

complaint

Ms L's complaint is that FXCM charged a fee on her share-holding account. She says FXCM did not tell her about the fee. The account was with FXCM Securities. It's now called Walbrook Capital Markets Limited.

background

I issued a provisional decision in this case. I summarised the background as follows:

Ms L invested in some shares in Bank of Ireland in 2008. She was not an active share trader. She opened an account with Sharewatch. It was the cheapest share dealing service she could find. She just wanted to buy and hold the shares – not trade them.

According to Ms L, the next material event was when she received an email demanding the payment of £537.75 from FXCM. She says she did not know she had an account with FXCM and thought it was some kind of fraud. Ms L contacted FXCM to complain about the demand.

FXCM says ODL Securities took over Sharewatch. And ODL Securities became FXCM Securities.

Later FXCM made some changes to its service. It introduced an inactivity fee. It's charged each month if the account holder doesn't carry out three trades in that month.

FXCM says it told Ms L about all of these events and changes.

One of our adjudicators considered Ms L's complaint. He said FXCM hadn't clearly told Ms L about the change that introduced the inactivity fee.

FXCM doesn't agree with the adjudicator. It says its terms and conditions allow it to tell Ms L about the changes by e-mail and that's what it did.

FXCM also said we have looked at some other complaints about the same thing and did not uphold them.

Ms L agreed with the adjudicator.

I then set out what I thought about the 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 Ms L. 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 Ms L 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:

- *“to cover the costs associated with FXCM facilitating your trading account.” ...*
- *“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 Ms L [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 Ms L who did not trade on her account. She 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 Ms L but it wrote in a way that was unlikely to attract her attention. The letter was addressed to 'Dear Trader' but Ms L was really just an account holder. She did not want exciting news. She just wanted to hold her shares for the longer term. It seems unlikely that Ms L 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 she 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 £500.

Ms L'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 – Ms L – 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 [one] 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 Ms L fairly. It has imposed a charge unfairly and in doing so it has caused her trouble, frustration and annoyance. I therefore consider that FXCM should repay Ms L the charge. I understand the charge was taken by selling Ms L's shares. The shares should therefore be returned to Ms L – or the cash equivalent if Ms L and FXCM prefer. And FXCM should re-pay any dividend or other income that has been lost.

FXCM should also pay Ms L £200 for the trouble and upset it has caused her.

I asked Ms L and Walbrook to let me have any comments they wished to make before I made a final decision.

Ms L agrees with me. Walbrook does not. 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 FXCM has shown that clients have opened and presumably read the notification emails.
- Ms L did receive and open the email.
- She had on-line access to her account at all times.
- Ms L 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.

In this case evidence was provided to show that the email was sent. Evidence was not provided to show it was opened. The record that was provided to show the email was sent has data field to record when the email was opened and it has been left blank.

And there is no evidence the email was read with any care or at all by Ms L.

Ms L cannot recall the email. I think this is reasonable even if did get past her spam-email filter and she opened it. As I said above the email is not a fair and clear communication.

Also Ms L was not an experienced securities investor – and not a trader. She only had the one holding. And she did not log on to her account. When FXCM contacted her to demand payment, and she queried things, she had to ask for her username and password to be given to her.

I don't think there's any evidence Ms L knew about the inactivity fee and knowingly allowed it to build up. On the contrary, my finding is that she didn't know about it because FXCM failed to tell her 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 Ms L's complaint.

FXCM/Walbrook sold Ms L's shares to pay its fees. The shares should now be returned to her or the cash equivalent if Ms L prefers. (And I now think it should be for Ms L only to decide which she prefers.) If the cash equivalent is preferred, that should be the value of the shares as at the date of this decision. Either way Walbrook should re-pay any dividend or other income that has been lost.

FXCM should also pay Ms L £200 for the trouble and upset it has caused her.

All money to be paid to Ms L under this decision should be paid within 28 days of our telling Walbrook that Ms L 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 Ms L'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 Ms L to accept or reject my decision before 15 December 2016.

Philip Roberts
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