DRN-3818366

The complaint

Ms H complains she was mis-sold an investment bond (held in an ISA wrapper) by Basset Gold Limited ("BG Ltd"), an appointed representative of Gallium Fund Solutions Limited ("Gallium"). She says the bond was mis sold to her by BGL as she believed it was low risk and similar to the NS&I Bonds. She says that Gallium mismanaged the bond as she was unaware it was used to finance a payday lender and the appropriate risk warnings weren't provided.

What happened

The B&G Plc Bond

In September 2017, Ms H invested in a Basset & Gold Plc ("B&G") three year Compounding High-Yield IFISA Bond. Sales of this bond were dealt with by BG Ltd, a separate business from B&G Plc, the issuer of the bond. BG Ltd arranged applications for investments in the bond, through a website it operated - bassetgold.co.uk. And it was responsible for advertising/ marketing the bond. Potential investors were also able to call BG Ltd, to discuss the bond.

The bond was non-readily realisable and therefore there were rules restricting who it could be promoted to and on how to test whether the investment was appropriate for the potential investor. BG Ltd's online application process took steps to meet the obligations created by these rules. I have set out details of the application process below and will set out, and consider, the relevant rules in my findings.

Neither B&G Plc nor BG Ltd was authorised by the Financial Conduct Authority (FCA) in its own right at the time of Ms H's investment. But both were appointed representatives of Gallium Fund Solutions Limited Gallium, which was an FCA authorised business.
B&G Plc and BG Ltd were appointed representatives of Gallium from 17 February 2017 to 28 February 2018. As such, Gallium is responsible for a complaint about either business which is about the acts and omissions which took place during this time, for which Gallium accepted responsibility.

Gallium also played a role in relation to the bond in its own right – it was responsible for approving BG Ltd's marketing and promotional material relating to the bond. Gallium has confirmed that the promotional material included the Invitation Document (which was the formal financial promotion document for the purposes of Section 21 of the Financial Services and Markets Act 2000), bassetgold.co.uk, and online advertising material issued by BG Ltd.

Ms H's investment in the bond

Ms H visited bassetgold.co.uk in September 2017, after she searched online to find a product which would provide her good interest. She says she then made contact with BG Ltd and spoke to someone who became her dedicated relationship manager.

Ms H completed the online application form on bassetgold.co.uk. In total she applied to invest

£10,000 in the bond. The bond Ms H invested in offered an interest rate of 6.70%, with the invested capital to be returned after three years.

When Ms H referred her complaint to us we asked for copies of any call recordings BG Ltd held. We were provided with copies of call recordings from immediately after the investment in the bond was made, and later. It provided some calls from when Ms H first inquired about investing with B&G ltd but it hasn't provided any calls in relation to when Ms H made her actual application in September 2017. .

Ms H says she thought the bond she invested in was similar to the NS&I bonds as the B&G Plc bonds appeared next to the NS&I bond products after a web search. She didn't think the bond was risky and wasn't provided any warning either. She says she invested a large sum of her overall savings.

On 8 January 2019, B&G Finance Limited (which by that point had taken on the role of BG Ltd), sent an email to all investors then holding B&G Plc bonds. That email included the following:

"To date the vast majority of lending has been to an FCA regulated lender that currently holds approximately 36,000 consumer loans. We are happy with the way that investment is performing, and the underlying spread of loans across tens of thousands of borrowers provides strong levels of predictability and resilience."

"As Basset & Gold Plc is currently predominantly invested in a single lender, it is our responsibility to ensure that you are aware of the associated risk, known as "Concentration Risk". It might help to explain this risk if you think of the goose that laid the golden egg. It was a great asset, but it only took one goose to die for the asset to dry up. Basset & Gold's investment team has performed due diligence on more than 40 opportunities over the past year. Its investment philosophy has been to accept the risk of holding one good asset, rather than diluting quality in order to improve diversification. We hope that this will translate into improved diversification over time, but as an investor you should be aware that Basset & Gold will only proceed with an investment when they are happy with it, even if that prolongs the Concentration Risk."

This refers to the fact that nearly all the money invested in B&G Plc bonds had been lent to one short term and pay day lender. Following action by the FCA, the lender went into administration in March 2020 - and B&G Plc went into administration shortly afterwards. As a result, Ms H has not had her invested capital returned to her.

The online application process

I have seen screen prints of each stage of the online application process. These show the application journey that Ms H underwent.

Certification

Ms H would first have arrived at a page titled "*APPLY NOW TO BECOME AN INVESTOR*" which asks the consumer to provide some basic details. The next page is titled "*PLEASE SELECT THE MOST ACCURATE INVESTOR PROFILE FROM THE LIST BELOW*" and in this case asked Ms H to select from "*EVERYDAY INVESTOR*", "*SELF CERTIFIED SOPHISTICATED INVESTOR*", "*ADVISED INVESTOR*" or "HIGH NET WORTH INVESTOR".

Ms H selected "*EVERYDAY INVESTOR*", which was described as follows:

"What Is An Everyday Investor?

Anyone can become an Everyday Investor. You just need to agree to not make more than 10% of your investments (including savings, stocks, ISAs, bonds and property excluding your primary residence) in investments that cannot easily be sold (i.e. illiquid). This is why the FCA refers to these investors as 'Restricted Investors'."

Having selected this profile, Ms H was then asked to make a statement, confirmation and declaration as follows:

"Everyday Investor Statement

I make this statement so that I can receive promotional communications relating to non-readily realisable securities and investments as a restricted investor.

I declare that I qualify as a restricted investor because both of the following apply:

In the preceding twelve months, I have not invested more than 10% of my net assets in non-readily realisable securities.

I undertake that in the following twelve months, I will not invest more than 10% of my net assets in non-readily realisable securities.

Net assets for these purposes do not include:

(a) the property which is my primary residence or any money raised through a loan secured on that property;

(b) any rights of mine under a qualifying contract of insurance;

(c) any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependents are), or may be, entitled.

Investment Duration

I confirm that I am aware that the minimum duration of the current bonds on offer are as follows:

Cash Bond: 30 business days.

3 Year Monthly Income Bond: 3 years. 5 Year Monthly Income Bond: 5 years.
Compounding High-Yield Bond: 5 years.
Pensioner Bonds: 1 year extendable up to 5 years.

Declaration

I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested.

I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

I have made investments in similar products in the last 30 months and/or I am familiar with this type of investment. I am not planning on borrowing, remortgaging or liquidating

assets to invest into a Non-readily Realisable Security. I am not investing via a SIPP/SSAS created specifically for investment in a Non-readily Realisable Security. I will retain

access to sufficient liquid resources following investment. I am aware the Bond is intended to be an income producing product and not a product that provides capital growth.

I agree to Basset & Gold Plc and Gallium Fund Solutions Limited keeping a record of this declaration and providing them to the FCA in event of an investigation."

Ms H was required to click "*Next*" to make the required statement, confirmation and declaration.

The appropriateness test

Having completed the certification, Ms H would then have arrived at a page titled "*JUST A FEW MORE QUESTIONS (REQUIRED BY LAW)"* which included the following multiple choice questions and answers, and a concluding confirmation:

"These questions are designed to check that this type of investment is appropriate for you. Please read each question carefully and select the answer that you believe is correct.

1) AFTER YOU INVEST IN THIS OFFER CAN YOU TRANSFER YOUR BASSET & GOLD BONDS?

The bonds are not transferable except in the case of the IFISA Bonds
Yes I can transfer them as a listed share

2) THE EXPECTED RETURN FROM BASSET AND GOLD BONDS?

is the fixed interest rate per annum paid over the term (plus my Money back at the end)
is dependent on movements in the financial bond and equity markets.

3) IS YOUR CAPITAL SECURE?

No, my capital is at risk and I might not get back all that I invested.
Yes, my capital is secure and I have no risk of losing.

4) CAN THE BASSET & GOLD BONDS BE CONVERTED TO BASSET & GOLD SHARES?

Yes
No

5) DIVERSIFICATION IS A COMMON WAY TO HELP MANAGE RISK WHEN INVESTING; WHAT DOES THIS MEAN?

That you should invest all of your money into a single bond.
That you should invest your money in a range of different bonds as well as other less risky investments.

I confirm that I have read, understood and agree to Basset Gold Ltd's terms and conditions of service and confirm that I would like to become a client of Basset Gold Ltd and receive financial promotions from time to time."

If any question was answered incorrectly the website displayed the following message (at

the point of the particular question being answered incorrectly):

"You have selected an incorrect answer. If this was an error please correct your answer, however please consider that if you are unfamiliar with the features of this investment then it might not be suitable for you."

Ms H completed the full process, so clearly answered the questions correctly – but it is not known if she answered any questions incorrectly initially and changed her answers, having seen this message.

Answering the questions correctly allowed Ms H to move the to the final stages, which involved selecting an ISA or bond, selecting which of the products she wanted to invest in, and how much she wanted to invest. After completing these final stages consumers were able to click on a box to open the Invitation Document for the bond. However, it was not mandatory to do this – consumers were able to proceed without opening the Invitation Document. Ms H has told us she doesn't "remember seeing the Invitation Document.

Gallium's response to Ms H's complaint

In April 2020, Ms H raised a complaint with Gallium and requested her money was returned.

Gallium did not uphold Ms H's complaint. It said, in summary:

- The Invitation Document stated that B&G plc was an unlisted company, the bonds were unlisted and that investing in an unlisted company carries substantial risk. The Invitation Document also stated that neither B&G plc nor Gallium were providing investment advice. There were no statements made that the bonds were regulated.

- The Invitation Document said B&G plc was committing its funds to investment in peer-to-peer (P2P) and marketplace lending markets which contain certain risks described in the Invitation Document. It is satisfied that the arrangements with the pay day lender fall within the categories of lending activity stated in the Invitation Document. The pay day lender was involved in FCA-regulated online lending to borrowers in the high cost short-term credit sector.

- It understands that B&G plc intended to diversify its lending activities to include lending to other borrowers and that the statements to that effect in the Invitation Document were accurate at the time they were made.

- It is not clear what documents or information Ms H had regard to when deciding to invest. However, it notes that the various financial promotions at the time, including the B&G plc website and the Invitation Document, contained appropriate risk warnings for potential investors including that an individual may be exposed to a significant risk of losing all of the money invested.

- The website pages and the banner adverts referred to certain bonds being available for investors aged 55 and over. These were called Pensioner Bonds. But there is no reference or comparison by B&G to NS&I bonds or that the bonds were Government backed.

After Ms H referred her complaint to us, Gallium sent us submissions. In those submissions it said, in summary:

- The issue of the bonds, and subsequent performance of B&G plc's business and

lending activities were not regulated activities and were not matters for which Gallium assumed any responsibility.

- As part of the application process, every prospective investor declared that they understood that "*the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested*", and that they "*have made investments in similar products in the last 30 months and/or [are] familiar with this type of investment*".

- Investors were also asked questions about their experience and understanding of the investment opportunity, to ensure that applicants could only invest if they had sufficient understanding, experience and financial means, such that the bonds were an appropriate investment for them.

- It was stated in the Invitation Documents that Gallium had no ongoing role within Basset & Gold and that it was not responsible for the implementation of the plans, objectives or intentions or the viability of the investment:

- The risks to investors were also clearly explained.

- Potential investors were required to confirm that they had read and understood the Invitation Document as part of applying to invest.

- The Invitation Documents clearly specified on multiple occasions that investors' capital was at risk, and gave detail on the risks of investing in bonds generally, and
- Basset & Gold bonds in particular.

I have considered the submissions in full. I have also seen a copy of what Gallium described as its "position statement", which sets out general information on the background to complaints about B&G Plc bonds, and have considered this when reaching my decision.

Our investigator's view

One of our investigators considered Ms H's complaint and concluded it should be upheld. He said, in summary:

- He was satisfied the complaint is about a regulated activity and that Gallium, as the principal of BG Ltd, was responsible for the acts or omissions the complaint relates to. So the complaint is one we can consider.

- The application process – both in terms of the certification of Ms H as a "restricted investor" and the assessment of the appropriateness of the bond for her - was mis-leading and didn't gather sufficient information to comply with the FCA's rules.

- Overall, BG Ltd, on Gallium's behalf, didn't comply with its regulatory obligations. Had it done so Ms H wouldn't have decided to invest or BG Ltd should have concluded that it shouldn't allow Ms H to invest. For these reasons, both cumulatively and individually, it was fair to uphold the complaint and for Gallium to compensate Ms H for the loss she has suffered.

Gallium's response to the view

Gallium did not accept the investigator's view. It said, in summary: On the scope of Ms H's complaint:

- Ms H hadn't detailed why she thought the bond had been mis-sold – though it appreciated our inquisitorial remit, it felt we had gone significantly beyond the scope of the complaint made. Complainants must establish a proper basis for a complaint about Gallium to be upheld and Ms H's complaint did not do that. It thought the case ought to have been dismissed on this basis.

On the certification process:

- Regardless of label, Ms H was required to confirm that she met the requirements of a restricted investor and confirmed that she did. If Ms H misrepresented that she fulfilled those criteria, it is a well-established legal position that she should be estopped from now seeking to take a position contrary to that representation. It would not be fair or reasonable to expect Gallium to anticipate that investors would incorrectly claim to satisfy the requirements of the declaration.

- It is not fair or reasonable to conclude that the use of the word "everyday" contributed to Ms H giving an incorrect declaration, by causing her to pay insufficient attention to the terms of the declaration.

- Ms H ought to be held to the declaration she made that she satisfied the requirements of a restricted investor.

- There is no reason to believe that including the remaining wording of the restricted investor declaration in the website would've led Ms H to act differently and to refrain from confirming that she was a restricted investor.

On the appropriateness test:

- It is important to recognise when appropriateness testing or suitability testing is required. As businesses structure their approach based on this, any incorrect application can wholly undermine their business model. There is significant cost to
- designing and implementing the approach. Our investigator had not applied the requirements correctly.

- The fundamental question when assessing appropriateness is whether the client is able to understand the risks involved in relation to the product (COBS 10.2.1R).

- COBS 10.2.1R notwithstanding, depending on the circumstances, a business may conclude that knowledge alone is sufficient for the client to understand the risks involved in the product. Equally, a firm may infer knowledge from experience (COBS 10.2.6G).

- Depending on the nature of the client and product complexity and risks, it may be appropriate for the business to seek information on the types of investment with which the client is familiar, their history of similar investments, and their level of education and profession. But there is no requirement to seek all of that information in every case: it is required only to the extent it is relevant to assessing whether the client was able to understand the risks of the product (COBS 10.2.2R).

- The FCA has provided guidance on its expectations around appropriateness since Ms H made her investment, and the regulatory environment has changed. At the time of the investment, however, the FCA had publicly articulated different expectations. We must apply regulatory expectations as they existed at the relevant time and not

seek to apply the different standards that exist today in a retrospective manner.

- In 2014 there had been discussions between the FCA and crowdfunding industry as to what the FCA expected businesses to do to ensure investments were appropriate for investors. The guidance took the form of two question and answer sessions with the FCA's Head of Investment Policy and UK Crowdfunding Association ("UKCFA"). These sessions addressed, in particular, the question of whether investor experience and education needed to form part of an appropriateness assessment. Gallium had regard to this guidance when considering BG Ltd's appropriateness testing.

- It understands that guidance provided by the FCA in those industry meetings clarified that firms were able to satisfy themselves of what information was pertinent to their investment process. Importantly, in appropriate circumstances, the FCA would not insist on an appropriateness test containing questions about education or prior investment experience.

- In any event, Gallium did in fact carry out adequate testing of investors' relevant knowledge and experience. Gallium required prospective investors to pass the appropriateness test by correctly answering 100% of the questions asked. In completing the appropriateness test, information was obtained about an investor's knowledge and experience of the key characteristics of the bonds.

- Ms H also certified that she was an "everyday" investor, confirming "*I have made investments in similar products in the last 30 months and/or I am familiar with this type of investment.*"

- Further, all investors also expressly confirmed that the bonds "*may expose me to a significant risk of losing all of the money or other property invested*" and they had read and understood the Invitation Document including the terms and conditions of the bonds and associated risks. The Invitation Document provided investors with full details of the nature of the investment and its risks.

- Taken together, the appropriateness test answers and these confirmations were sufficient for Gallium to satisfy itself that prospective investors had sufficient knowledge and experience of the bonds to understand the risks those bonds involved, per COBS 10.2.1(2)R.

- The fact Ms H was able to invest demonstrates that she answered the appropriateness test correctly and gave the confirmations. Gallium was entitled to conclude that she had answered each question honestly and conscientiously, and in so doing had demonstrated she understood the investment opportunity.

- COBS 10.2.4R provides that "[a] *firm is entitled to rely on the information provided by a client unless it is aware that the information is manifestly out of date, inaccurate or incomplete*". Gallium had no such awareness.

- If Ms H misrepresented her knowledge and experience, in accordance with well-established legal principles explained above, she should be estopped from taking a position contrary to her own representation. If investors were willing to give false information in response to the appropriateness fest and the confirmations, there is no basis to suppose they would have given accurate information had further questions been asked.

On whether Ms H would have proceeded with the investment in any event:

- Ms H was notified in clear terms in January 2019 that there was a concentration risk arising from the high proportion of funds being lent to one entity, carrying out one type of lending. The risks this entailed were explained in clear terms to her and she was given the opportunity to seek to redeem her bonds, but took no steps to do so.

- This provides evidence of how Ms H would have acted if presented with that material when deciding whether to invest. In any event, it demonstrates that Ms H became aware of the concentration risk in 2019, had the option to seek to exit her investment in the bonds, and chose not to do so, or even to explore the possibility. Her loss is therefore caused by the decision not to exit the investment when that risk was made clear to her in 2019. Whilst Gallium does not accept that the promotional material was not fair, clear and not misleading; this demonstrates clearly that she would have continued to invest regardless.

- The investigator's view says Ms H wasn't prepared to take any risk with loss of capital. The available evidence does not support these conclusions.

- Ms H expressly acknowledged on numerous occasions that by proceeding with the investment she was at risk of losing the capital invested. Ms H cannot now be permitted to suggest that she would not have put her capital at risk, when she confirmed on numerous occasions that she understood and acknowledged that her capital was at risk.

- Nor can the Decision rationally conclude either that there is nothing in the evidence to suggest that Ms H wanted to take any risk with her money. Not only is there evidence to demonstrate that Ms H specifically acknowledged the risk to her money, but there is also an absence of any evidence to suggest that Ms H was not prepared to take that risk.

- The 6.70% interest rate evidences Ms H knew the investment was not risk free – the Bank of England Base Rate was below 1%, so it's not realistic to suggest she did not appreciate or accept the risk.

What I've decided – and why

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

As a preliminary point, I note there is some dispute from Gallium about what we should be looking at when considering Ms H's complaint. Gallium says our investigator made findings on matters significantly beyond the scope of the complaint Ms H made. It also says complainants must establish a proper basis for a complaint about Gallium to be upheld and Ms H's complaint did not do that.

The Financial Ombudsman Service is an informal dispute resolution forum. A complaint made to us need not be, and rarely is, made out with the clarity of formal legal pleadings. As recognised by the High Court in R (Williams) v Financial Ombudsman Service [2008] EWHC 2142, our service deals with complaints, not causes of action. Our jurisdiction is inquisitorial, not adversarial.

