DRN-4918012

Financial Ombudsman Service

The complaint

Mr H complains that Parker Kelly Financial Services Ltd ("PKFS") gave him unsuitable advice to invest in an Enterprise Investment Scheme ("EIS") in 2015.

What happened

In 2013 Mr H was advised by PKFS to invest £25,000 into an EIS and £25,000 into a VCT. In 2015, PKFS advised Mr H to invest a further £12,000 in the same EIS portfolio. By 2021, Mr H had switched advisers, and in July 2021 the investment made in 2015 had lost over £10,500. As a result, in 2022 Mr H made a complaint to PKFS, saying that he felt the advice in 2015 had been unsuitable, especially given that PKFS took both an initial and ongoing advice fee from the investment and yet it failed entirely. In reply, PKFS said the complaint had been made too late under the relevant rules.

Mr H didn't agree and so brought the complaint to our service, saying that it would have been better advice to invest the money differently, for instance in his SIPP. He added that he'd submitted a subject access request ("SAR") to PKFS but that they only partly fulfilled this. We found the complaint had been made in time, but when we considered the merits of Mr H's complaint, an investigator at our service didn't uphold it. He said he thought the advice was suitable, as Mr H had the capacity and willingness to take the level of risk involved with this investment, and that the risks involved were clearly set out.

Mr H asked for an ombudsman to consider the complaint, in summary because:

- In reply to the SAR, PKFS only provided the suitability letters from 2013 and 2015. He doesn't believe the 2015 letter was sent to him, as it wasn't signed by the adviser. As no other documents had been provided to him under the SAR, he felt this showed very little thought had been given to the recommendation.
- As he already held an EIS prior to 2015, the selling of another meant his overall portfolio of investments was unbalanced.
- He feels the investment was sold as an "off the shelf" product and the risks were downplayed, rather than being properly presented as very high risk.
- That PKFS have failed to provide evidence from the sale showing what was discussed.

The complaint was passed to me for a decision, and I requested further evidence from PKFS, particularly around how Mr H's attitude to risk was established. I also asked the investigator to share the documents from 2015 which PKFS had provided, with Mr H. On reviewing these documents, Mr H said, in summary:

- The fact find document from 2015 contained a number of errors. Had he seen this document in 2015 he would have been worried about these inaccuracies.
- PKFS were in breach of data protection laws, as the SAR was not correctly fulfilled, shown by the fact he hadn't been sent some of the documents we provided.
- That the EIS had been sold purely for the income tax benefit with little or no thought on the long-term performance of the product or ability to surrender it, should performance be poor.

We shared Mr H's comments with PKFS, who said, in summary:

- They felt they had complied with the SAR, as they sent Mr H the documents available that contained his personal information. Documents showing research into different products, or generic documents like the terms and conditions of an investment, wouldn't contain his personal information so wouldn't be released under a SAR.
- Regarding alternative investments, they had separately recommended he invest in his SIPP.
- Regarding the information in the fact find that Mr H said was incorrect, they addressed some of the points Mr H had made, and others they were unable to comment on. They explained this is because the adviser has sadly since passed away, so they couldn't get his comments on the information he'd recorded.
- The high-risk nature of an EIS was set out in the 2013 and 2015 suitability letters, and so Mr H would have been aware of the risky nature of the investment.

Following those submissions, I issued a provisional decision. My findings from that decision are set out at the end of this document, and form part of my final decision.

Replies to my provisional decision

PKFS replied and said in summary:

- Mr H had significant experience in higher risk investments – they named four structured products that Mr H had invested in on 12 March 2010, 4 March 2011, 17 February 2012 and 11 March 2014.
- Mr H had requested a further EIS or VCT investment in 2018, which they feel shows he was willing to undertake higher risk investments.
- The amount invested in 2015 was a relatively low sum and a small percentage of Mr H's overall net worth, so he could afford the risk.

Mr H replied and said he agreed with the provisional decision. He said he didn't recall the investments in the structured products being described as high risk when he took them out. He reiterated his concerns about PKFS's records of his circumstances, pointing to inaccuracies in the documentation about his assets – for instance some items were listed as owned by him, when they were in his wife's name. Regarding the investment in 2018 – he said this was proposed by PKFS and it didn't go ahead.

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.

Having done so, I've reached the same conclusions as those set out in my provisional decision. I've investigated the other investments that PKFS has said Mr H took out prior to the advice to take out this EIS, to consider their impact on Mr H's attitude to risk, knowledge and experience. I can see they are structured products, the first two of which were issued by one company, who I'll call Company A, and the latter two were issued by another company, who I'll call Company B. Both companies have details of the products available on their websites.

From the information on Company B's website, the two products taken out in February 2012 and March 2014 had each matured early after one year, returning Mr H's capital in full plus growth of 8% and 12% respectively.

I've not seen performance data for the products issued by Company A – though I can see both included a guaranteed return of at least the capital invested, provided the underlying indices performed in a certain way. The 2010 investment was based on the performance of the FTSE 100 and the Euro Stoxx 50, and the 2011 investment was based on the performance of the share prices of ten companies. They both had six-year terms, but neither of those investments were listed in the fact find completed in November 2015, so I've concluded its likely they matured early.

These are very different investments to the EIS sold in 2015 – both in the types of risk involved, and the way returns would be calculated. For instance, the returns on all the structured products were based on the performance of mainstream shares, available on the main market of the LSE or equivalent markets. Mr H's previous investment experience would mean he would have been familiar with those types of shares. However the EIS involved untested, illiquid companies and as he was less experienced in that area, it was incumbent on PKFS to ensure he fully understood the unique risks associated with EIS.

There were also some guarantees with the structured products – and though there does appear to have been a risk of total loss, in my experience there likely would have been a view given at the sale of how likely this would be, based on the type of indices being tracked. The early maturity events also decreased that risk. Whereas with the EIS there was a high risk of losing the whole investment. At least two of the structured products performed objectively well, returning an amount of interest well above the rates available at that time – so those investments at least wouldn't have given Mr H an in-depth appreciation of the risks associated with structured products.

So, I'm satisfied that his experience with the four structured products wouldn't have made Mr H any more willing to take the risk involved in this EIS, than I'd previously concluded. Nor does the existence of those investments change my conclusions about Mr H's experience in investing in EIS products. His only experience of that type of investment was the EIS taken out in 2013. As that had only lost a small amount of money by 2015, it wouldn't have given Mr H a true appreciation of the risks associated with EIS.

I don't consider the events in 2018 to be relevant to 2015 as they do not change the way in which PKFS presented the EIS in 2015. The way the risks were described compared to the relatively small benefits of investing in an EIS could not be impacted by later events.

I appreciate that Mr H could afford to take risk with the £12,000 invested in 2015. However, I'm satisfied that is irrelevant if he didn't want to take that risk – or wasn't given the opportunity to make a fully informed decision about whether to take that risk. Simply because a consumer can afford to take a risk, doesn't mean they want to.

I understand Mr H remains concerned over the details in the fact find. However, as I've upheld the complaint overall, there's no need for me to make a finding on the accuracy of that information, as it doesn't impact on the overall outcome I've reached.

In conclusion, the points made by PKFS and Mr H have not persuaded me to depart from the findings I made in my provisional decision – and I make those findings final. I'm satisfied Mr H's decision to increase the risk he was taking, over and above his ordinary attitude to risk, was made on the basis of unclear, unfair and misleading information about the risks involved. If he'd truly understood the risk involved, I'm persuaded that Mr H would not have invested in this EIS. In addition, no further submissions were received about the award of £100 I made in respect of the complaint point about the SAR, and so I see no reason to change my findings on this point. I've set out below how PKFS should put things right.

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr H as close to the position he would probably now be in if he had not been given unsuitable advice.

I take the view that Mr H would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

What must PKFS do?

To compensate Mr H fairly, PKFS must:

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

- PKFS should also add any interest set out below to the compensation payable.

- Pay to Mr H £100 for the concern caused by not responding in full to his information request.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
£12,000 invested in the 2015 EIS	No longer in force	FTSE UK Private Investors Income Total Return Index	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement

Actual value

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

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 from the EIS – and any tax rebate(s) received by Mr H in relation to this investment - 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 PKFS totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr H wanted Capital growth and was willing to accept some investment risk.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr H's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Parker Kelly Financial Services Ltd should pay the amount calculated as set out above.

