



4th March 2013

Dear Complainant,

**Complaint against the Financial Services Authority
Reference Number: GE-L01502**

I refer to your email of 14th January 2013 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 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 are unhappy with the outcome of the FSA's investigation into your complaint as you do not believe that circumstances which gave rise to your complaint have been sufficiently considered or reviewed.

From your email I believe that Firm A (your firm) recently incurred a £250 late submission penalty as your firm failed to submit a number of sections of its GABRIEL return. You say that you believed that, as you pressed the 'submit all' button, you had submitted all of the required reports to the FSA on 8th November 2012 which was before the due date of 9th November 2012.

You add that when submitting the return, although you say clicked the "submit all" box only four of the required 10 items were actually submitted. You add that as you received nothing to indicate that the return was not submitted in full you were unaware that part of the return was outstanding until you received notification that the late submission penalty had been applied.

Given that you believed that the return had been submitted in full you feel that the FSA's systems are at fault either by failing to show an error message or by failing to accept all of the returns and, as a result, are looking for me to recommend that the FSA waives the £250 late submission penalty that it has imposed against your firm.

Coverage and Scope of the Scheme

COAF provides as follows:

- (1) The complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions. The complaints scheme covers complaints about the way in which the FSA has acted or omitted to act, including complaints alleging:
 - (a) mistakes and lack of care;
 - (b) unreasonable delay;
 - (c) unprofessional behaviour;
 - (d) bias; and
 - (e) lack of integrity.
- (2) [deleted]
- (3) To be eligible to make a complaint under the complaints scheme, a person (see COAF 1.2.1G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the FSA's actions or inaction.

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 the 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. There is no act taken by the FSA which is incompatible with the Human Rights Act 1998 which caused you or your firm to lose its possessions as the FSA expects all authorised firms to all of its appropriate returns by their due date and applies consistently the late submission penalty to all firms which fail to do so.

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 the FSA. I have also referred to the FSA’s handbook which sets out the requirements it imposes on individuals and firms who wish to be authorised.

Before I comment further 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 return of reports by the industry to the FSA on my website under the heading of “Views of the Commissioner” (<http://www.fsc.gov.uk/documents/recent-issues-feb08.pdf>) and have also addressed this issue on pages 13 and 14 of my 2012 annual report (http://www.fsc.gov.uk/documents/annual/Annual%20reports/AnnualReport_2012.pdf).

As part of becoming authorised under the FSA you accepted to be bound by its rules. I note that I have not seen any evidence of your firm challenging the effect of the rules surrounding the requirement for electronic submission prior to the date which the regulatory return was due. This is clearly explained in the FSA handbook which sets out the rules with regard to regulatory returns, which you have previously agreed to comply with as part of the authorisation process.

The FSA's records show that your firm first became authorised by the FSA on 7th June 2006 and that you have been submitting RMAR returns in this manner since the introduction of GABRIEL in September 2008. The FSA has also confirmed that, since the introduction of GABRIEL, your firm has no history of the late submission of any part of the required returns.

From the papers presented to me by the FSA it is clear that the FSA sent a centrally generated notification to your firm confirming that the firm's reporting period (for the period ending 30th September 2012) had ended and a GABRIEL submission (consisting of a number of individual reports) was due and that these needed to be submitted no later than 9th November 2012 and this email again listed all of the individual reports which were required. Two subsequent reminders were then sent to you on 30th October and 6th November 2012.

Subsequently, on 7th November 2012, I understand that you saved and validated three of the required GABRIEL reports (Complaints, RMA-C, RMA-F and RMA-G). Then, on 8th November 2012 I understand that you saved and validated a further six of the required GABRIEL reports (RMA-A, RMA-B, RMA-D1, RMA-D2, RMA-E and RMA-I) before you submitted four of the required reports (RMA-A, RMA-D1, RMA-D2 and RMA-E). The remaining reports (Complaints, RMA-B, RMA-C, RMA-F, RMA-G and RMA-I) were not submitted.

I appreciate that you say that you attempted to submit all of the required returns by completing these and clicking the "submit all" button. You add that as you had saved and validated all of the individual reports required in the return, it is unclear why these were not submitted.

I can and do appreciate that you say that you clicked the "submit all" button and, having done this, believed that all of the returns had been submitted. However, I am also aware that you say that did not receive any notification to confirm whether this was or was not the case and were therefore unaware that only four of the reports were actually submitted.

I note that, prior to the FSA's Complaints Team considering your complaint, you contacted the FSA's Firms Contact Centre (FCC) and challenged the application of the late submission penalty. I note that during your telephone conversation with the FSA's FCC you indicate that as you had pressed the "submit all" button it must have been an error on the part of the FSA's system which resulted in the reports not being submitted in their entirety. I also note that the FCC's initial enquiries it confirmed that there were no recorded computer issues on 8th November 2012 which would have affected the submission of a GABRIEL return. I have no reason to dispute this information.

It is unfortunate that the six of the GABRIEL returns were not submitted, and although it is accepted that these had completed and saved, they were not submitted on 8th November 2012. This is not the fault of the FSA. Given that you did not receive any confirmation that the returns had been successfully submitted, it is unclear to me why you did not check the reporting schedule to confirm that there were no outstanding returns.

I appreciate that you clicked on the submit button but given that you had completed RMA-A, RMA-B, RMA-D1, RMA-D2, RMA-E and RMA-I on the same day (8th November 2013) and then had to 'cross validate' RMA-A, RMA-D1, RMA-D2 and RMA-E. As the RMA-A, RMA-D1, RMA-D2 and RMA-E had been cross validated, the submit button would, I believe, simply select these four reports which had been ticked (or checked) to enable their 'cross validation'. As such, the 'submit' button *only* (my emphasis) submitted to the FSA those reports which were ticked/checked presumably from the cross validation process.