I acknowledge the complaint form Ms H completed when making a referral to us mainly refers to her investment loss. Ms H's complaint concerns what she considers to be a misinformation when the bond was sold to her by BG Ltd. She refers to information she was

given by a representative of BG Ltd before applying to invest in the bonds, and to an advert she saw online before she spoke to BG Ltd. In short, her complaint is about events which led to her investing in the bond. In my view the points the investigator considered are within the scope of Ms H's complaint and are, in any event, points which it is appropriate for me to consider inquisitorially, given the nature of Ms H's complaint.

For completeness, I have first considered all the available evidence and arguments to decide whether we can consider Ms H's complaint.

Rule DISP 2.3.1R says we can;

"*consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them*".

And the guidance at DISP 2.3.3G says:

"*complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for which the firm…has accepted responsibility)*".

The bond was a security or contractually based investment specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). At the time Ms H made her investment, the RAO said regulated activities include arranging deals in investments. Acts such as obtaining and assisting in the completion of an application form and sending it off, with the client's payment, to the investment issuer would come within the scope of Article 25(1), when the arrangements have the direct effect of bringing about the transaction. So I am satisfied the online application process falls within the scope of Article 25(1). These all involved making arrangements for Ms H to invest in the bond, and had the direct effect of bringing about the transaction.

So I am satisfied Ms H's complaint – insofar as it relates to the bond application process - is about regulated activities. I am also satisfied this part of the complaint is about acts for which Gallium accepted responsibility. They are therefore acts of Gallium and can be considered in a complaint against it.

In this case I think the focus is on the acts or omissions of BG Ltd, as it was BG Ltd which was responsible for the sale of the bond. So, in the circumstances – keeping in mind what I say above about our jurisdiction being inquisitorial - I think it is appropriate to consider all the acts or omissions which relate to the sale of the bond. Although I only need to make findings on these to the extent it is necessary to reach a decision on what is fair and reasonable in the circumstances of this case.

I am not able to consider B&G Plc's issuing of the bond or what B&G Plc did with the money once Ms H invested. B&G Plc's issuing of the bond and what B&G Plc did with the money once Ms H invested did not involve regulated activities.

The merits of Ms H's complaint

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

Relevant considerations

I have carefully taken account of the relevant considerations to decide what is fair and

reasonable in the circumstances of this complaint. In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

In my view the key consideration as to what is fair and reasonable in this case is whether Gallium met its regulatory obligations when BG Ltd, acting on its behalf, carried out the acts the complaint is about. I consider the following regulatory obligations to be of particular relevance here.

The Principles for Businesses

The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). I think Principles 6 and 7 are relevant here. They provide:

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.

Principle 7 - Communications with clients - 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"

COBS 4 – Communicating with clients, including financial promotions

Principle 7 overlaps with COBS 4.2 - Fair, clear and not misleading communications, which I also consider to be relevant here:

COBS 4.2.1R:

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

As mentioned, the bond was non-readily realisable and therefore there were rules restricting who it could be promoted to and how to test whether the investment was appropriate for the potential investor. These rules were set out in COBS 4.7 and COBS 10. I have set out below what I consider to be the relevant rules, in the form they existed at the time.

COBS 4.7 - Direct offer financial promotions

COBS 4.7.7R:

(1) Unless permitted by COBS 4.7.8 R, a firm must not communicate or approve a direct-offer financial promotion relating to a non-readily realisable security to or for communication to a retail client without the conditions in (2) and (3) being satisfied.

(2) The first condition is that the retail client recipient of the direct-offer financial promotion is one of the following:

(a) certified as a 'high net worth investor' in accordance with COBS 4.7.9 R;

(b) certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;

(c) self-certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;

(d) certified as a 'restricted investor' in accordance with COBS 4.7.10 R.

(3) The second condition is that firm itself or the person who will arrange or deal in relation to the non-readily realisable security will comply with the rules on appropriateness (see COBS
10) or equivalent requirements for any application or order that the person is aware, or ought reasonably to be aware, is in response to the direct offer financial promotion.

COBS 4.7.10R

A certified restricted investor is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

"RESTRICTED INVESTOR STATEMENT *I make this statement so that I can receive promotional communications relating to non-readily realisable securities as a restricted investor. I declare that I qualify as a restricted investor because:*	
(a)	*in the twelve months preceding the date below, I have not invested more than 10% of my net assets in non-readily realisable securities; and*
(b)	*I undertake that in the twelve months following the date below, I will not invest more than 10% of my net assets in non-readily realisable securities.*
Net assets for these purposes do not include:	

(a)	*the property which is my primary residence or any money raised through a loan secured on that property;*
(b)	*any rights of mine under a qualifying contract of insurance; or*
(c)	*any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependants are), or may be entitled; or*
(d)	*any withdrawals from my pension savings (except where the withdrawals are used directly for income in retirement).*

I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

Signature:

Date:"

COBS 10 – Appropriateness (for non-advised services)

At the time COBS 10.1.2 R said:

"This chapter applies to a firm which arranges or deals in relation to a non-readily realisable security, derivative or a warrant with or for a retail client and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion."

COBS 10.2.1R:

"(1) When providing a service to which this chapter applies, a firm must ask the client to provide information regarding her knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client.

(2) When assessing appropriateness, a firm:

(a) must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded;"

COBS 10.2.2 R:

"The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

(1) the types of service, transaction and designated investment with which the client is familiar;

(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;

(3) the level of education, profession or relevant former profession of the client"

10.2.6G – Knowledge and experience:

"Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for her to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience."

COBS 10.3 Warning the client COBS 10.3.1R
(1) If a firm considers, on the basis of the information received to enable it to assess

appropriateness, that the product or service is not appropriate to the client, the firm must warn the client.

COBS 10.3.2R

(1) If the client elects not to provide the information to enable the firm to assess appropriateness, or if she provides insufficient information regarding her knowledge and experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for her.

COBS 10.3.3G

If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances.

I note Gallium has referred to the FCA's policy statement PS14/4, and to question and answer sessions with the FCA's Head of Investment Policy and UKCFA. I have had regard to the policy statement, and to Gallium's recollections of the two question and answer sessions.

My decision, in summary is:

- BG Ltd, acting on Gallium's behalf, misled Ms H into certifying herself as belonging in a category to which she did not belong (a "restricted investor") by changing the term used in the rules to "*everyday investor*" and describing the category as being one "*anyone*" could fall into. This was not treating Ms H fairly or acting in her best interests. Had BG Ltd followed the rules and not misled Ms H, it is unlikely she would have certified herself as being a restricted investor.

