

10th February 2016

Dear Complainant,

**Complaint against the Financial Conduct Authority (FCA)
Reference Number: FCA00132**

Thank you for your email of 10 January 2016. I have now completed my review of your request to consider the decision of the FCA – as set out in its letter of 13th November 2015 – to exclude your complaint, dated 30th October 2015, from the Scheme.

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

I have now considered all the information you and the regulator have sent us. My decision on your complaint is explained below.

Your complaint

You allege in your complaint that the current FCA “*rules do not sufficiently protect consumers and as such fail to provide appropriate protection to the average person*”, as regulated firms, such as Independent Financial Advisers (IFAs), are not required to specifically warn consumers when they are recommending an unregulated product (element 1).

Further, you believe that cases like yours, where the consumer is dealing with an authorised IFA and believes that they were recommended a regulated product, should come under the remit of the FOS and the Financial Services Compensation Scheme (FSCS), so that when something goes wrong the consumer has recourse to compensation without having to go to the courts, at their own expense (element 2).

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Background to the complaint

In considering this case, I have carefully reviewed both your complaint and the regulator's decision to exclude it from the Scheme on the grounds that it is in relation to "*the performance of the regulars' legislative functions as defined in the 2012 Act (including making rules and issuing codes and general guidance)*" - paragraph 3.4 of the Scheme.

You allege you suffered a significant financial loss as a result of following an FCA authorised IFA's advice to invest (unbeknown to you) in an unregulated product. You complained to the Financial Ombudsman Service (FOS) but they advised you that your complaint cannot be investigated as it is about an unregulated product and it falls outside their jurisdiction. The only option open to you now is to take legal action at a considerable cost.

My findings

I agree with the FCA that element 1 of your complaint falls under paragraph 3.4 of the Scheme, and is therefore excluded. However, I understand your concerns about regulated firms not being required to explicitly advise consumers when a sale or recommended product is not covered by the FOS or FSCS.

The Treating Customers Fairly (TCF) principles need to be applied to every customer a firm does business with, and there are rules in the FCA Handbook requiring regulated firms to communicate in a fair, clear and non-misleading way with consumers to enable them to understand the nature and risks of the service and / or product (COBS 2.2.1). There is also a specific requirement (COBS 4.9) that firms advise their clients, when there is a financial promotion with an overseas element, that:

- the usual protections put in place for retail clients do not apply;
- the extent and level to which the FSCS will be able to assist the consumer;
- whether or not there is protection available under another system of regulation (such as the Regulator of the country in which the investment was made) but this is optional.

Although I agree with the FCA's decision to exclude element 1 of your complaint, I nonetheless urge the FCA to consider the points raised and assess the efficacy of the existing rules in the light of its consumer protection objective. A consumer understanding what is **not** covered under the FOS and FSCS has an equal, if not greater, importance than understanding what is covered, as it has potentially far graver consequences if something goes wrong with an unregulated product.

In relation to element 2 of your complaint, I also agree with the FCA that it is outside the remit of the Complaints Scheme. The investments which fall under the regulation of the FCA and therefore within the remit of the FOS are defined by the Financial Services and Markets Act 2000 (FSMA) and were decided upon by Parliament. Any changes to what does or does not fall into this category and can therefore be investigated by the FOS would also have to be made by Parliament and it is not something that the FCA or my office can change. Should you wish to take the matter further, you may write to your Member of Parliament with your suggestion.

In relation to the FCA's letter dated 13th November 2015, I believe they could and should have provided you with further and more relevant information, as I have done, about why they cannot change which products are regulated and what specific measures are in place to

protect consumers, as well as what firms are expected to do, such as TCF, COBS 2.2.1 and 4.9, as outlined above.

Furthermore, I would have expected the Complaints Team, once you clarified the name of the IFA, to have forwarded your concerns in relation to this IFA to the relevant Supervisory area for their consideration and action as appropriate. While the FCA is generally prevented by s348 of FSMA from giving consumers updates on what action they are taking in response to information provided to them, they can and should ensure that the information reaches the right areas within the FCA and notify the consumer that they have done this. Therefore I recommend that they take these steps and confirm them to you.

Conclusion

Although I understand that you are unhappy with the FCA's decision not to investigate your complaint, I believe it was correct to do so and, as a result, I am unable to help you under the Complaints Scheme. I appreciate that you will be disappointed with my decision but hope that you will understand why I have reached it.

I do, however, urge the FCA to consider the wider points your complaint raises about firms providing a clear indication to consumers when they will **not** be covered by the FOS and FSCS, and how consumers might be protected better in future.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner