

17th June 2015

Dear Complainant,

**Complaint against the Financial Conduct Authority
Reference Number: FCA00029**

Thank you for your recent emails. I am sorry for the delay in responding, but your complaint has raised a number of complex issues on which it has been necessary to make further inquiries of the Financial Conduct Authority (FCA).

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

You can find full details of how I deal with complaints at www.fsc.gov.uk. If you need further information, or information in a special format, please contact my office at complaintscommissioner@fsc.gov.uk, or telephone 020 7562 5530, and we will do our best to help.

What we have done since receiving your complaint

Since we received your complaint we have been considering all of the comments and evidence presented to us and, where necessary, seeking further information from the FCA. I have now completed my investigations and provide you with my final decision.

As the rules of the scheme under which I consider complaints can be found on our website at www.fsc.gov.uk, I do not intend to set them out fully below.

Your complaint

From your email and the papers sent to me by you and the FCA I understand that your concerns relate to the manner in which the Financial Services Authority (FSA) and/or FCA (which I will refer to as the regulator) have conducted themselves in relation to a number of unregulated investments in which you have invested. You have indicated that you deliberately selected non-regulated investments, being fully aware of the risks they posed, as they 'offered' considerably higher returns than you were able to obtain elsewhere. You consider that the regulator's interventions have been inappropriate and caused you losses. You say that:

- in respect of Firm A and Firm C you believe that :
 - the FCA’s conduct in seeking freezing orders was not in the public interest but was based on a desire to generate income.
 - the FCA has not protected consumers because the liquidator, who will be appointed by the FCA to reconcile the remaining funds and distribute these to ‘investors’, will utilise all remaining assets to meet their fees.
 - the FCA’s decision to defer this complaint was inappropriate as you need access to the money which the FCA has now frozen to repay your mortgage later this year.

- in respect of Firm I:
 - you say that the regulator failed to protect investors by failing to spot that the investment was a ‘Ponzi Scheme’.
 - you add that, although the regulator indicated that it applied for a freezing order to protect the investments made by consumers, the order was incorrectly removed allowing those running the investment to transfer the funds overseas resulting in a loss to investors.
 - you are also unhappy with the level of communication you received from the regulator. You consider that the regulator failed to inform you that it had applied for and then revoked the order. You have added that, had you been aware that the order had been revoked, you would have withdrawn your money from the investment.
 - finally you believe that “had the regulator stayed out of the matter altogether, we would have had a chance of payment at the end of our 1 year term in 2012 or at the very worst take action via the Courts under the guarantees issued by Firm I”.

My assessment of your complaints

I have now had the opportunity to consider fully the papers presented to me. Although there are a number of complex technical details surrounding your complaint, at heart your complaint about the regulator’s actions in relation to all three firms is that the interventions in unregulated investments have exacerbated rather than mitigated the risks you faced as an investor. The questions I therefore have to consider is whether the regulator’s actions were reasonable and, if not, whether I should recommend that you should be offered any form of redress.

I start with your complaints about Firms A and C, which the FCA has deferred. Whilst Firm A and Firm C were not regulated, the FCA concluded that the investments they offered fell within the definition of regulated activities and therefore needed to be authorised by the FCA. Given this concern, the FCA concluded that it had to take action as it is a criminal offence to conduct a regulated activity without being authorised. The recent court decision that, as Firm C was operating a collective investment scheme, it was acting illegally, supports the FCA’s approach.

I appreciate that you are disappointed that the FCA has chosen to defer its consideration of your complaint about the action it took against these firms. Having reviewed the FCA's investigation file I am satisfied that, in the light of the continuing enforcement action, the FCA's decision to do this appears to be reasonable. Paragraph 3.7 of the Complaints Scheme states:

Investigations which may be deferred

A complaint which is connected with, or which arises from, any form of continuing action by the regulators will not normally be investigated by either the regulators or the Complaints Commissioner until the complainant has exhausted the procedures and remedies under [the Financial Services and Markets Act 2000] FSMA (or under other legislation which provides for access to the Scheme) which are relevant to that action. The complainant does not have to be the subject of continuing action by the regulators for this provision to be engaged. An investigation may start before those procedures are completed if, in the exceptional circumstances of the case, it would not be reasonable to expect the complainant to await the conclusion of the regulators' action and that action would not be significantly harmed.

In the FCA's decision letter reference was made to paragraph 7.4 of the Complaints Scheme. I consider that that was an error and the correct paragraph was 3.7. Whilst it is disappointing that the FCA referred you to the incorrect paragraph of the complaints scheme, I consider that its decision to defer your complaint because of its continuing action in relation to Firm A and Firm C was correct, and the error has had no substantive effect.

It is unfortunate that you are unable to access the money you have invested with Firm A and Firm C, but that does not mean that the FCA was at fault in taking its action. When taking action such as this the regulator attempts to preserve assets for the benefit of all investors. This means that the regulator can apply for a freezing order which, in addition to preventing the firm from dissipating assets, will also prevent consumers from withdrawing from the scheme. This means that all investors will be treated equally and prevents those who become aware of the regulator's concerns at an early stage benefiting at the expense of those who may be unaware of the regulator's concerns.

