Complaints Commissioner

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21st November 2013

Dear Complainant,

Your complaint against the UK's Financial Services Regulators
Reference Number: FSA01583

I write with reference to your email of 30th September 2013 addressed to the Office of the Complaints Commissioner.

Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints' scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner charged with the task of investigating those complaints made about the way the regulators have themselves carried out their own investigation of a complaint that comes within that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role.

From 1st April 2013, as part of the changes implemented by the Government, the Financial Services Authority (FSA) was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulators of the UK's financial services industry. I would add that although the FSA has been replaced, transitional provisions have been put in place to enable the continued consideration of complaints against the FSA. As your complaint relates to the inactions of the FSA, in relation to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new transitional complaints' scheme.

As set out in the consultation paper (CP12/30 Complaints against the regulators) and confirmed in the policy statement (PS13/7 Complaints against the regulators), any complaints which have not been concluded as of 1st April 2013 will continue to be investigated by the FCA Complaints Team with the cooperation of the PRA if needed and my office. In practice, this means that, although the governing legislation will have changed there will be no change to the manner in which, or the terms under which, your complaint is investigated.

Your complaint

In your email you set out your complaint in the following terms:

1. *"Absolutely no calls were made by either of the people associated with the company. Firm A had a total part time staff of two. One part time employee in Adelaide Australia who did not travel outside Australia and I worked part time on brochures and websites from my home in the United States. We both worked on other projects for clients. The FCA allegation is that Firm A had offices in UK, Australia and the USA. The Australian address and the USA address were our homes. There was no active address in the UK or the British Virgin Islands.*

2. *Neither of the parties involved with the company made any calls to anyone soliciting share sales. The FCA claims to have people who said we did but will not identify these alleged complainants. Both of the people involved with Firm A have very broad Australian accents. It should not be difficult to ascertain whether we called them or not. It should also not be difficult for the FCA to ask the accusers, if they did in fact buy shares, to whom they paid the funds for those shares. I can assure you they were not paid to us in Australia. Before the FCA ruined my reputation I should have had the right to confront my accusers.*

   The FCA says it takes share fraud very seriously as it should. It also says it has 'clear evidence' that we approached people in the UK to sell shares. With due respect this is absolute unadulterated rubbish. They may have been approached by someone who claimed to be us, but it as sure as hell was not us (sic).

3. *I have attached my CV [...]. Does any of that sound like I am involved in a share selling scam? It simply did not happen.*

   This totally unjustified alert has cost me literally hundreds of thousands of dollars and several contracts. I left the company in 2011 and as I understand it, the company is no longer in existence".

Coverage and scope of the transitional complaints scheme

The transitional complaints scheme provides as follows:

9.1 The transitional 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 under FSMA. The transitional 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.

9.2 To be eligible to make a complaint under the transitional complaints scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.

9.3 The transitional complaints scheme does not apply to the Bank's functions under Part 5 of the Banking Act 2009 (overseeing inter-bank payment systems) as this was not previously subject to these complaints arrangements.

I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. FSMA (as the relevant legislation in place at the time) stipulated in Schedule One that the FSA is exempt from "liability in damages". It stated:

(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.

I have referred to FSMA here as it was FSMA which was the relevant legislation when you first raised your complaint and when the actions about which you are unhappy occurred. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. I would add here for the sake of completeness that you have not alleged that the FSA (or the FCA) acted in bad faith nor have you adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The transitional complaints scheme nevertheless then goes on to provide in paragraph 6.6 that:

Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This 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 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 (or indeed by the FCA) which is incompatible with the Human Rights Act 1998. The FSA had, and the FCA continues to have, a statutory objective of protecting consumers and reducing financial crime. In this case the actions of the regulators, in publishing the consumer alert about what is believed to have been a share sale scam (commonly known as a 'boiler room' operation), would appear to be consistent with these objectives.

