

complaint

Mr F's complaint is that FXCM charged a fee on his share-holding account. He says FXCM did not tell him about the fee. The account was with FXCM Securities. It's now called Walbrook Capital Markets Limited.

background

I issued a provisional decision on 20 October 2016. I summarised the background as follows:

In July 2015 Mr F complained to FXCM about the overdrawn balance on his cash account. This had arisen as a result of a number of inactivity fees being charged to his account. Mr F says he didn't receive the email about these fees.

Overall, FXCM didn't uphold the complaint. It said an email was sent to Mr F's email address in late 2012, to let him know the fee was being introduced. Mr F wasn't happy about this response and asked us to look at his complaint.

This complaint was considered by one of our adjudicators. He initially came to the view that the complaint should be upheld because FXCM didn't provide sufficient evidence to show that the email in late 2012 was sent to Mr F. He thought FXCM should return Mr F's share certificates and write off all charges and pay him compensation.

However, upon receipt of additional information the adjudicator changed his opinion. He felt FXCM hadn't done anything wrong in the circumstances. In summary he said:

- *FXCM had shown that it sent an email to Mr F explaining the inactivity fee before it was introduced. So it had told Mr F about the fee and given sufficient notice.*
- *FXCM was prepared to liquidate Mr F's holdings and close his account without chasing the remaining fee.*
- *It was Mr F's responsibility to monitor his own account.*

Mr F didn't agree with the adjudicator's view. He thought FXCM should have made more of an effort to notify him of the accruing fee. He also does not feel that an email was actually sent.

I went on to set out my view what I thought about Mr F's complaint, as follows:

I'm required to decide this complaint based on what I consider to be fair and reasonable in all of the circumstances. I am not bound to follow any previous decisions we have made. I do have to take into account relevant:

- *law and regulations*
- *regulators rules, guidance and standards*
- *codes of practice*
- *and where appropriate what I consider to be good industry practice at the relevant time.*

This dispute is about the introduction of an inactivity fee. That means it is about a change in the contract between FXCM and Mr F. The FXCM terms and conditions do include a term that allows it to vary the contract.

I have not, in reaching this provisional decision, thought in detail about the fairness of the contract terms. This is because I don't think FXCM have acted fairly and reasonably in its dealing with Mr F in any event.

I am aware that inactivity fees are now fairly common in the industry. So I don't think that an inactivity fee is automatically unfair. But even if a contract has a fair and reasonable variation clause I think the introduction of the fee would have to be explained clearly and fairly. I say this because of the obligations on regulated firms regardless of the details of the Unfair Terms in Consumer Contracts Regulations.

The fundamental obligations on regulated firms like FXCM are set out in the Principles in the FCA rule book. Those Principles include:

6 Customers' interests	<i>A firm must pay due regard to the interests of its customers and treat them fairly.</i>
7 Communications with clients	<i>A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.</i>

Also FXCM is subject to conduct of business rules. They include:

COBS 2.1.1 R

(1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

As I said, this complaint relates to the introduction of a fee for not trading – an inactivity fee.

FXCM has explained its reasons for introducing the fee as follows:

- "The introduction of the inactivity fees is to ensure that FXCM has active traders on all platforms and to cover the costs associated with a trading account." ...*
- "Holding a dormant or inactive account was [an] increasing cost to FXCM - in administrative account related fees. In providing the service of an inactive account FXCM would incur a cost. FXCM wished to close the service of inactive accounts or recoup the costs - for commercial financial reasons." ...*

So it seems to me the reasons were:

- holding inactive accounts involves costs to FXCM*
- it did not want to continue to hold such accounts*
- so it wanted customers to trade actively or close their account*
- to encourage that outcome it introduced the fee*
- the fee would also cover the cost of holding the account for those who neither traded actively or closed their account.*

I think it is right to keep those motives in mind when considering the way the firm introduced the fee.

FXCM says it told Mr F [about] the change [in] an email as allowed by the terms and conditions. The email was sent in the autumn of 2012. I have copied the first part of the email below:

So the email starts "Dear Trader". And then says: "Exciting news abounds!" It goes on to talk about the improvements to its trading platforms.

This may have been exciting news to some of FXCM's clients. But not for everyone. It could not be described as exciting news to someone like Mr F who did not trade on his account. He only used it to hold shares bought years before. FXCM had to know that.

FXCM was announcing changes that were introduced to affect customers like Mr F but it wrote in a way that was unlikely to attract his attention. The letter was addressed to "Dear Trader" but Mr F was really just an account holder. He did not want exciting news. He just wanted to hold his shares for the longer term. It seems unlikely that Mr F would read such an upbeat and salesman-like or obviously marketing communication.

I accept the email did announce the new fee. And it did give some options if the client did not want to "take advantage of the new offering". The options were to transfer to Barclays Stockbrokers. Or shares could be sold and accounts closed.