Parker Kelly Financial Services Ltd should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr H either to accept or reject my decision before 16 August 2024.

My provisional findings

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

As PKFS was giving advice in 2015, they had certain obligations towards Mr H. This included making a suitable recommendation, based on Mr H's circumstances, objectives, investment experience and attitude to risk. The information supplied by PKFS about their recommendation needed to be clear fair and not misleading, in order for Mr H to make an informed decision about whether to accept the recommendation.

Mr H first discussed EIS with PKFS in 2013, so although this complaint only concerns the advice given in 2015, I've reviewed the earlier paperwork, as well as that from 2015, as it provides context for the 2015 discussions. The fact find completed by the adviser in 2015 shows that Mr H was 53, with an annual income of £140,000. He held investments in ISAs and a SIPP, as well as over £125,000 in cash savings.

The EIS portfolio recommended in 2015 was the same as that recommended in 2013 – though I note the portfolio manager had changed the type of company in which they were predominantly investing by 2015. The £25,000 Mr H had invested in 2013 was worth just under £24,000 in 2015. At both times, Mr H's aim was:

"a growth return greater than that offered by cash deposits over the medium to longer term (for example 5 to 10 years) and you do not require access to this capital… You particularly wanted to take a slightly higher risk with some of your funds held on deposit. You were attracted to VCT's and EIS's due to the tax efficiency of these plans, as detailed below."

The suitability letters went on to explain the different tax advantages of an EIS for income, capital gains and inheritance tax. However, there's nothing to suggest, from either 2013 or 2015, that capital gains tax or inheritance tax was of a particular concern to Mr H – there's no inheritance tax calculations, or a mention of a particular gain which he'd like to mitigate or defer. Given his level of income, I think it's likely it was the income tax benefit – of a 30% rebate on the amount invested – that would have been attractive to Mr H.

In 2013 Mr H's attitude to risk was assessed as a seven, on a scale of one to ten, with ten being the highest level of risk. In 2015, PKFS felt there was no need to reassess this as it had been carried out relatively recently – and Mr H doesn't dispute this level of risk. His other investments – those in his ISA and SIPP – are in a mixture of funds containing shares, property and bonds. I accept that this shows Mr H was a somewhat experienced investor – but only in more mainstream investments than an EIS. In the suitability letters, PKFS said that with the EIS investments, Mr H was willing to take "a slightly higher risk".

It's not unheard of that an investor would agree to increase the risk that they are prepared to take in order to benefit from something they wouldn't otherwise receive, for instance tax reliefs, as was the case here. However, I'd expect that any decision to increase the level of risk in this way should be made on the basis of clear, fair and not misleading information. This is especially when the increase in attitude to risk results in an investment into a product that is widely considered to involve significant risk – as is the case with EIS. So, I've considered whether Mr H was in a position to make a fully informed decision here, by carefully looking at the way the investment and the risks involved were described. Having done so, I've concluded that the information was presented in a misleading way, for the following reasons.

PKFS described the EIS as "slightly higher" than the level of risk Mr H had previously been taking. Naturally this level of risk wouldn't have, on its face, felt too high for Mr H, as it suggests it's only a small amount higher than the amount of risk he was already taking. However, I don't think that categorisation adequately conveys the different style of investment that an EIS was, compared to the sorts of investments he'd previously made. I've considered the definitions provided by PKFS – level seven was defined as:

"you are above average in how much risk you want to take in your investments.

Summary

- *Your risk is 'highest medium'.*
- *Your priority is likely to be making higher returns on your investments but you are still probably concerned about losing money due to rises and falls.*
- *Your preferred investments are likely to contain mainly higher-risk investments such as shares with a few lower- and medium-risk investments such as bonds and property."*

In the 2015 suitability letter, PKFS said the EIS was a high-risk investment, and also said it involved "a slightly more risk" than level seven. I've therefore concluded that PKFS rated this EIS as a level eight on its risk scale - the definition for which says:

"The risk scale is made up of 10 profiles overall. This means that you are above average in how much risk you want to take in your investments.

Summary

- *Your attitude to accepting risk is 'high'.*
- *Your priority is likely to be making higher returns on your investments but you are still probably concerned about losing money due to rises and falls.*

- *Your preferred investments are likely to contain mainly higher-risk investments such as shares with the occasional lower- and medium-risk investments such as bonds and property."*

Neither of these differentiate the type of shares being discussed, either by geographic location of the company, or characteristics such as listing location, company size or success – such as being in the FTSE 100. Only risk level ten differentiates the shares in any way – it mentions that it may include some shares from outside the UK. I consider that a reasonable interpretation of these risk definitions is that any mention of shares is intended to suggest mainstream shares – such as those listed on the main exchange of the London Stock Exchange, which have minimal liquidity problems.

Technically, the investment into the EIS portfolio did involve buying shares – but I'm convinced this isn't the type of shares that are suggested by the risk definitions given by PKFS. None of the risk definitions mention alternative investments, and I don't find it reasonable to suggest that an EIS only involves "slightly" more risk than level seven. Even an everyday reading of the level ten definition, by someone familiar with EIS, doesn't describe a portfolio containing a substantial EIS style investment, as in the case of Mr H when you consider both investments together. In particular it makes no reference to specialised investments or investments in unquoted companies. So, it seems an EIS doesn't fit into any of the definitions and on my reading, it vastly exceeds any of the risk levels set out.

So overall, I'm not satisfied that the risk levels referred to, were clear enough to convey the risks involved, in order for Mr H to make an informed decision about taking a higher amount of risk.

Nor do I consider that PKFS made sure to convey the full risk here, outside of the definitions. In particular, the risk of losing his entire investment was not prominently set out. I understand that some of the risks involved EIS are set out in the information memorandum document produced by the EIS portfolio provider. When considering what was discussed about risk here, I'm more inclined to concentrate on the documents written by the adviser directly as these are designed to summarise and reflect the discussions held between the parties. The 2015 suitability letter says the EIS:

"is a discretionary portfolio service that invests in UK smaller companies across a range of industry sectors… where we believe there is potential for capital preservation. This strategy is aimed at investors looking to preserve the value of their investment rather than achieve high returns…

Potential investors should be aware that EIS investments may be considered risky and are relatively illiquid as they must be held for at least three years…

EIS should be considered a high-risk investment. Even though they target capital preservation, your capital is still at risk…

[The] EIS invests in smaller companies that have a higher risk profile than larger companies. This is because smaller businesses have a higher failure rate than more established businesses, such as those that have their shares quoted on the Main Market of the London Stock Exchange. In addition, smaller companies can change in value more quickly and more significantly than larger companies. Your capital is at risk and the investment return is not guaranteed."

I don't consider this to go far enough to set out the risk of loss. The phrase "potential for capital preservation" suggests a positive outlook on the success of the investment to at least

maintain Mr H's capital. Whereas not only is there no guarantee of growth with an EIS, but there's a considerable risk that investors can lose all their money due to the type of companies being invested in, as they tend to be small, untested companies. I note the suitability letter further details the liquidity risks:

"This means that the total amount of time you need to hold the investment before being able to withdraw may be closer to four and a half years. [The] EIS will offer investors the choice of exiting as soon after the minimum holding period as possible or remaining invested. At the end of this period, they will seek to refinance the portfolio to provide this liquidity…

[The] EIS invests in the shares of companies that are not listed publicly on the London Stock Exchange. This means the shares are less liquid than shares in listed companies, so they may take longer to be bought or sold. Therefore, you should be prepared to leave your money invested for at least three years from the date of investment or the start of trade, whichever is later, even in the event of your death. They won't be able to arrange the sale of your investment during the three-year period.

This suggests there will be liquidity after four years – though there are difficulties mentioned, altogether it gives the impression that accessing the money will be possible. However, that is rarely the case with this type of investment. When read altogether I'm satisfied it suggests there will be an amount left in the investment, which will be accessible – rather than explaining that if there is any value to the investment, there might (or will), be problems accessing it. Those two ways of phrasing the information covey a very different picture of the potential liquidity of the investment.

I've also considered Mr H's experience investing in EIS. By 2015, the 2013 investment hadn't lost much value at all – and that investment would have saved Mr H a significant sum in income tax, much higher than the loss experienced. I'm satisfied that by 2015 he only saw the benefits of EIS and not the downsides, so I wouldn't say he was a particularly experienced investor in this field.