I appreciate that you have stated that the Regulator's actions *"has cost me literally hundreds of thousands of dollars and several contracts"* but you have not provided any evidence to support this statement. I would also add that the aims of the Complaints Scheme are to allow complaints against the regulators to be investigated quickly and was not designed to consider claims for substantial sums of money.

With this in mind, if you feel that you have incurred losses of *"hundreds of thousands of dollars"* as well as the loss of *"several contracts"* and it was the UK Regulator's actions which directly led to this then, in accordance with paragraph 3.6 of the rules of the complaints scheme I would recommend that this is something which your pursue through the Courts.

Paragraph 3.6 of the rules of the complaints scheme states:

> *"Complaints that are more appropriately dealt with in another way*
>
> *The regulators will not investigate a complaint under the Scheme which they reasonably consider could have been, or would be, more appropriately dealt with in another way (for example by referring the matter to the Upper Tribunal or by the institution of other legal proceedings)".*

I do however note that, in your response to my Preliminary Decision, you have stated that *"I would like to assure you that I have not had, and do not have, any thought of, or any intention to seek any sort of financial compensation from anyone, I simply want to clear my name and distance myself from any wrongdoing that may have occurred after I left the company".*

My Position

As part of my investigation into your concerns I have obtained and reviewed the FCA's investigation file. In reviewing your complaint I have considered the comments you have made when corresponding both with the FCA's Complaints Team and my office.

From the correspondence I have seen you say that Firm A was created by Mr X, its sole shareholder, sometime before you joined it. You add that you were aware that Mr X had previously worked for a Canadian organisation listing companies on the Frankfurt Stock Exchange. As the result of an approach by Mr X in December 2010 you joined Firm A in a marketing and business advisory capacity (with your main role being the design of marketing material). You add that although you worked for Firm A on a part time basis, due to your personal circumstances, you did so from your home/office in California.

You have also indicated to the Regulator that your home address was only included on Firm A's website (as its US Office) as you were working with a third party, Firm B, to assist Firm A obtain a US marketing licence. You also add that due to communication problems between Mr X and yourself you resigned from Firm A in November 2011 and that you have had nothing to do with Firm A since your resignation.

Subsequently, on 17th January 2013 the Regulator issued an alert which indicated that consumers had been contacted by Firm A which it believed had been running a 'boiler room' operation. This alert, in its original form, indicated that Firm A operated from addresses in four different geographical locations (which were Australia, the British Virgin Islands, the United Kingdom and the United States) and listed these addresses. I should also add that the addresses included in the alert were also shown on Firm A's website.

However, following your representations, the alert was amended to show only the full addresses of Firm A's alleged offices in the Australia, the British Virgin Islands and the United Kingdom and only reflected that Firm A simply had an office in California. Although the Regulator amended the alert as result of your representations, given the Regulator's statutory duty, it refused to remove the alert from its website. It is this refusal about which you now appear to remain unhappy.

The information the Regulator has provided to me indicates that Firm A was first brought to its attention by a number of consumers during mid to late-2012. The concerns the consumers raised with the Regulator related to individuals, identifying themselves as representatives from Firm A, contacting consumers regarding the purchase of shares. These consumers also added that they were also directed to Firm A's website.

As I have indicated above, Firm A's website indicated that it had offices in four geographical locations (Australia, the British Virgin Islands, the United Kingdom and the United States) and also provided full postal addresses for each of these alleged offices. For the avoidance of doubt your home/office address was quoted on Firm A's website as its US office. Additionally, Firm A's website also made a specific reference to you and provided 'your' personal Firm A email address.

As the Regulator has explained, it has a statutory objective of protecting consumers and reducing financial crime. In this case, to conduct regulated activity within the UK (which includes the sale of shares to consumers within the UK) a firm must be authorised by the Regulator (as set out within Section 31 of the FSMA). In this case, the organisation identifying itself as Firm A was not authorised to conduct regulated activity and was therefore contacting UK consumers in breach of the Section 31 of the FSMA. Additionally, the shares which were being 'sold' by Firm A appear to have been of either a restricted or fictitious nature. Given this, it appeared, correctly in my opinion, to the Regulator that Firm A may have been running a 'boiler room' operation.

