firm's appeal
29 <sup>th</sup> September 2010	Revenue emails a member of your firm enclosing its letter of 27 <sup>th</sup> May 2010. This letter explains your firm has been treated fairly and have not demonstrated exceptional circumstances therefore the only option left is to complain.
29 <sup>th</sup> September 2010	A member of your firm emails Revenue stating that some of the points remain valid as the FSA did not give correct advice on reducing costs.
1 <sup>st</sup> October 2010	Revenue emails a member of your firm confirming that the rules have been applied correctly therefore invoices remain payable. Revenue again makes the suggestion that you should complain.
11 <sup>th</sup> October 2010	You refer your complaint to the FSA's Complaints Team.
4 <sup>th</sup> March 2011	The FSA's Complaints Team issues you its substantive response confirming that it was unable to uphold your complaint.
7 <sup>th</sup> April 2011	You refer your complaint to my office for a review of the FSA's investigation into your complaint.

### My Position

I have now had the opportunity to review the FSA's investigation file and your submissions to my office. From the papers I have seen it appears that your firm first became authorised on 1<sup>st</sup> December 2002.

Since becoming authorised I understand that your firm has been required to pay annual fees and levies to the FSA. The following table, I believe, sets out the invoices (fees and levies) you have received (and paid) to the FSA.

Invoice Date	Invoice	Period	Levy	FSCS Levy Amount (£)
06.02.2003	FSCSN02_35930	2002/03	FSCS	6.79
07.07.2003	FSCS03_43943	2003/04	FSCS	24.27
19.07.2004	PFA04_23451	01.04.2004-31.03.2005	Periodic Fee/Levy	43.93
27.06.2005	PFA05_77498	01.04.2005-31.03.2006	Regulatory Fees & Levies	41.75
12.06.2006	PFA06_107311	01.04.2006-31.03.2007	Regulatory Fees & Levies	30.81
11.06.2007	PFA07_144214	01.04.2007-31.03.2008	Regulatory Fees & Levies	77.67
07.07.2008	PFA07_203627C	01.04.2007-31.03.2008	FSCS Credit Note	(40.88)
06.08.2008	PFA08_200871	01.04.2008-31.03.2009	Regulatory Fees & Levies	304.58
30.03.2009	PFA08_256838	01.04.2008-31.03.2009	FSCS Interim Levy (Specific and Compensation costs)	1130.22

15.06.2009	PFA09_268917	01.04.2009-31.03.2010	Regulatory Fees & Levies (Base costs and Specific and Compensation costs)	1036.73
30.03.2010 Outstanding	PFA09_309078	01.04.2009-31.03.2010	FSCS Interim Levy (Specific and Compensation costs)	2670.64
05.07.2010 Outstanding	PFA10_331111	01.04.2010-31.03.2011	Regulatory Fees & Levies (Base costs only o/a now exempt)	54.70

I appreciate that you are unhappy with the outcome of the FSA's investigation into your complaint but note that, in its decision letter of 4<sup>th</sup> March 2011 it set out that FSCS exemption arrangements (for firms which do not conduct investment intermediation activity) were first introduced on 1<sup>st</sup> December 2001 and were originally set out in Chapter 13.3 of the Compensation Sourcebook (COMP), although they can now be found in Chapter 6.2 of the Fees Sourcebook (FEES). The FSA also explained that it was the firm's responsibility to be aware of the FSA's rules and if the firm felt that it qualified for an exemption then it was down to the firm to apply for this.

During the telephone conversation you had with the FSA about the June 2009 invoice, in July 2009, I understand that the FSA operative to whom you spoke provided you with incorrect and misleading information where you were informed that the only way you could reduce your firm's annual fees was to reduce the number of approved persons your firm had. The operative did not, I believe, make you aware that if your firm did not conduct investment intermediation activity, you could apply for an exemption for this part of the FSCS levy (and associated interim levies).

I believe that the FSA later corrected the guidance you were given and that this resulted in you applying for an exemption from the investment intermediation part of the FSCS levy (the exemption) on 25<sup>th</sup> February 2010. I also understand that the FSA received your application on 5<sup>th</sup> March 2010) and that it confirmed your application had been successful, by letter dated 27<sup>th</sup> May 2010. As a result your firm was exempt from FSCS levies relating investment intermediation activities with effect from the 2010/11 accounting year. I also believe that in this letter the FSA acknowledged that the information you were given in July 2009 was incorrect and apologised for this error.

Whilst it is unfortunate that you were provided with incorrect information in July 2009, I do not think that your firm was financially disadvantaged as a result. As the FSA explained in its letter of 27<sup>th</sup> May 2010, once the exemption was granted it takes effect from the next (my emphasis) accounting year. As such, as the FSA accounting year runs from 1<sup>st</sup> April to 31<sup>st</sup> March, for the exemption to apply for the 2009/10 accounting year (the levy you challenged in your telephone call from July 2009) the FSA must have received your application no later (my emphasis) than 31<sup>st</sup> March 2009.

In this instance, as you did not challenge the application of the levy until July 2009, the earliest FSCS levies you could become exempt from were those accruing during the 2010/11 accounting year. As you applied for (and were granted) exemption from FSCS levies due during the 2010/11 accounting year you have not been disadvantaged despite being given incorrect information for which the FSA has apologised as this was the earliest (my emphasis) period for which an exemption could be given.

I have noted that you feel that you have been incorrectly treated by the FSA as, despite it, in effect, confirming that you were exempt from FSCS levies from the date of your authorisation, it will not refund the levies you have previously paid. Although I can understand your views on this, ultimately, as the FSA has explained, the availability of an exemption from an investment intermediation levy was explained in the FSA's COMP and FEES sourcebooks and if you felt that you were exempt you were free to apply for the exemption. From the papers presented to me there does not appear to be any record of you questioning whether you were eligible for the exemption prior to the call you made to the FSA in July 2009.

When confirming your exemption, I understand that the FSA also explained that it could not retrospectively apply waivers and that waivers only became effective from the following accounting year. I appreciate that this may be a 'hard line' for the FSA to adopt but ultimately, the FSA is collecting levies on behalf of the FSCS which has calculated the 'funding' it feels it requires from the industry having calculated individual firm's liabilities based upon its requirements and the number of firms which are required to pay this.

Clearly the FSA must be consistent and if it was to recommend that all firms, who apply for an exemption receive a refund from the date of their confirmation of exemption and also a refund of contributions from previous years, this could leave the FSCS (through the FSA) in a position where it needed to request additional contributions from other firms (in respect of compensation payments already paid). This would create a significant burden on both the firms which have paid their levies as well as being extremely difficult and expensive to administer.

I appreciate that in your response to my Preliminary Decision you state that you challenged the FSA about the FSCS levies your firm was expected to pay on three occasions between 2002 and 2009. Although you were asked, by my Senior Investigator, to provide specific details of when you challenged the FSA and to whom you spoke to, you appear to have been unable to provide the specific information I requested and instead have simply reiterated that you spoke to the FSA on three occasions between 2002 and 2009.

When considering this issue, I also asked the FSA to undertake a review of its records and establish what contact its Firms Contact Centre and Revenue areas has had with you over this period. The FSA has confirmed that although it has records of you contacting it on over 60 occasions, its records do not indicate that the issue of a reduction in or an exemption from the FSCS levies your firm was expected to pay was raised during any of these calls.

Unfortunately, when assessing a complaint, I have to base my findings on the information which is available. In this case, you have been unable to provide me with specific dates and/or details of the individuals to whom you spoke about this matter. However, the FSA has been able to provide me with significant details relating to calls it took from your firm. Whilst I do not dispute that the issue could have been raised during a call you made to the FSA, the information available to me does not show that this was raised (or was simply raised as an aside and was not therefore raised in specific detail to warrant it being recorded on the brief telephone notes that are made of such conversations).

Similarly in your response to my Preliminary Decision you also add that you would like me to help you understand “*why the FSA is allowed to design a charging structure which lets [it] impose charges on [your firm] for a regime that the FSA knew was outwith the scope of [your] FSA Approvals*”. This question can best be answered by consideration of the procedure the FSA adopts when making changes to its rules. Before making a change, the FSA adopts an approach where it consults with the industry.

In this case, in April 2008 the FSA issued a consultation paper (CP08/08) which was entitled “FSCS funding –tariff changes” and asked the industry to respond to its proposals (by 17<sup>th</sup> June 2008). Following consideration of the responses it received to its proposals, it communicated the new rules to the industry in Policy Statement 08/11. This document also set out when the changes were to become effective, which was, in the main, with effect from the 2010/11 accounting year (which is when I note your exemption also became effective).

Although I have provided the above information as a matter of background, I should point out that the rules of the complaints scheme mean that I cannot consider specific complaints in relation to the FSA’s legislative functions (which includes its rule making functions under the Act). Specifically I would draw your attention to paragraph 1.4.2(3) of COAF which states:

1.4.2 Exclusions from the scheme

Each of the following is excluded from the complaints scheme:

- (3) complaints in relation to the performance of the FSA’s legislative functions under the Act (including making rules and issuing codes and general guidance).

As I have explained, it is unfortunate that the FSA did not explain that you could apply for an exemption when you called it in July 2009, however, given that the FSA has apologised for this error and appears to have clarified the position (given that you were granted an exemption from the 2010/11 accounting year) I believe that the FSA has correctly addressed the situation.

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 are clear and straightforward to find in the FSA sourcebooks. Whilst I accept that you complied with these (by paying your regulatory fees and levies when they were due), had you reviewed the rules or made specific enquiries with FSA you would have identified that, as your firm did not deal with customers who may be able to seek redress from the FSCS, you may be exempt from FSCS investment intermediation levies and could therefore apply for an exemption. The fact that you did not appear to appreciate this until late 2009 does not appear to be the fault of the FSA given that you became authorised in December 2002 and do not have appeared to have clarified the position with the FSA until July 2009. Nevertheless the level of efficiency on the part of the FSA displayed in what I have read between July and October 2010 does leave something to be desired and I do regret that.

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 or that it is treating you unfairly. Therefore your complaint cannot be upheld and as a consequence I am unable to recommend to the FSA that it should refund the FSCS investment intermediation levies your firm has incurred and paid or waive any which remain outstanding.

Likewise, I note from the FSA's file that the invoices the FSA sent to you on 30<sup>th</sup> March 2010 (for the 2009/10 accounting year) and 5<sup>th</sup> July 2010 (for the 2010/11 accounting year) are still outstanding. If these have not been paid you should now make arrangements to pay these with immediate effect.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sir Anthony Holland', written in a cursive style.

Sir Anthony Holland  
Complaints Commissioner