- The appropriateness test carried out by BG Ltd, on behalf of Gallium, did not meet the requirements of the rules. And, had it done so, it would have been apparent the bond was not an appropriate investment for Ms H. In the circumstances Ms H would either not have proceeded or, acting fairly and reasonably, BG Ltd should have concluded it should not promote the bond to Ms H.

For these reasons – individually and cumulatively – my decision is that Ms H's complaint should be upheld. I am satisfied Ms H would either not have proceeded to make the investment or would not have been able to proceed, had Gallium acted fairly and reasonably to meet its regulatory obligations. And so I am satisfied it is fair to ask Gallium to compensate Ms H for her loss.

I have set things out in more detail below.

The online application process

Having reviewed the available evidence, I think it is most likely that Ms H did initially complete an online application. While she does appear to have had some telephone contact with BG Ltd, from what I've seen I think she would have still been required to apply online first. So I've examined the online application process to help me reach my decision.

There were a number of regulatory obligations which applied to the sale of the B&G Plc bond. The bond was non-readily realisable and therefore there were rules restricting who it could be promoted to and on how to test whether the investment was appropriate for the potential investor. These are the two conditions set out in COBS 4.7.7R which must be satisfied before a business such as BG Ltd (here acting on Gallium's behalf) could

communicate or approve a direct-offer financial promotion relating to a non-readily realisable security such as the bonds issued by B&G Plc.

The online application took steps toward meeting the rules which set out how a busines must satisfy the two conditions, which I have set out above. I will consider the steps taken by BG Ltd, on behalf of Gallium, in relation to each in turn.

At the outset I think it is important to emphasise the bond Ms H invested in was not a straightforward product. Risk factors associated with the bond included the track record of B&G Plc, the detail of its due diligence on the businesses it would be lending to, the criteria B&G Plc applied to its lending and the conditions on which the loan was made. The credit history of the business the loan was made to would also need to be considered, its capacity to repay, and its capital position. Furthermore, as the business B&G Plc was lending to was itself lending, the lending criteria it applied, the default rate and the success of its past lending would need to be considered. All of these points (and this is not an exhaustive list) would need to be considered in order to understand the investment.

In the market for corporate bonds listed on the main exchanges, institutions – ratings agencies – carry out analysis work to assess the risk associated with a bond and express a view (a "rating"), and investment managers often carry out further credit analysis before deciding to invest in a bond. Here there were no such aids to a consumer's understanding of the product. There was also a liquidity risk. The bond was not listed on a recognised exchange, and so could not be readily sold (in fact it seems to have been a condition of the investment that it could not be transferred). And, as Gallium has pointed out, the Invitation Document which set out the details of the bond was over 40 pages long. I have read the document and it contains a lot of complex technical information which may not be readily understood by the average investor.

So the bond was complex, risky and specialist and this is why the bond fell into a category of investment on which the FCA puts restrictions as to who it could be promoted. And an obvious risk of consumer detriment arises if the rules relating to this are not properly applied. The importance of Gallium fully meeting its regulatory obligations here was therefore high. Its responsibility was significant. And the steps it took to meet its regulatory obligations need to be considered with that in mind.

Certification

The first condition set out in COBS 4.7.7R required a retail client, such as Ms H, to be certified as being in one of four categories of investor in order to receive promotional communications relating to the bond. In this case, Ms H was certified as a "restricted investor". The detail of this category and the process by which an investor can certify themselves as belonging to it is set out in COBS 4.7.10R, which I have quoted above.

I am of the view the certification stage of the application stage on BG Ltd's website did not meet the requirements of COBS 4.7.10R in a number of ways.

Firstly, BG Ltd did not use the correct term – "restricted investor" - it instead used the term "*everyday investor*".

Secondly, the statement, confirmation and declaration Ms H was asked to make included some of the wording set out in 4.7.10R – but not all of it. And additions had been made. The title of the statement also departed from the wording set out in 4.7.10R – it was described as a "*Everyday Investor Statement*".

Finally, BG Ltd provided its own definition of a restricted (or, as it put it, "*everyday*") investor,

as follows:

"Anyone can become an Everyday Investor. You just need to agree to not make more than 10% of your investments (including savings, stocks, ISAs, bonds and property excluding your primary residence) in investments that cannot easily be sold (i.e. illiquid). This is why the FCA refers to these investors as 'Restricted Investors'."

But the requirements set out in 4.7.10R are much further reaching than "*You just need to agree to not make more than 10% of your investments (including savings, stocks, ISAs, bonds and property excluding your primary residence) in investments that cannot easily be sold".*

4.7.10R requires the prospective investor to agree to *all* of the following:

- In the twelve months preceding the certification date, not to have invested more than 10% of their net assets in non-readily realisable securities.
- To undertake that in the twelve months following the certification date, they will not invest more than 10% of my net assets in non-readily realisable securities.
- To accept that the investments may expose them to a significant risk of losing all of the money invested.
- To be aware that it is open to them to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

I have considered the impact of these departures from the requirements of 4.7.10R.

As set out in the background above, Ms H was offered the option of four "investor profiles", after she had completed the first stages of her application. The options, other than "everyday investor" were "self-certified sophisticated investor" ,"advised investor" or "high net worth investor".

I am of the view the change of the term "restricted investor" to "*everyday investor*" and BG Ltd's definition of this being a category to which "*anyone*" could belong, by simply agreeing to not make more than 10% of their investments in investments that cannot easily be sold, had the effect of making the restricted investor category appear to be one into which investors like Ms H would naturally fall.

"Restricted" is, by its common and ordinary meaning, something which is limited in amount or range. Synonyms include words like *limited, constricted* and *controlled.* And what is set out in 4.7.10R is consistent with this. "Everyday" is, by its common and ordinary meaning, something which is ordinary, typical or usual and is inconsistent with what is set out in 4.7.10R The change of the term was also likely to alter how it was perceived. This is compounded by BG Ltd's definition of a restricted investor as being a category to which "*anyone"* can belong. Clearly not "*anyone*" can belong to a restricted category.

I find this put undue emphasis on the "everyday investor" option, and led consumers like Ms H to selecting this option when she may not have done so otherwise. I do not think it was fair or reasonable for BG Ltd to act in this way. It was not treating Ms H fairly or acting in her best interests. BG Ltd ought to have known that changing the term created a risk of consumers perceiving a "restricted investor" to be something different to what it was, and certifying themselves incorrectly as a result, and risked consumers skipping through this as a formality.

I note Gallium says it would not be fair or reasonable to expect it to anticipate that investors would incorrectly claim to satisfy the requirements of a restricted investor. But I'm not persuaded. If you change the description of a category from "restricted" to an "*everyday*" one to which "*anyone*" can belong an obvious risk is that prospective investors who do not belong in the category mistake the category as being one to which they do belong. Indeed, it is difficult to see why BG Ltd departed from 4.7.10R and changed the term and definition other than to get investors to certify themselves as being eligible to receive a promotion of the bond when they might not otherwise have done so. In my view this appears to have been done to contrive this outcome in a bid to access more investors.

I think an "*everyday investor*" – particularly when described as a category to which "*anyone*" can belong - is an option Ms H would immediately have understood or could resonate with as that term is a reasonable description of an investor with her characteristics – someone without significant investment experience or assets who was looking to invest a modest amount to provide an income to supplement their pension. In my view Ms H would have been attracted to this profile based on her understanding and perception of the word "*everyday*" and the description of it as a category to which "*anyone*" can belong.

Ms H did not qualify as a restricted investor. Ms H says she invested half of her total savings. She says the money she used for this investment came from the sale of premiums bonds – a capital secure investment. She says she had no other investment experience and had no idea her money was at risk at all. I also think it unlikely she was aware of the bonds had significant risk associated with it and she had not made investments in similar products in the last 30 months. I am satisfied there is sufficient evidence to make a finding Ms H was unlikely to be aware of the significant risk associated with the bonds.

I note Gallium's view is that Ms H nonetheless gave the statement, confirmation and declaration, that it is not credible to say she would have completely disregarded the detail of these, and that it was reasonable for it to rely on them.

I acknowledge that the statement, confirmation and declaration did largely mirror what is set out in 4.7.10R and so Ms H did state, confirm and declare something which was not accurate. However, I am of the view it is unlikely Ms H knowingly gave a false statement. The money invested was significant to her – it was half her savings - and I've not seen that she had much in the way of other limited liquid assets. So I think it unlikely that she had regard to the full detail of the statement, confirmation and declaration and chose to proceed having understood them in full. I think it instead likely that she did not consider the detail of what she was being asked to agree to as she understood it to be an "*everyday*" i.e. ordinary, typical or usual category, to which "*anyone*" could belong. And, as mentioned above, I think BG Ltd should have been aware this was a possible consequence of it changing the wording required by the FCA's rules.

I note Gallium's reference to case law relating to circumstances where someone is seeking to take a position contrary to an earlier representation. The law is a relevant consideration which I need to take into account. But I am of the view the case law Gallium has referred to is quite different to the facts of this case. The Bank of Leumi v Wachner case relates to circumstances where Ms Wachner was clearly a wealthy, sophisticated investor with lots of experience of previous similar investments and in that situation the court decided that it was fair for the business to rely on the professional client declaration made and that it was likely Ms Wachner did understand the papers she signed. The situation is quite different here, where Ms H is investing half her savings and has no investment experience. Ms H's complaint is about what she generally describes as a "mis- sale". And Ms H is not making a legal claim - my role here is to decide what is fair and reasonable in the circumstances, on the basis I have set out. I do not think it would be fair and reasonable to say the statement,

confirmation and declaration should be relied on in circumstances where, in my view, Ms H was misled into giving them.

I think it is unlikely Ms H would have made the statement confirmation and declaration at all had the correct "restricted investor" term been used and had the website not presented the restricted investor category as being an "*everyday*" one into which "*anyone*" could fall. I think, in the circumstances, the correct term would have made Ms H pause for thought. As mentioned, she had no investment experience and was investing a sum which was significant to her. I do not think in such circumstances she would have proceeded had she been told she was a "restricted" investor. As mentioned above, I think "restricted" has a very different meaning to "everyday". The latter would have provided comfort to Ms H whereas the former would have made her pause for thought and realise that was a category to which she did not belong. I also think it unlikely she would have described herself as a "self-certified sophisticated investor", "advised investor" or "high net worth investor" as it would have been clear from the descriptions of those categories that she did not fit into them either.

So I am satisfied if BG Ltd, acting on behalf of Gallium, had acted fairly and reasonably to meet Gallium's regulatory obligations Ms H would not have got beyond this stage. The first condition set out in COBS 4.7.7R could not be met and things could not have proceeded beyond this. And I think it would be fair and reasonable to uphold Ms H's complaint on this basis alone. I have however, for completeness, gone on to consider the appropriateness test.

Appropriateness

The second condition set out in COBS 4.7.7R required BG Ltd to comply with the rules on appropriateness, set out in COBS 10 and quoted in the relevant considerations section above.

The rules at the time (COBS 10.2.1R) required BG Ltd, acting on behalf of Gallium, to ask Ms H to provide information regarding her knowledge *and* experience – and for this information to be relevant to the product offered (the first limb of the rule). The rules required that information to then be assessed, to determine whether Ms H did have the necessary experience and knowledge in order to understand the risks involved (the second limb of the rule).

As set out above, COBS 10.2.2 R required BG Ltd, acting on behalf of Gallium, when considering what information to ask for, to consider the nature of the service provided, the type of product (including its complexity and risks) and for it to include, to the extent appropriate to the nature of the client:

> *(1) the types of service, transaction and designated investment with which the client is familiar;*
>
> *(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;*
>
> *(3) the level of education, profession or relevant former profession of the client"*

I find BG Ltd failed to ask for an appropriate amount of information about Ms H's knowledge and experience, as required by COBS 10.2.1R and COBS 10.2.2 R.

BG Ltd did not refer to an appropriateness test on the website – it instead referred to "*just a few more questions (required by law)*". I think this, in itself, is a further example of BG Ltd

downplaying the significance of the regulatory requirements and attempting to make them appear as a formality, as it did under the certification section.

Under the "*few more questions*" section BG Ltd asked five questions which tested knowledge. These questions asked whether Ms H knew if the bonds were transferable, if the return was fixed, if their capital was secure, if the bonds could be converted to shares and the meaning of diversification. Nothing was asked about Ms H's experience. And if Ms H got a question wrong, she would be told her answer was wrong and prompted to reconsider it.

Even if Ms H did know the correct answer to all five questions without prompting this only showed she understood the bonds were not transferrable, the return was fixed, capital was at risk, whether the bonds could be converted into shares and was able to select a correct answer from two options as to what the definition of diversification was.

I am of the view this falls a long way short of adequately testing whether Ms H had the knowledge to understand the risk associated with the bonds – particularly in circumstances where the multiple-choice options were limited to two and Ms H was allowed repeated efforts to get them right. The risks, as I set out earlier, were complex and multifactorial. It was not, for example, a question of whether Ms H simply understood money could be lost – but whether she was able to understand how likely that might be and what factors might lead to it happening.

Gallium has referred to it being reasonable to rely on the statement, confirmation and declaration given during the restricted or "everyday" investors stage of Ms H's application. I acknowledge BG Ltd asked Ms H to declare, at the previous stage "*I am familiar with this type of investment."* and "*I have made investments in similar products in the last 30 months"*. And it says this means it did have some information about Ms H's experience, and additional information about her knowledge. However, I am of the view, even accounting for the declaration, an appropriate level of information was not asked for. I am also of the view, for the reasons I have set out in the previous section, the statement, confirmation and declaration could not reasonably be relied on in the circumstances in which it was obtained.

I'm persuaded that, as the first limb of COBS 10.2.1R was not met, BG Ltd was unable to carry out the assessment required under the second limb. BG Ltd should have been confident, from the information it asked for, that it was able to assess if Ms H had the necessary experience and knowledge in order to understand the risks involved with investment in the bond. But it was not in a position to make such an assessment, based on the information it obtained.

In its previous submissions Gallium referred to 10.2.6G which says there may be circumstances in which *a firm may be satisfied that the client's knowledge alone is sufficient for him to understand the risks involved in a product or service.*

I am of the view these were not such circumstances – not least because BG Ltd did not ask for an appropriate amount of information about Ms H's knowledge. The guidance in any event does not supplant the rules and in my view it is clearly meant to apply where the client has been asked about both knowledge *and* experience, as the rules require, and the information obtained shows knowledge is high and experience is low. It does not say a business can ask only about knowledge when conducting an appropriateness test.

Gallium has referred to industry conferences with the FCA and to the FCA's policy statement PS14/04. This relates to the regulation of firms operating online crowdfunding platforms or conducting other similar activities. It does not however specify what guidance from the FCA it received, and I have seen no evidence to show any guidance provided to Gallium implied that it did not have to ask about Ms H's experience *at all.*

I have read the policy statement. And I am of the view it simply confirms the rules on appropriateness apply and must be followed. I note, for example, the statement confirms, at 4.24, that firms are required to assess whether the client has the necessary experience and knowledge to understand the risk involved. In relation to the crowdfunding coming under its regulation the FCA's proposal (which was adopted), summarised at 4.6, was:

"*where no advice was provided, that all firms (MiFID and non-MiFID) must check that clients have the knowledge and experience needed to understand the risks involved before being invited to respond to an offer*"

The policy statement does not therefore change my view that BG Ltd, acting on behalf of Gallium, did not meet its regulatory obligations. And I have seen no evidence to show the FCA gave guidance to Gallium otherwise which would have led it to conclude its appropriateness test was adequate.

In any event – and notwithstanding what I say above about COBS 10.2.1R and 10.2.6G – it remains the case that as Gallium did not ask for sufficient information about Ms H's knowledge, it was not in a position to assess whether her knowledge alone was sufficient.

Gallium also suggests the FCA has provided guidance on its expectations around appropriateness since Ms H made her investment in 2017, and the regulatory environment has changed since then. To be clear, my findings are based on the rules that existed *at the time*.

I am of the view that, had the process been consistent with what the rules required - had Ms H been asked for appropriate information about her knowledge *and* experience - the only reasonable conclusion BG Ltd could have reached, having assessed this, was that Ms H did not have the necessary experience and knowledge to understand the risks involved with the bond.

Ms H did not have investment experience and I have seen no evidence to show she had anything other than a very basic knowledge of investments. As noted above, she has told us she had no investment experience and understood this investment to be similar to the NS&I savings she had previously held her funds in.

If BG Ltd assessed that the bond was not appropriate, COBS 10.3.1 R said a warning must be given and the guidance at COBS 10.3.3G said a business could consider whether in the circumstances to go ahead with the transaction if the client wished to proceed, despite the warning.

Gallium says if Ms H answered one or more questions incorrectly that means she received the warning that the bonds may not be appropriate, and elected to proceed anyway. But, if a warning was given, it was not given in a way which met COBS 10.3.1 R. This envisages the test being completed, and a result determined, before the warning was given. As BG Ltd designed the test the only warning was in response to incorrect answers and simply said "*if you are unfamiliar with the features of this investment then it might not be suitable for you".* In my view this does not meet what is required by COBS 10.3.1R, which is a warning that the product is *not* appropriate. And, by allowing Ms H the opportunity to effectively silence the warning through selecting a different answer, the impact of it was reduced in any event.

The process also did not give BG Ltd the opportunity to consider whether in the circumstances to go ahead with the transaction if Ms H wished to proceed, despite the warning.

I am of the view a warning which told Ms H clearly an investment in the bond was *not* appropriate for her would likely have put Ms H off proceeding further. That is a clear, emphatic statement which would have left Ms H in no doubt the bond was not an appropriate investment for her. And she ought to have been privy to such a warning, had an appropriateness test consistent with the requirements of the rules been conducted.

Furthermore – and separately from any acceptance of a warning by Ms H - had BG Ltd given itself the opportunity to consider in the circumstances whether to go ahead with the transaction if Ms H wished to proceed, having asked for appropriate information about Ms H's knowledge *and* experience, it would have been fair and reasonable for BG Ltd to conclude it should not allow Ms H to proceed. Had Ms H been asked for appropriate information about her knowledge *and* experience this would have shown she may not have the capacity to fully understand the risk associated with the bond. As mentioned, I have seen no evidence to show Ms H had anything other than a very basic knowledge of investments. In these circumstances, it would not have been fair and reasonable for BG Ltd to conclude it should proceed if Ms H wanted to, despite a warning (which, as noted, was not in any event given in the required terms or required way).

All in all, I am satisfied BG Ltd, acting on behalf of Gallium, did not act fairly and reasonably when assessing appropriateness. By assessing appropriateness in the way it did it was not treating Ms H fairly or acting in her best interests. If it had acted fairly and reasonably to meet the relevant regulatory obligations when assessing appropriateness, Ms H would not have got beyond this stage. And I think it would be fair and reasonable to uphold Ms H's complaint on this basis alone. Even if I am wrong to say Ms H would not have said she was a "restricted investor" and given the statement, confirmation and declaration relating to this had BG Ltd, on behalf of Gallium, acted differently (and for the reasons I have set out, I still do not consider that to be the case) Ms H would not have got beyond this second stage.

The second condition set out in COBS 4.7.7R could not be met and things could not have proceeded beyond this.

Invitation Document

Gallium has referred to the explanation of risks set out in the Invitation Document. However, I am of the view things need to be considered in the order in which Ms H would have been privy to them. Ms H could only have been privy to the Invitation Document after having completed the certification and appropriateness test. And, as I set out above, I do not think Ms H should have reached this point.

