# The FSA's response to the Complaints Commissioner's Report GE – L0176 Published on 10 December 2004

We have considered the final report of the Complaints Commissioner on complaint GE-L0176 and now respond to his recommendations and comment on his findings.

Paragraph 1.21 (a)

Within the framework of our risk-based approach we assess the risk posed to the FSA's objectives by networks and their Appointed Representatives (ARs) and take appropriate follow-up action where we discover problems. In assessing the adequacy of individual firms' systems and controls we take into account the number of ARs and advisers that they need to oversee. We monitor the number of advisers within individual networks and require firms to hold financial resources which reflect the number of advisers for whom they are responsible. It is a matter of public record that in appropriate cases we take enforcement action against firms where we find material shortcomings in their oversight of their ARs. We will take the Complaints Commissioner's comments into account in our future work in this area. As we explain below, however, we see a basic distinction between the position of regulated firms and ARs.

The Complaints Commissioner suggests, as one possibility, that the FSA could restrict the number of ARs which a network may operate. We would note that we could not simply impose this. If this were done through rules, the legislation gives the FSA the obligation to consult and to consider the "principles of good regulation". If it were done by seeking to impose requirements on the principals' permission, the legislation confers on them the right to refer any such FSA decision to the Financial Services and Markets Tribunal. We would expect the competition authorities to take a close interest in any systematic attempt by the FSA to restrict, by rule, the number of ARs which a network may operate.

Paragraph 1.21 (b)

For reasons that we explain below, we do not accept that there is currently a gap in our rules on Professional Indemnity Insurance. We welcome the Complaints Commissioner's acknowledgement that our legislative functions, including our rule-making powers, are excluded by statute from his jurisdiction.

Paragraph 1.21 (c)

Our view was and remains that the Complainant' substantive complaint does not fall within the Complaints Scheme. We took the view in autumn 2002 that the Complainant was complaining about the firms not the FSA and this was therefore not a matter for the Scheme. On 25 October he made a complaint about the FSA which we excluded on 15 January. We agree

**that this was still outside the 10-day deadline, and we have apologised to the Complainant for that.**

**Now that the Complaints Commissioner has published his final report, we have replied to the Complainant's letter of 4 March 2003.**

**We welcome the Complaints Commissioner's acknowledgement of the changes made in the resources and working practices of the Company Secretariat since the events described in his report. Management keep the adequacy of these resources and effectiveness of the arrangements under continuing review.**

**We agree that correspondence addressed to the Chairman or Chief Executive should be dealt with promptly, in line with our overall service standards. Our procedures for achieving that are:**

- **Letters received in those offices are reviewed and passed promptly to the relevant department for consideration and reply.**
- **The relevant department aim to respond on a timely basis, in line within any published service standards which apply.**

**Given the volume of correspondence received by these offices (some of which does not require a response of any kind from the FSA), we remain of the view that it would be an appropriate use of our resources to acknowledge all incoming letters.**

**Paragraph 1.21 (d)**

**We accept that in this case we should have been more proactive in seeking ways of resolving the differences of view between us and the Complaints Commissioner on this issue; our aim in future will be to resolve such differences of view sooner, in meetings with the Complaints Commissioner and his staff, rather than engage in protracted correspondence. We welcome the constructive discussions which we have recently had with the Complaints Commissioner and his staff on this point. We will amend our procedures as appropriate to reflect the approach we have now agreed with him.**

**However, the summary of the Complaints Commissioner's report in this case is not in our view a balanced account of events during 2004. In particular, we consider that the reasons for the sources of the delay lay with both the FSA and the former Commissioner and her office.**

**<u>Other observations on the Complaints Commissioner's Report</u>**

**In our view the relevant legislation – the Financial Services Act 1986 and the Financial Services and Markets Act 2000 – has established regulatory regimes in which there is a material difference between the position of a regulated firm and an Appointed Representative (AR). In summary:**

a. **The regulator has a direct relationship with the regulated firm.**
b. **The regulator has no direct relationship with an AR.**
c. **The regulated firm is responsible for the AR's compliance with relevant regulatory requirements.**

**Parliament could have legislated to require all firms to be directly regulated; it did not, but chose instead to make a distinction. At some points the report appears to accept this distinction; at other points it appears to infer that the same standards (and the full detail of those standards – not just the standard of care under the general law) should be imposed on intermediaries, whether they are directly regulated or ARs. We think this view is inconsistent with the legal framework.**

**The report implies that the regulator should require intermediaries to have run-off cover to cover claims which may arise after they have left direct regulation – either by ceasing to carry out regulated activities at all or by becoming an AR. Our response to this is:**

- **We do not have vires to make rules applicable to firms after cessation of authorisation (which may include becoming an AR)**
- **The regulated firm needs to ensure that its ARs have sufficient capital in the light of business they transact while an AR. Pre-AR business is not relevant in this context.**

**The report appears to suggest that we should require all firms to require their ARs to have run-off cover to cover claims against them for pre-network days. It is arguable that we would have vires to do this. However, we do not believe we could justify this in light of the 'Principles of Good Regulation' in the legislation; in particular, we do not believe such a requirement could be justified on cost-benefit grounds. A further consideration is that, given the severe constraints currently on the availability of PI cover for regulated firms, it is extremely unlikely that run-off cover of the kind the Complaints Commissioner's report envisages would be available at all or, if available, obtainable at a realistic price.**

**Paragraph 1.20 (b) of the Complaints Commissioner's report assumes a continuous chain of relationships between the Complainant and, first, Firm X and, subsequently, with Firm Y. In our view this is at least debatable. It may be that before X became an appointed representative of Firm Y the Complainant had already transferred his agency to another firm, Firm Z. X's letter to the Complainant of 7 January 1994 notes that the Complainant switched the servicing of his policies to Firm Z but the full date is not stated. So we are unsure that the Complainant was, as the report suggests, an ongoing client of Firm Y. And if he was not an ongoing client, he would not have received a Terms of Business letter. In any event, PIA rules in force at the time did not require firms' Terms of Business letters to make clear that the PII cover they held did not cover pre-network business.**

**We welcome the report's finding that PIA had reasonable measures in force to oversee its members. We would re-emphasise that Firm X was never regulated by the FSA, but by FIMBRA and then PIA. At some points (for example, paragraph 1.20 h) the report does not make this distinction sufficiently clear.**

**10 December 2004**