For the reasons set out above, I'm satisfied the decision to increase the risk he was taking was made on the basis of unclear, unfair and misleading information about the risks involved. So, I've considered what he'd have done differently had he been given clear fair and not misleading information and to do this, I've weighed up the tax benefits against the risk involved.

There's no evidence of PKFS ever clearly and deliberately weighed the benefits of investing and mitigating tax with all of its risks, against the cost of simply paying what was owed, and having the peace of mind that his investment wasn't in something that was riskier than he had the tolerance for. I'll explain further.

None of the paperwork clearly set out the monetary benefits of the EIS for any type of tax relief. A £12,000 investment would have allowed for income tax relief of £3,600, and the full £12,000 would have been outside of his estate for inheritance tax purposes, after two years of investing. So, the options were for Mr H to either:

- *Not receive an income tax rebate and keep £12,000 to save or invest. If Mr H had an inheritance tax need (which I don't accept given its not documented at all), at his age there were several ways he could potentially mitigate the IHT his estate would pay in other ways - such as gifting, using trusts, or simply be more comfortable having his estate not benefit from the reduction in IHT; or*
- *Mr H could put £12,000 in the EIS to receive a £3,600 rebate (provided the companies in which the EIS invested qualified for it and remained qualifying*

throughout the investment). However, the risk involved would be significant and he could lose most or even all of the £12,000.

There's nothing to show Mr H needed an additional £3,600 for any purpose – his disposable income meant he had a comfortable life and he had double that amount available each month after expenditure. Nor did he need to take this much risk in order to potentially achieve a better growth rate than cash. I'm not convinced his attitude to risk was ever high enough to take the true risk involved here. So having considered whether he would have invested, had he truly understood the risk involved, I think Mr H would have chosen not to take the further risk with this money. This is especially given he already had £50,000 in such a high-risk environment.

So, I'm persuaded that PKFS should put Mr H as close to the position he'd be in now, had the investment not been made. I've set out below how the return on the investment ought to be calculated, assuming that Mr H would have instead invested this money at a level of risk he was comfortable with.

I note that Mr H has also raised concerns about the SAR he sent to PKFS and whether this was properly fulfilled. My role is to decide what's fair and reasonable in all the circumstances of a complaint. It's not my role to say whether a business has acted unlawfully – that's a matter for the Courts. However, in order to decide what is fair and reasonable, I have to take a number of things into account - including relevant law and what I consider to have been good industry practice at the time. So, I won't be making a direct finding as to whether PKFS has complied with data protection laws – rather I've considered whether they treated Mr H fairly and reasonably in how they provided him with the information he requested.

When he made the request, PKFS replied on 9 June 2022 and promised to send:

- *"Documents, emails and notes/diary entries from meetings that were prepared/taken in relation to this [the 2015 EIS] financial product.*
- *Any internal emails/notes in relation to the suitability of the above product and any research we conducted in relation to this product"*

PKFS only provided Mr H with the suitability letters, despite holding more personal information that this – most notably the fact find document from 2015, so there was more they should have sent him. PKFS has argued that other documents not containing personal information wouldn't be provided under a SAR, because under the relevant obligations it's not necessary for them to provide anything else. While that may or may not be the case, I note they had agreed to provide information that wasn't personal information. If PKFS later chose not to or found there wasn't any of the documents requested, then it would have been fair and reasonable to provide an explanation as to why they wouldn't be provided.

Overall, I think PKFS could have handled Mr H's request for information in a more thorough way – and Mr H has become quite concerned by the reply he had received. As a result, I'm satisfied a small amount of compensation would be warranted here, to acknowledge the fact more could have been done. I consider that £100 would be a fair amount for the concern and inconvenience caused here by not supplying all the documents.

I've noted Mr H has made several comments over whether he was sent the 2015 suitability letter and whether the fact find was accurate. I've noted the 2015 and 2013 suitability letters were very similar in regards to the EIS investment. So even if I were convinced Mr H didn't receive the letter, I'm not persuaded it would have changed Mr H's decision to invest in 2015, given he chose to invest in 2013 and accepts he received that suitability letter.

Regarding the accuracy of some of the information in the fact find, I’m not convinced its necessary for me to comment on it, given I’ve found the advice wasn’t suitable for Mr H.

Katie Haywood
Ombudsman