I acknowledge that it is possible that Ms H may have seen the Invitation Document (although she doesn't recall doing so), as she was incorrectly certified as a restricted investor as a result of being misled by BG Ltd and the bond was incorrectly assessed as being appropriate for her due to BG Ltd failing to meet its regulatory obligations in relation to this. However, considering the available evidence, I think it unlikely Ms H looked at the Invitation Document in any detail and that she did not have the capacity to fully understand it even if she did look at it in detail.

So I am of the view Gallium cannot reasonably rely on the Invitation Document to say Ms H had an understanding of the bond and proceeded on that basis.

I think it is also important to say that an objective of the appropriateness test was to protect consumers such as Ms H from receiving communications about investments which were not appropriate for them. One obvious reason for this being that such consumers may not be able to fully understand these communications. So it would not be fair and reasonable to say, where the test has not been applied as set out in the rules and an incorrect conclusion

reached on appropriateness as a result, that any knowledge subsequently acquired from the Invitation Document can be used in an effort to retrospectively satisfy the test.

The website and any other marketing material

For similar reasons to those given above, I am of the view I do not need to consider anything else (i.e. other than the application stages set out) Ms H may have been privy to before making the investment. I say this because nothing else that could have been conceivably shown on the website or elsewhere changes the position that Ms H would not – and could not - have satisfied the first or second conditions in COBS 4.7.7R and therefore could not receive promotional communications relating to the bond.

I have noted the point Ms H has made about the Terms and Conditions and her view these misled her as to the level of regulatory protection available to investors in the bond. However, I do not think it is necessary to consider this either, for the same reason.

Is it fair to ask Gallium to compensate Ms H?

I have considered all the points Gallium has made. However, for the reasons given, I am satisfied that if BG Ltd, on behalf of Gallium, had acted fairly and reasonably to meet its regulatory obligations Ms H could not – or would not - have proceeded to invest in the bond.

Ms H could not have satisfied the first or second conditions in COBS 4.7.7R in order to receive promotional communications relating to the bond. And even if I am wrong about the first condition Ms H could not have passed an appropriateness test which met the requirements of the rules and so could not have met the second condition, in any event. And even if she had said she wanted to proceed following a warning (and such a warning had been given in a way which was consistent with the rules) I do not think, as I set out above, that it would have been fair and reasonable for BG Ltd to conclude it should allow Ms H to proceed.

So, Ms H should not have been able to proceed, had Gallium acted fairly and reasonably to meet its regulatory obligations. The starting point is therefore that it is fair to ask Gallium to compensate Ms H for the loss she has suffered as a result of making the investment.

Gallium says Ms H expressly acknowledged on numerous occasions that by proceeding with the investment she was at risk of losing the capital invested, and this is evidence Ms H would have proceeded to invest in the bond regardless of what it did. It adds that the high return offered reflected the fact capital was at risk and it is unrealistic to think that Ms H was not aware of this and prepared to take a risk with her capital.

Gallium has also referred to the January 2019 update email. It says the wording of this notice was approved by the FCA as being appropriate wording to inform investors of the risk and it is, therefore, unreasonable to find that this notice was not adequate, or that it gave investors insufficient warning.

I do not think it would be fair to say Ms H should not be compensated on this basis. Firstly, she should not have been able to proceed, had Gallium acted fairly and reasonably to meet its regulatory obligations. Secondly, for the reasons I have given, I am not in any event persuaded Ms H did proceed with a full understanding of the risks associated with the bond.

As noted above, I am not persuaded Ms H looked at the full detail of the acknowledgements she gave, and I think she was reassured by the “everyday” investors description associated with them. And, given what Ms H has said about her understanding of the bond, and her lack of investment experience, I am not persuaded she understood from the relatively high return

on offer that the investment involved significant risk.

Turning to the 2019 email, what I am considering here is the impact of the warning in the specific circumstances of Ms H complaint and what impact it actually had. I do think the wording of this email was largely reassuring and it is fair to consider that it had very little impact (Gallium says that only one of 1,700 investors who received this email took any action). I have not seen any further evidence on the FCA's approval of this communication but, even if it was approved as an adequate general warning, I need to consider it in the context of the facts of this individual complaint. And I do not think it follows from any approval by the FCA that it would not be fair to ask Gallium to pay compensation in circumstances such as those in this complaint.

As mentioned, I am not persuaded Ms H had the capacity to fully understand the risks associated with the bond – and she was in this position because BG Ltd, acting on behalf of Gallium, did not act fairly and reasonably to meet its regulatory obligations at the outset. And I think this is sufficient reason for me to find it would not be fair to say the January 2019 update means Ms H should not be compensated for the loss she suffered.

I therefore I am satisfied it is fair to ask Gallium to compensate Ms H.

In conclusion

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it is fair and reasonable to uphold the complaint. I am satisfied, for all the reasons given, that Ms H would not have invested in the bond had BG Ltd, on behalf of Gallium, acted fairly and reasonably to meet its regulatory obligations. And I think it is fair to ask Gallium to compensate Ms H for the loss she has suffered.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Ms H as close to the position she would probably now be in if she had not invested in the bond.

I think Ms H would have invested differently. It is not possible to say *precisely* what she would have done, but I am satisfied that what I have set out below is fair and reasonable given Ms H 's circumstances and objectives when she invested.

What should Gallium do?

To compensate Ms H fairly, Gallium must:

- Compare the performance of Ms H's investment with that of the benchmark shown below and pay the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.

- Gallium should also pay interest as set out below.

- It is also clear that Ms H has been caused some distress and inconvenience by the loss of her investment. Given her circumstances, this is money Ms H cannot afford to lose, nor is it money she is able to replace. I do not believe Ms H foresaw such a drastic loss and I recognise the considerable worry she will have felt when B&G Plc failed. I consider a payment of £350 is fair compensation for the upset caused.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From (“start date”)	To (“end date”)	Additional interest
B&G Plc bond	Still exists but illiquid	Average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Ms H agrees to Gallium taking ownership of the investment, if it wishes to. If it is not possible for Gallium to take ownership, then it may request an undertaking from Ms H that she repays to Gallium any amount she may receive from the investment in future.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any withdrawal, income or other distributions paid out of the investments should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I’ll accept if Gallium totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Ms H wanted to achieve a reasonable return without any significant risk to her capital.

- The average rate for the fixed rate bonds would be a fair measure given Ms H's circumstances and objectives. It does not mean that Ms H would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.

My final decision

I uphold the complaint. My decision is that Gallium Fund Solutions Ltd should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H to accept or reject my decision before 16 February 2023.

Daniel Little
Ombudsman