If, as you have indicated, you received advice to invest in these firms, then you should complain about this advice to your adviser (or the adviser's sponsoring firm) who had a duty to complete sufficient due diligence to ensure that the firms were properly authorised and to ensure that the investments were entirely suitable for you.

I now come to your complaint regarding the regulator's conduct in relation to Firm I. Having reviewed the papers the FCA has presented to me it is clear that the regulator believed that Firm I was acting in breach of FSMA and had engaged with the firm about its concerns. Following consideration of the matter Firm I accepted that it might have acted in breach of the FSMA. As a result Firm I agreed to provide consumers with certain rights which would allow them to receive refunds of their investments. The regulator then requested further information to ensure that Firm I had offered the appropriate refunds to all of its investors. During the regulator's review of the information, it concluded that Firm I had not engaged fully with it and applied to the Court for an interim freezing order

Unfortunately, it rapidly became apparent that Firm I had provided the regulator with all of the information it had requested and that, due to an error by the regulator, the information had not been identified (as the email in which it was contained had been erroneously deleted). Whilst the regulator still had considerable concerns over Firm I's conduct, the regulator concluded that any attempt to maintain the interim freezing order would fail, and the interim order therefore lapsed after only one week. Because the regulator had not notified investors of the interim order, it did not notify them that the interim order had lapsed.

It is regrettable that, following the withdrawal of the interim freezing order, Firm I provided incorrect communications to its investors suggesting that the regulator had approved its conduct. These communications were issued by Firm I rather than the regulator and were not approved by the regulator. Indeed, despite discharging its application for the interim freezing order, the regulator continued to have concerns over Firm I's conduct and was continuing to pursue these concerns. I would add that when it was made aware of the letters Firm I had sent to its investors, the regulator immediately raised concerns with the firm.

I appreciate that you feel that, once the FCA discharged its application for the interim freezing order, it allowed Firm I to defraud its investors by transferring all client funds to an overseas bank account and therefore failed in its consumer protection objective. I do not agree with that analysis. The facts are that the firm was an unregulated one (as you were aware). The FCA made an unsuccessful attempt to freeze Firm I's assets, which it then had to allow to lapse. While regrettable, the lapse of the interim order simply returned the position to that which had existed before the FCA's intervention. The cause of your losses was not the FCA's actions, but the actions of the unregulated firm. As the FCA explained in its decision letter, it continued to pursue investigations into Firm I until the firm was liquidated by HMRC in an unrelated action.

Finally, I should address your general point that, as someone who chooses to deal in unregulated investments, you should not have your interests interfered with by the intervention of the regulator. While I understand your point, the fact is that the FCA has consumer protection duties which are not limited to regulated investments; and the FCA has to deal with problems which occur across the boundary between regulated and unregulated activities (a boundary which is not always entirely clear). Even were I to conclude that the FCA's intervention was the cause of your losses (and, for the avoidance of doubt, I can and do reach such conclusions in the complaints I deal with, though I have not in your case), it would not follow that the FCA had behaved improperly.

Conclusion

In summary, whilst I have considerable sympathy for your position, I do not uphold your complaints against the regulator. I have concluded that your losses were caused by the actions of the unregulated firms in which you chose to invest, not by the regulator.

Nonetheless, I hope that the following comments may be of some use. It is clear that you opted to invest in non-regulated investments in the belief that they would offer higher returns.

The regulator has indicated that, in their opinion, unregulated investments such as those offered by Firms A, Firm C and Firm I) should not usually be recommended to retail investors¹. From the papers you have presented to me it appears that despite these warnings your adviser has provided you with what amounts to advice to invest (on at least one occasion) in an unregulated investment. Given the warnings which the regulator has issued to the industry, it may be that the investments you made with Firm A, Firm C and Firm I were wholly unsuitable for you as a retail investor (who does not appear to meet the sophisticated or high net worth investor requirements).

If that is correct, you could consider whether to complain to your financial adviser (whom you have referred to as your broker) about the advice you were given. Based upon the limited information I hold, it would appear that you do not meet the regulator's sophisticated and/or high net worth investor criteria, and therefore the investments may not have been suitable for your circumstances. Once your adviser (or his parent organisation given that your adviser only appears to have been authorised as an introducer) has considered your complaint and responded to you, if you remain unhappy you may be able to refer the matter to the Financial Ombudsman Service (FOS). Although your adviser should provide you with the FOS's contact details when it issues its response the FOS can be contacted as follows:

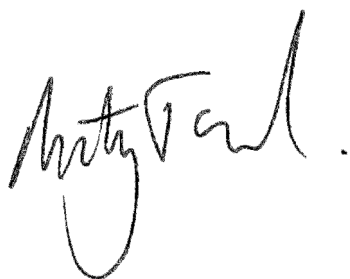
The Financial Ombudsman Service
Exchange Tower
London
E14 9SR

Telephone: 0800 023 4 567 or 0300 123 9 123

Email: complaint.info@financial-ombudsman.org.uk

I appreciate that you will be disappointed with my decision but hope that you will understand why I have reached it.

Yours sincerely



Antony Townsend
Complaints Commissioner

¹ CP12/9 and PS13/3 - Restrictions on the retail distribution of UCIS and close substitutes
(<http://www.fca.org.uk/firms/financial-services-products/investments/ucis>)