I appreciate that you believed by pressing submit you were submitting all of the reports but this does not appear to have been the case. I would add that, had you returned to the reports due screen, I believe that you would have identified that only four of the reports were highlighted in green and would showed a "Submitted" status and that the remaining six reports were highlighted in orange and showing a "Ready to submit" status. As all of the reports were not submitted by the due date, the FSA issued your firm with an administration charge of £250.

Although the charge for the late submission of part of your GABRIEL return may seem high, particularly as the returns had been completed and saved but not submitted (and as this was the first time your firm has failed to comply with its reporting requirements), the amount of the administrative fee is intended to recover the costs that the FSA incurs, as an end-to-end process, in pursuing firms with overdue returns. It is intended to be separate to the FSA's Enforcement powers and is not therefore a financial penalty.

The late payment charge for the FSA, Financial Ombudsman Service and Financial Services Compensation Scheme were all aligned to £250. This was consulted publicly in CP05/2 and approved by the FSA Board in March 2005. An administrative charge for the late payment of FSA fees has been in existence since N2 (November 2001 - when the main provisions of FSMA came into force) and continues the process operated prior to N2 by the Personal Investment Authority.

The Act requires the FSA to have regard to the need to use its resources in the most efficient and effective way. The simplicity of having the same charge, whether a firm pays late or submits returns late means it is easier for firms to understand, and is more efficient and therefore cost effective for the FSA to administer data collection and fee payment. This is explained in the compatibility statement to CP05/2.

Details of the penalties and administration charges applied for the late submission of a return can be found in the FSA rule book under SUP 16.3.14.

SUP 16.3.14 states

If a *firm* does not submit a complete report by the date on which it is due in accordance with the *rules* in, or referred to in, this chapter or the provisions of relevant legislation and any prescribed submission procedures, the *firm* must pay an administrative fee of £250.

In this case, as your submission was received by the FSA some time after it was due, the FSA is following the rules laid down in its rule book by imposing a £250 administration fee on your firm. The onus for compliance with all of the FSA's rules (including the timely submission of reports required by it) falls upon those who are authorised.

This responsibility is accepted as part of the authorisation process by the firm applying for authorisation. The rules on regulatory returns are clear and straightforward to find in the FSA handbook. By imposing the administration fee following the late submission of your GABRIEL return, the FSA has followed its stated procedures on the matter.

As I have explained above, I do sympathise with your position as it is clear that the firm incurred an administration charge despite attempting to fulfil its requirements under the Act. However, I also have to be mindful of both your and the FSA's actions. It is clear to me that the FSA made you fully aware of which returns were due and although you attempted to submit these you clearly failed to do so on time.

Whilst I am mindful that you attempted to submit the returns in a timely manner, the facts are that, in my opinion, you omitted, for whatever reason, to submit the required returns. Ultimately, as you did not submit in full your GABRIEL return by the due date, you have not complied with the FSA's rules. By imposing the administration fee (which is detailed in its hand book under SUP 16.3.14) the FSA has followed its stated procedures on the matter.

Conclusion

In assessing a complaint, I have to have regard to the FSA's investigations and findings, together with the further representations complainants make to my office. I appreciate that you feel that the FSA should be sympathetic to your claim as your firm has previously always submitted its returns on time. As I have indicated above, whilst I can and do appreciate that your firm has always previously submitted its returns on time, on this occasion, for whatever reason you simply failed to do so.

Whilst I also appreciate that you believe that you used the "select all" button before submitting the return, from the information presented to me this does not appear the case. I would stress here that I do not dispute your belief that you submitted all of the required returns, but I have to base my decision upon the information available to me.

Unfortunately, without evidence (by way of a screen print) to show that *all* (my emphasis) of the required reports had been submitted (i.e. were highlighted in green and showed a "Submitted" status), the FSA's assurances that its GARBRIEL system did not experience any problems on 8th November 2012 (which would result in reports not being submitted), suggests that the reason for non-submission was a submission error on your part.

I would also add that once a report or series of reports have been submitted the GABRIEL system provides a confirmation message and also directs you back to the reporting schedule to *ensure* (my emphasis) that all of the required reports have been submitted. Given that you stated to the FCC operative that you did not see a confirmation message it would suggest that the reports had not been submitted in full. Likewise, the fact that only the cross validated reports had been submitted, suggests that you did not ensure that all of the reports were to 'ticked' for submission and that you checked your firm's reporting schedule to ensure that you had complied with your firm's reporting requirement.

Whilst I accept that you had completed and saved the required returns, the fact remains that until these have been submitted they can be amended and, as such, the FSA cannot use the information contained in them. As a result, I must concur with the FSA's view that a firm's reporting obligation "*is only satisfied once all of the data items in the return [required individual GABRIEL reports] have been successfully submitted*". As such, the reports have to be *actually submitted* (my emphasis) if a firm is to avoid the £250 administration fee. I would stress here that, although I do not doubt your belief that you had correctly submitted the returns, based on the information presented to me there is simply insufficient evidence to show that the non-submission of the reports was the fault of the FSA by way of a system error.

I am sorry, but as a result of my investigation I am unable to find any evidence to show that the FSA has not correctly dealt with your complaint. I am therefore unable to alter the decision previously made by the FSA. I appreciate that you will be disappointed with my findings, but hope that you will understand why I have arrived at this decision.

I would also point out that, as consequence of my Final Decision the £250 administration charge is now payable in full and I understand that, following my Preliminary Decision you have now contacted the FSA to arrange for the payment of this administration fee.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner