complaint

Mr H has complained that Chilli Financial Limited ("CFL") misadvised him to set up a self-invested personal pension ("SIPP") in order to facilitate an investment into an unregulated fund.

background

In October 2009, Mr H was contacted by a financial firm, Aston Lloyd (referred to from now on as the promoter) which was promoting an unregulated investment, the Aston Lloyd Agricultural Commodities Limited Ukraine Project (the Ukraine Project). The firm explained that Mr H would require a self-invested personal pension ("SIPP") through which to make the proposed investment.

In December 2009, CFL compiled a financial planning report which set out its recommendation for a SIPP to allow investment into the Ukraine Project. It noted that at that time the existing SIPP was worth approximately £69,000 and that the tax free cash benefit had been taken already.

The report noted that Mr H wanted to invest in the Ukraine Project and that he had a good understanding of and interest in agriculture. CFL, in numerous places in the report that it produced, set out that it was not advising on the investments proposed and that these had been selected by Mr H himself.

The recommendation later changed as the initial SIPP provider would not accept the Ukraine Project and a new SIPP provider who was willing to administer the arrangement if invested in the Ukraine Project was found. CFL recommended that the funds be transferred from the existing provider to the new provider. The report noted Mr H was not planning at that time to take an income.

In 2010, Mr H had formally invested in the Ukraine Project via his SIPP.

In 2011, due to financial issues with the Ukraine Project, Mr H exchanged the contractual rights under the Ukraine Project for those under the AgroHoldings AG investment.

In 2013, Mr H made CFL aware about his concerns with the investment, and asked it to look into this for him. Aston Lloyd is no longer trading.

Mr H subsequently brought a complaint to this service about advice given to invest in a SIPP in order to allow the proposed investment to take place.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

CFL has said that it did not provide Mr H any advice about the investment. It says its role was to set up a SIPP to help Mr H make his intended investment. It says that it specifically did not look into the investment itself and has highlighted that point in several

letters, it alerted Mr H to the unregulated nature of the investment and the ramifications which could follow.

I agree that the correspondence on file is limited to advice about the SIPP itself and not the investment. Whilst this might be the case, the regulator has taken a specific view on advice given to invest in unregulated products through a SIPP and any advice which might purport to limit itself to the latter.

In a January 2013 FSA alert, the regulator set out the following guidance:

"The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating."

Hence, the regulator has set out that suitable financial advice would need to take into account *"the overall proposition"* which would include the *"underlying investment."*

The alert was issued a few years after the advice of concern here, but in my opinion it reinforces the rules which had already been in place. For example, COBS 9.2.1 says:

COBS 9.2.1 states:

"1. A firm must take reasonable steps to ensure that a personal recommendation, or decision to trade, is suitable for its client.

2. When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
a. Knowledge and experience in the investment field relevant to the specific type of designated investment or service.
b. Financial situation; and
c. Investment objectives.

So as to enable the firm to make the recommendation, or take the decision which is suitable for him."

COBS 9.2.2 states:

"*A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:*

(a) meets his investment objectives;
(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

Therefore, the COBS rules set out that suitable advice requires an adviser to *"have a reasonable basis for giving due consideration to the nature and extent of the service provided."* Advising on a SIPP without giving due consideration to the underlying investment would not meet the above criteria. I do not consider that the advice given to invest in a SIPP without consideration of the underlying investments was suitable.

Furthermore, it was apparent to CFL that there were concerns about the fund promoter. It said:

"We should point out that also that we feel uncomfortable with what we can only describe as the heavy handed approach adopted by [the fund promoter] over this matter."

The above point is also compounded by CFL's view that there was "*clearly some concern*" with the initially recommended SIPP provider about the investment.

CFL has said that Mr H had *"some form of commitment"* with the fund promoter before its involvement. It has suggested that Mr H had decided on the investment at an early stage at that it was brought in to assist with the process. Firstly, CFL has not provided any evidence to indicate that Mr H was contractually tied to the investment before its involvement. The information from the SIPP provider also does not suggest this, and it would appear that the investment was contractually entered into in 2010 when CFL was Mr H's adviser. If it was the case that Mr H had made enquiries about the investment before CFL were involved, and had a strong desire to go ahead with it, I would have expected CFL to take the position to not advise on the SIPP without conducting due diligence into the suitability of the investment.

The other matter which needs to be addressed is the question of how the introduction to CFL came about. CFL has said that there was *"ongoing dialogue"* between the initial SIPP provider and the fund promoter, which is how Mr H's introduction to CFL came about.

The initial SIPP provider has said it does not direct clients to IFA's and instead, it directs them to particular websites which will allow them to independently research this.

CFL has provided an email which suggests that a representative of the initial SIPP provider firm provided CFL'S details to the fund promoter. Although there is a lack of certainty about how the introduction came about, this is material to the outcome of the complaint, as irrespective of how the introduction came about, once CFL became an adviser to Mr H it gave unsuitable advice.

CFL has also relied on an *"exclusions statement"* which Mr H signed in 2011, saying that the decision to invest in the AgroHoldings AG investment was solely his own. This statement was signed after the initial advice complained about, casting doubt on its

application. CFL has also highlighted other earlier documents which indicate that Mr H had entered into the transaction voluntarily, fully aware of the risks and that no advice was being provided on the investment, Mr H's signing of any such documents does not automatically render the relevant regulatory rules redundant, i.e. CFL nonetheless had a duty to provide suitable and full advice and should have advised Mr H not to invest in the high risk fund.

The regulator has stated that an adviser cannot avoid looking into where the funds were to be invested if this was known and was the reason for setting up the SPP. The regulator set out clearly that it was not possible to separate out the decision to invest in an unregulated fund from the decision to invest in a particular SIPP. I agree with this statement and it is line with the conclusions that I have reached in this decision.

Under the regulator's Conduct of Business Rules it is clear that an adviser must take into account where the funds will be invested and then whether this is suitable for the investor concerned

my final decision

I uphold this complaint against Chilli Financial Limited.

I direct Chilli Financial Limited to calculate a notional value that Mr H's pension plan would have been had he been advised to invest appropriately in 2009. Mr H should not have been advised to transfer out of the SIPP he was in prior to CFL's involvement. It would have been more appropriate to assess his attitude to risk and invest him in appropriate funds as part of this SIPP. In considering his circumstances, I consider that Mr H would have been willing to take some level of risk.

To compensate Mr H fairly, he should be put in as close to the position he would probably now be in if he had not been given unsuitable advice. A notional value should be provided to establish this.

Chilli Financial Limited must:

1. Obtain the current transfer value of Mr H 's SIPP

   Determine the notional transfer value the SIPP would have obtained using the FTSE WMA Stock Market Income Total Return Index as at the same date

2. Determine the compensation payable as the difference between the notional transfer value and the actual transfer value of the SIPP. If the actual transfer value is greater than the notional transfer value, no compensation is payable.

3. Pay the sum in (2) together with interest at the rate of 8% per annum simple from the date of calculation to the date of settlement. If Mr H is unable to sell the investment then CFL should take ownership of it with Mr H agreeing to this by paying an amount to the SIPP provider. If it is not possible for the ownership of the investment to be transferred then the calculation should be completed assuming a "nil" value for the investment, with Mr H providing an undertaking to pay out any future funds he receives from the investment.

4. If the business is unable to pay the total amount into Mr H's pension plan, they should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr H's marginal rate of tax.

5. Pay £200 to Mr H for the distress and inconvenience caused by this matter.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr H to accept or reject my decision before 19 February 2016.

Adrian Hudson
ombudsman