As such, the Regulator had a statutory duty to issue a consumer alert. I would also add here that as the alert surrounded Firm A, it is Firm A's responsibility to challenge the Regulator on the contents of the alert (including situations where a firm believed that its details had been 'cloned'). To my knowledge neither Mr X nor Firm A's representatives have challenged the content of the Regulator's alert.

When contacting my office you stated that you were concerned over the allegations that had been made against Firm A as Firm A did not contact any UK consumers. In my Preliminary Decision I respectively pointed out that, from the information presented to me, it appeared that the UK consumers *who contacted the Regulator* (my emphasis) appeared to have been contacted during early to mid-2012 and, as you had indicated that you resigned from Firm A in November 2011 (having no further contact with Firm A after your resignation), it was unclear to me how you could confirm that the contact did not originate from Firm A when you were not working for the firm at the time the alleged contact had taken took place. I welcome your acceptance of this argument.

However, I would also add that the alert issued by the Regulator does not say that you were part of the share scam, only that a firm identifying itself as Firm A has been contacting UK consumers. For the avoidance of doubt the alert now states:

> "*This statement is to advise members of the public that an organisation identifying itself to UK citizens as:*
>
> *Firm A Ltd*
>
> *13 The Topiary*
> *Basingstoke*
> *Hampshire*
> *London*
> *RG24 8YX*
>
> ***Tel:*** *0203 280 3630*
> ***Fax:*** *0203 280 3632*
> ***Website:*** *[Firm A website address]*
> ***Email:*** *[Firm A contact email address]*
>
> ***International Offices:***
> *California, USA.*
> *14 Stanford Ave, Novar Gardens, South Australia, 5040, Australia.*
> *ABM Chambers, Columbus Centre, Pelican Lane, Road Town, Tortola, British Virgin Islands.*
>
> *is not authorised under the Financial Services and Markets Act 2000 (FSMA) to carry on a regulated activity in the UK. Regulated activities include, amongst other things, advising on investments and dealing and arranging deals in investments ('investments' include stocks and shares). We believe that the organisation may be targeting UK customers*".

I would also add that the alert only highlights the office address information which was included on the Firm A website. I appreciate that you have stated that you had asked Mr X to remove your details from the Firm A website following your resignation and that he refused both your requests to do so and to engage with you over this issue. I also believe from your correspondence that a similar request for assistance was made to the New Zealand authorities but this too proved fruitless. In the circumstances Mr X's lack of assistance turned out to be extremely unfortunate.

As I have set out above, UK consumers were targeted by a non-authorised company identifying itself as Firm A. Given the information provided by those who were targeted, the Regulator had an obligation to issue the alert and to provide as much information as possible to alert UK consumers. In this case this included making UK consumers aware that the firm, Firm A, was contacting UK consumers and then to provide as much information as possible about the firm.

Given the manner in which the firm was being portrayed by its 'representatives' I feel that it was appropriate for the Regulator to mention that the firm was alleging to operate from offices in four geographical locations (Australia, the British Virgin Islands, the United Kingdom and the United States) and to provide the addresses of those offices. Given that your address was specifically stated on Firm A's website as the firm's US office I do not believe that it was inappropriate for the Regulator to include this in the alert. For the avoidance of doubt I would state here that I believe that the Regulator's alert was correctly issued and contained the appropriate information.

I would also add that an internet search shows that another organisation has itself issued an alert about Firm A's conduct and did so a considerable time before the alert issued by UK Regulator. Whilst I accept that this, although not in itself evidence that Firm A was running a 'boiler room' operation, does add support to the allegations made by consumers and, in my opinion, provides further justification for the decision the Regulator made to issue the alert in the terms that it did.

