summary of complaint

This dispute concerns the advice given by UBS AG ("the business") to Mr L to invest in an AIG Life Premier Access Bond (PAB) within the Enhanced Variable Rate Fund (the Enhanced Fund). Specifically, Mr L has stated that, although UBS has offered to calculate redress in relation to this advice, it has been undertaken on incorrect assumptions as to the alternative investments he would have made. Mr L has also stated that he was advised to remain invested in the PAB when it was divided between the Protected Recovery Fund and the Standard Fund, which prevented reinvestment in higher returning investments.

background to complaint

Acting upon the advice provided to him by the business, Mr L invested £1m into the Enhanced Fund in February 2005 with further additional investments amounting to approximately £3.4m between June 2005 and November 2007.

On 15 September 2008, AIG Life suspended withdrawals from the Enhanced Fund for a period of three months, owing to the large number of withdrawal requests it had received. It subsequently announced that it would close the fund at the end of the three-month suspension period.

Following the announcement, AIG Life divided the fund in two, moving one half (the cash elements of the fund) into the Standard Variable Rate Fund (the Standard Fund) which investors could withdraw – known as the 'initial switch' – and offering investors a choice about what to do with the second half. Investors could:

- Surrender their investment or move it to the Standard Fund (known as the 'exit plan') by selling assets early at the best achievable market prices, which because of market conditions meant investors would receive less than the paper value of their investment. Investors could withdraw their money from the Standard Fund if they wanted.

- Keep their investment (known as the 'maturity plan') in a new fund – the Protected Recovery Fund (PRF), which guaranteed that on 1 July 2012 investors would receive at least the full value of their investment as at 14 December 2008.

Mr L opted for the maturity plan.

On 12 February 2013, the FSA published a Final Notice in relation to sales made by the business of the AIG Enhanced Fund between 1 December 2003 and 15 September 2008. The business agreed with the FSA to pay redress to all its relevant affected clients. For the affected clients such as Mr L, the business calculated whether they would have earned a better return from an investment in the Standard Fund instead over the same period. This calculation however showed that the Enhanced Fund had outperformed the Standard Fund and because of this, Mr L had not suffered an actual loss.

Dissatisfied with the business' findings, Mr L complained to the business which, having reviewed the merits of Mr L's complaint, performed a calculation to compare his position to that if, instead of investing in the Enhanced Fund, he had invested in an instant access deposit account until December 2005, followed by an investment of one third of his capital in an instant access deposit account and two thirds in its fixed term rolling six month deposit account. However, this calculation also indicted that Mr L had not suffered an actual financial loss.

Mr L was not persuaded that the business' calculation was equitable and so he referred his complaint to this service.

Following our involvement, the business agreed to calculate any loss to Mr L by comparing his position if he had invested in a deposit account in 2005 for a return of 4% per year until 6 November 2008, 2.5% per year until 5 March 2009 and 1.5% per year thereafter. This offer followed the methodology of calculating a consumer's loss as set out in a decision published by this service in June 2012 involving a similar complaint

Mr L remained dissatisfied with the business' offer, however. He has said that, but for the advice to invest in the Enhanced Fund, he would have initially invested in the Standard Fund until 2008, and then invested in a range of safe, long term investments, including index linked gilts and National Savings and Investments (NS&Is), yielding at least an overall average of 4% gross per annum. Mr L has submitted supporting documentation for the investments he did in fact make with the proceeds of half of the PAB to which he had access in late 2008 and early 2009. As such, Mr L has asserted that it would be fair for the business to compensate him on the basis that he would have achieved a higher return that that calculated by the recommended methodology. As agreement has not been reached on the matter, it has been referred to me for review.

my findings

I have included only a brief summary of the complaint, but I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is fair and reasonable in all the circumstances of this complaint.

As the business has already accepted that the Enhanced Fund was not suitable for Mr L and has offered to compensate him accordingly, I do not intend to comment further on the "suitability" aspect of the complaint. The matter which appears to remain in dispute, and so which I must consider, is that of how fair compensation should be calculated in all the circumstances of the case and if the manner of calculating that redress, as previously recommended by this service and accepted by the business, is fair and reasonable in this instance.

I have therefore considered what Mr L would likely have done if he had not invested his capital in the Enhanced Fund. I have also considered the arguments relating to the alternative investments which Mr L has stated he would have established in 2008 with the funds which were instead retained in the PRF.

Mr L has provided evidence of these investments, and it would seem that, of the approximately £1.6m which was available to him as half of the Enhanced Fund investment, he invested £1m into index linked gilts, £130,000 into various NS&I bonds with maturity periods of between one and five years, £400,000 into equities and corporate bond funds and a balance on deposit awaiting reinvestment of approximately £146,000.

However, I must also take into account the fact that Mr L's complaint has been assessed and upheld on the basis of unsuitability, specifically in that the PAB was mis-sold for the reason that the Enhanced Fund was portrayed as a cash-type product and that Mr L was expecting a no risk investment which would operate in a similar way to an instant access deposit account, albeit with enhanced rates of return. Against this background, it is reasonable to assume that Mr L was unlikely to have wanted to invest in any way which exposed his capital to risk (other than the minimum possible risk).

I am mindful of Mr L's assertions that he would have invested the remainder of his funds in the same way as he would for the funds which were withdrawn. However, there are several aspects regarding this which lead me to believe that it would be difficult to safely conclude that this would have been the case. Firstly, the fundamental premise of the complaint being upheld is that Mr L was seeking a cash equivalent investment, ie one which he could access and presented minimal risk. If it is to be concluded that Mr L would in fact, just a few months later, have otherwise sought to expose his capital to the risks of a portfolio which included approximately 25% equity and corporate bond investment, 60% gilt investment and the remainder in bonds which prevented access for between one and five years, this would in my view somewhat undermine that notion and so the very basis of the complaint's success.

To clarify, and notwithstanding the fact that gilts were seemingly discussed and rejected by Mr L in 2005, although I accept that index-linked gilt investment would be towards the lower end of the risk scale, there is nevertheless the risk of capital loss, especially if purchased in the secondary market where the actual value will fluctuate at a premium or discount to the amount paid for the holdings. I do note that the return on the gilt investments has been healthy in a period of low interest rates since the end of 2008, but such returns are not guaranteed. I am not therefore of the view that they are cash-equivalent holdings.

The investment in the NS&I bonds, whilst satisfying the requirement of minimal risk, would – due to their fixed investment periods - nevertheless negate the cash-type instant access requirement, which forms a part of the rationale for upholding the complaint. I have noted, for example, the prior withdrawals from the PAB totalling £2.6m between March 2005 and June 2008, and so this would be consistent with the requirement of access to the funds.

Mr L has also stated that, but for the mis-selling, he would have invested in the Standard Fund up until October 2008, rather than the Enhanced Fund. However, many of the risks associated with the Enhanced Fund were also – albeit perhaps to a reduced extent – present within the Standard Fund. For example, there was some risk to capital and under certain circumstances, withdrawals from the Standard Fund could also be deferred for up to three months. Accordingly, I am of the view that, on the basis of the rationale for upholding the complaint, the Standard Fund would similarly not have been appropriate.

Furthermore, it is worth noting that, although Mr L has stated that he was advised to remain invested in the PRF until maturity, he was not in fact prevented from withdrawing his funds if he considered that there were more lucrative opportunities for investment outside of the PAB.

Although I do not know the exact content of the discussions held in October 2008, Mr L was nevertheless aware of the type of return he would be receiving if the funds were left with AIG, in that there was the guarantee of the underpin, but that returns could exceed this and that the maximum which could be expected was in the region of 115% of the value in December 2008. If Mr L believed that investment in alternative funds would return in excess of this, a withdrawal would in any case have been possible. Such a withdrawal may have resulted in a reduced return due to the terms of the recovery arrangement, but Mr L would then have had the facility to complain regarding this and, ultimately if dissatisfied with the response, referred the matter to this service.

Therefore, I am satisfied that, on balance, Mr L would most probably have invested his money in a deposit type account and there is no compelling reason – at least one which would not undermine the rationale for upholding the complaint in the first place – to conclude that it would not have remained invested in that manner for the duration of the PAB.

So I consider it fairest to conclude that with reasonable advice, Mr L would have invested his capital in one of the higher interest rate paying instant access deposit account available from the UK Clearing Banks.

As stated in the published decision, no doubt much time and effort could be expended by all concerned to identify precisely which account might have been used. Notwithstanding the sum involved, I also think it sensible to deal with this issue in a simplified manner rather than engage in further conjecture. When the £1m investment was made in early February 2005, the Bank of England base rate was 4.75% and between June 2005 and November 2007, base rates were between 4.75% and 5.75%.

Rates have fallen since – by the end of 2008 the base rate had been reduced to 2% and since March 2009, it has been at 0.5%. I should clarify that the investors in the published decision did not remain invested beyond December 2008 and so the redress in that instance did not need to take account of the fall in interest rates in March 2009. However, for much of the last five years, readily achievable deposit rates have been in excess of the base rate.

In the circumstances, I am satisfied that UBS' agreement to redress Mr L by comparing his position to that if he had placed his capital on deposit at the initial rate of return of 4% per year compounded annually until November 2008, reducing to 2.5% per year compounded annually until March 2009, and then 1.5% compounded annually thereafter is fair and reasonable. Additionally, circumstances which might merit an interest rate of 8% simple pa on the crystallised loss do not appear to have been present in this instance and so I am satisfied that the usage of 2.5% pa would also be reasonable.

Where I am unable to say with certainty how a particular consumer would otherwise have invested their capital, I must use my judgement to arrive at what I consider is a fair and reasonable conclusion in the circumstances. In this instance, although I have noted Mr L's comments regarding the likely alternative investments, for the reasons stated I am not of the view that these are consistent with the rationale for the determination that the complaint should succeed. The interest rates that I have referred to above were adopted following a review of historically available instant access savings rates using 'Moneyfacts' and accordingly, I consider them fair and reasonable to both parties. This process cannot be an exact science, but I am satisfied here that reasonable assumptions have been adopted in order to arrive at a fair assessment of investment loss and where appropriate, compensation for being deprived of money.

my final decision

My final decision is that the offer made by UBS AG of calculating redress, as set out below, is fair and reasonable in the circumstances of the complaint. I simply leave it to Mr L to decide whether to accept this.

UBS AG should pay Mr L compensation of D+E where:

A = the capital invested in the Enhanced Fund, less any amounts paid out by way of withdrawals, distributions of capital or before-tax income and transfer to the standard fund as part of the initial switch;

B = a return on the amount from time to time of A at 4.0% per year until 4 November 2008, 2.5% per year until 5 March 2009 and then by 1.5% per year thereafter compounded annually from the date of investment to the date the investment in the Protected Recovery Fund matured;

C = the amount Mr L received when the Protected Recovery Fund matured; and

D = A + B – C, representing the investment loss at the date of maturity.

E = interest on the amount of D at the rate of 2.5% simple per year from the date the protected recovery fund matured until the date compensation is paid. If it considers that it is legally obliged to deduct income tax from the interest, it must send a tax deduction certificate with the payment.

For the avoidance of doubt, A and B above should work as follows:

Any sum paid into the investment should be added to the calculation from the point in time when it was actually paid in so it accrues the ‘reasonable rate of return’ within the calculation from that point on. Any reduction to the investment should be deducted from the calculation at the point in time when it was actually deducted so it ceases to accrue the ‘reasonable rate of return’ within the calculation from that point on.

UBS AG should pay Mr L the amount produced by the calculation (that is the amount of D) plus interest on that amount.

Philip Miller
ombudsman