In my view, the letter is not a clear communication. What FXCM really wanted to do was close the accounts of inactive traders. But it didn't say that. It hoped to nudge people into trading – which is not something that should be done lightly. Or it hoped to nudge people into closing their account. And if the client didn't get the hint, if he didn't act on the nudge, FXCM would make a charge to cover the costs it says it incurs. That is a charge of £300 a year without, so far at least, any information to show that level of charge is fair and reasonable.

Also, FXCM introduced the charge but then did nothing to collect that charge until the fees had, in this case, run up to over £700.

Mr F's shareholding is not large and it does not make economic sense to incur £300 just to continue to hold the shares and do nothing with them. It seems to me that, as a broad principle, FXCM knew this.

I also think that any well-managed business will have planned the change it made. Then implemented it. And then reviewed the outcome to see if its objectives had been achieved. As a regulated firm that process should have involved making sure the customer – Mr F – was being treated fairly, and that it was acting in the best interests of its client.

It seems to me that the fair and reasonable thing to do in this case would have been:

- *to recognise that inactive traders – especially ones who had not opened accounts with FXCM - were unlikely to pay close attention to emails from FXCM.*

- *so the communication from FXCM should have been very clear.*
- *it should not have confused or obscured the message with euphemism or an obvious marketing tone.*
- *as FXCM wanted inactive traders to close their accounts it should have been much clearer about it than it was.*
- *it should have reviewed the effectiveness of its communication promptly and identified whether its inactivity fee was really in the client's best interest.*
- *it should have taken prompt action to ensure that its customers really did understand the inactivity fee and really did agree to pay it. Some may have been content to do so for short periods. It's unlikely that many would want to for longer periods.*
- *it should not have allowed large bills to build up without being sure that the client did actually agree to such fees.*
- *Accordingly it should have considered some or more of the following:*
 - *sending more than one letter*
 - *using ordinary as well as email*
 - *getting express consent to the change and/express consent to close the account since that is what it really wanted.*

Just because FXCM's terms say it can communicate by email this does not excuse poor communication. It does not override the obligation to communicate fairly. Or the obligation to act in the client's best interest.

In all the circumstances, I don't consider that FXCM has treated Mr F fairly. It has imposed a charge unfairly and in doing so it has caused him trouble, frustration and annoyance. I therefore consider that FXCM should repay Mr F the charge. I understand the charge was taken by selling [Mr F's] shares. The shares should therefore be returned to Mr F – or the cash equivalent if Mr F and FXCM prefer. And FXCM should re-pay any dividend or other income that has been lost.

FXCM should also pay Mr F £200 for the trouble and upset it has caused him.

Mr F agreed with my provisional decision – but did say that the shares had not yet been sold. He would however now like to close his account and have his share certificate returned to him.

Walbrook does not agree. It says:

- It has inherited this situation from FXCM. This has made it more difficult to deal with this (and other similar) complaints.
- It thinks we have usually accepted inactivity fees and the notice FXCM gave as it has shown that clients have opened and presumably read the notification emails.
- Mr F did receive and open the email.
- He had on-line access to his account at all times.
- Mr F allowed the fees to build up unpaid.
- FXCM's terms and conditions allowed for the introduction of inactivity fees.
- It is reasonable to say that the customer, as an experienced securities investor who received and opened the email, had agreed to the fee.
- The fee is there for a reason. There are costs in running the accounts. The fee was imposed to offset those costs.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I'm not persuaded by Walbrook's points.

I don't, in this case, question the fairness of an inactivity fee – if it's introduced fairly. My view in this case is that it wasn't introduced fairly.

While there is evidence the email was sent there is no evidence it was received and opened. And there is no evidence the email was read with any care or at all by Mr F.

Ms F cannot recall the email. I think this is reasonable. As I said above the email is not a fair and clear communication.

I don't think there's any evidence Mr F knew about the inactivity fee and knowingly allowed it to build up. On the contrary, my finding is that he didn't know about it because FXCM failed to tell him about it clearly. And it then failed to monitor things reasonably, and it allowed the charge to build up.

So, for the reasons set out in my provisional decision I uphold Mr F's complaint.

The charge should now be waived or refunded by Walbrook as appropriate. It is then for Mr F to arrange with Walbrook for his account to be closed.

FXCM should also pay Mr F £200 for the trouble and upset it has caused him.

All money to be paid to Mr F under this decision should be paid within 28 days of our telling Walbrook that Mr F has accepted this decision. If it isn't paid in that time interest at the rate of 8% simple interest per year is to be paid on the sum due from the date of this decision to the date of payment.

my final decision

I uphold Mr F's complaint against Walbrook Capital Markets Limited. It is to put things right in the way I set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 16 December 2016.

Philip Roberts
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