I appreciate that you feel that the Regulator has not investigated this matter appropriately, but I must disagree. As I indicated above, the Regulator received a number of detailed approaches from consumers regarding contact they had received from those describing themselves as 'representatives' of Firm A. I have noted that you feel you should have the opportunity to 'challenge' those who you describe as your accusers before the alert was posted on the Regulator's website but I disagree. The Regulator has not made any accusation towards you. The alert was aimed at Firm A and simply stated information contained on Firm A's website which had also been relayed to UK consumers during the approaches Firm A had made to them.

I should also add that the Regulator's role is to assess the information it receives, and then to take the course of action it deems appropriate. In this case, I am satisfied that the Regulator, having assessed the information it received from a number of sources, carried out what I believe was a sufficiently detailed investigation, before issuing the alert.

As I have indicated above, given the information presented to it *from a number of different sources* (my emphasis) the Regulator had a statutory duty to act to protect consumers generally. The Regulator's general duties were set out in Section 2 of FSMA (as this was the relevant legislation which was in place at the time) and are described in the following manner:

(1) In discharging its general functions the Authority must, so far as is reasonably possible, act in a way—

(a) which is compatible with the regulatory objectives; and

(b) which the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are -

(a) market confidence;

(b) public awareness;

(c) the protection of consumers; and

(d) the reduction of financial crime.

(3) In discharging its general functions the Authority must have regard to—

(a) the need to use its resources in the most efficient and economic way;

(b) the responsibilities of those who manage the affairs of authorised persons;

(c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(d) The desirability of facilitating innovation in connection with regulated activities;

(e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;

(f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;

(g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority.

(4) The Authority's general functions are—

(a) its function of making rules under this Act (considered as a whole);

(b) its function of preparing and issuing codes under this Act (considered as a whole);

(c) its functions in relation to the giving of general guidance (considered as a whole); and

(d) its function of determining the general policy and principles by reference to which it performs particular functions.

(5) "General guidance" has the meaning given in section 158(5).

From this you will see that, although FSMA required the Regulator to discharge the regulatory objectives, an order of prioritisation in which the statutory objectives must be considered by the Regulator was not set out within FSMA. Instead FSMA provided the Regulator with a discretion over how it prioritised its objectives and how it carried out its duties stipulating only, in Section 2(1), that it must act in a way which:

(a) was compatible with the regulatory objectives; and

(b) the Authority considered most appropriate for the purpose of meeting those objectives.

The composite effect of these provisions is to create an inevitable tension between market confidence, through the exercise of the Regulator's regulatory powers and the protection of consumers. In effect the Regulator had to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives. Issues like the ones raised in your complaint therefore will inevitably involve a consideration of difficult and differing courses of action for any Regulator when seeking to deal both with prudential regulation and consumer protection.

The manner in which the Regulator has acted is, in my opinion, consistent with these objectives and obligations. I would also reiterate that if Firm A feels that the alert is incorrectly portraying the firm then it is for Firm A or its representatives to challenge the overall content of the alert. As I have indicated above, to my knowledge neither Mr X nor Firm A's representatives (including its administrators) have challenged the content of the alert. Clearly, if a firm felt that the alert was incorrect (i.e. the approaches had been made by a 'clone' of Firm A), it is reasonable to suspect that the firm (or its representatives) would challenge the Regulator over the issue and contents of an alert. The lack of any challenge from either Mr X, the firm or its representatives unfortunately leads any objective assessor to a single conclusion.

In your response to my Preliminary Decision you add that your "*sole intention from the beginning of this drawn-out saga was to simply have my name and address removed from the Advisory and for the Advisory to mention that the alleged offences took place on or after early 2012. I believe that this, along with evidence of my resignation from the company in 2011, should satisfy any clients that are concerned by the Advisory*". You add that, to remedy the situation you believe that it "*would also be extremely helpful if I could get a short letter from either the FSA or your office, concisely reiterating the points made in [the Preliminary Decision which was issued on] 30th October 2013*".

As I have indicated above, my role is to review the manner in which the Regulator has considered a complaint and, where necessary, to make a recommendation in respect of that finding. My role is not to provide a 'letter', 'narrative' or 'note' which is not directly linked to my investigation to support either the actions of the Regulator or to assist a complainant. In this case, whilst I can appreciate the reasons behind your request, as it is *the Regulator which is in possession of all of the relevant information* (my emphasis) and which ultimately is responsible for the production and issue of the alert, it will be *the Regulator's decision* (my emphasis) upon whether it wishes to provide you with the 'letter', 'narrative' or 'note' that you have requested. I would however add that, as you are not specifically named or identified in the alert it is unclear how a 'letter', 'narrative' or 'note' from the Regulator will assist you. However, if you still feel that a 'letter', 'narrative' or 'note' from the Regulator will be of benefit to you then you should approach the Regulator about this. I would, however, again emphasis that it will be for the Regulator to decide whether a 'letter', 'narrative' or 'note' should be provided to you.

Conclusion

In this case the Regulator acted upon the information it was given from a number of sources which resulted in the issue of the alert about Firm A. I would also add that the alert the Regulator issued *did not* (my emphasis) specifically name you with the alert being directed at the firm for which you had worked, albeit for a limited time. I appreciate that you feel that your reputation may have been damaged by your association with the firm but this is not the fault of the Regulator. In my opinion, if any damage has occurred to your reputation, this was a direct result of your association with Firm A and the continued inclusion of your details on Firm A's website *rather* (my emphasis) than as a result of the actions of the Regulator.

As I have set out above, the Regulator has acted in accordance with its statutory obligations. The evidence I have seen also indicates that the contents of the Regulator's alert is based *solely* (my emphasis) upon the concerns which were raised with it and *the contents of the Firm A website to which UK consumers were directed* (my emphasis). I appreciate that you say that Firm A did not act in this manner and, although this may be the case whilst you were engaged with it, as you resigned in November 2011 it is unclear how you can comment with any certainty on what events transpired after you left. Likewise, given that you were based in California it may be difficult for you to comment upon the events which actually transpired in the geographical locations from which you knew Firm A operated (Australia or New Zealand) or in the locations where Firm A is also alleged to have offices (the British Virgin Islands and the UK).

I have noted your comments surrounding the reasons why your address was included on Firm A's website. Whilst your address may have only been included to enable Firm A to obtain a US Marketing licence this does not alter fact that your address *was shown* (my emphasis) on Firm A's website as the firm's US offices. I would add that, given your extensive business background, I am quite sure that you would have not entered allowed Firm A to use your address on its website without first entering into a formal agreement with it (which would inevitably include a contractual requirement that your address be removed upon your resignation as well as making provision for penalties in the event of any failure in this area). In my opinion, it appears that ultimately it is the failure of Mr X and/or Firm A to remove your address which has ultimately led to the complaint. I believe that this makes the matter a dispute between you and Mr X and/or Firm A's representatives (including its administrators given that it is no longer trading).

Given my views on this matter which, I have set out in considerable length above, it is my Final Decision that the Regulator acted appropriately given the information presented to it *from numerous sources* (my emphasis). I appreciate that you appear to have been implicated by association in the actions of a firm with which you were no longer involved. However, there is nothing to suggest that the Regulator acted in a way which could be considered to be inappropriate particularly given that you were not specifically named in the alert and that your home/office address was included on Firm A's website (and the Regulator took steps to amend the alert as a result of your representations). I am sorry, but I am therefore unable to uphold your complaint or make a recommendation to the Regulator that it should offer you any form of redress.

Yours sincerely

Sir Anthony Holland
Complaints Commissioner