complaint

Mrs G's complaint is about a managed trading account she held with ITI Capital Limited (formerly known as FXCM and referred to as FXCM in this decision). Both parties are legally represented. In the main, Mrs G's representative alleges, on her behalf, the following:

- In 2014 FXCM inappropriately promoted to Mrs G its Protected Index Options Strategy (also known as PIOPT) service. In addition FXCM's recommendation, to Mrs G, of a PIOPT based account was unsuitable because it was not a low risk strategy/service and it lacked the liquidity necessary to allow an exit from the strategy. It is also asserted that FXCM did not properly assess suitability of the strategy/service/account for Mrs G.
- FXCM did not provide the type of management service (from advice and trading management to communications with Mrs G) in the PIOPT account that it was supposed to provide and after the departure of her broker in 2016 Mrs G had to manage the account herself (with the aid of her appointed agent – her husband).
- FXCM committed contractual and regulatory breaches in the matters alleged above.
- FXCM should pay compensation to Mrs G in the form of the money she lost in the account (around £200,000, after deducting withdrawals of around £110,000 from the total original investment of around £310,000) plus interest and costs.

background

FXCM disputes the complaint. In the main, its position is as follows:

- Mrs G was introduced to FXCM by an introducing broker who had no role in FXCM and for whom FXCM had no responsibility.
- Specific documentary evidence shows that Mrs G's personal circumstances in 2014 were assessed, that her objective and attitude towards risk for the venture was *speculative* and *aggressive*, that she was given sufficient information about the PIOPT service alongside information about its terms and conditions for the account and that she was given sufficient risk warnings.
- FXCM did not unlawfully compromise Mrs G's bests interests in the venture and it did not encourage her to retain the strategy/service against her will – evidence shows that her agent made withdrawals from the account and that she was able to redeem her investment and close the account at any point, but she chose not to.
- Mrs G did not have to manage the account herself. Her broker left the firm on 29 April 2016; the account had no open positions at the time; she had prior awareness of the broker's departure and she received another notice on 12 May 2016; before this date her agent had already been liaising with another broker who had taken over her account; her agent instructed closure of the account on 13 May 2016 and the balance from the account was remitted to her on 16 May 2016.

One of our adjudicators looked into the complaint and concluded that it should not be upheld. In the main, he said:

- Available evidence shows that Mrs G was initially assessed for an execution only account and then for the managed/advised account. The former assessment captured basic details about her and it recorded "*rarely/never*" in terms of her trading experience. The latter assessment was more detailed, it captured her professional and financial circumstances – [which refers to her professional occupation and suggests that she was a high net worth investor] – it noted she had 10 years of

trading securities (but not options, futures or CFDs) and it included reference to the speculative and aggressive (high risk) profile FXCM mentioned.
- There were no guarantees in the PIOPT strategy/service.
- There appears to have been no obstruction to Mrs G's ability to withdraw from the account and there is evidence of withdrawals that were made.
- Mrs G and her agent continued trading in the account even after learning about losses by July 2015.
- Overall, Mrs G was aware of the risks involved with the strategy/service and it does not appear to have been unsuitable for her so FXCM could not reasonably be held responsible for her losses.

Mrs G's representative disagreed with this outcome. It said the adjudicator did not address the contractual and regulatory aspects within the complaint and that his conclusions were erroneous or in conflict with evidence. The matter was then referred to an ombudsman.

my findings

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 have reached the same conclusion as the adjudicator's. I do not consider that the criticisms that have been made of his view are fair. I consider that he applied a composite, but nevertheless meaningful, approach to the complaint which sought to address the crux within it – that is, the claim for compensation for the total investment loss. As such, he considered what was necessary in order to determine whether (or not), on balance, such compensation was justified. I adopt a similar approach. However, for the sake of added clarity, I address the following:

- The issues (including the alleged breaches) about promotion of the PIOPT strategy/service appear to be duplicated by the issues about suitability or unsuitability of the PIOPT service for Mrs G. Perhaps one has been presented as an alternative basis for compensation, if the other is unsuccessful. It does not appear to be in dispute that use of the PIOPT strategy was recommended as the basis for Mrs G's managed account. It follows that whether (or not) it was appropriately promoted, the fact remains that it was also subsequently recommended by FXCM. The compensation that Mrs G seeks arises mainly from the assertion that the PIOPT was an unsuitable investment/strategy recommendation, so (un)suitability appears to be the main issue. To put it another way, even if Mrs G can show that FXCM's promotion of the strategy was flawed or unlawful, the loss she claims for arose from recommendation and use of the strategy so the pursuit for compensation depends mainly on showing that the recommendation and use of the strategy was unsuitable.

- It is beyond this service's remit to consider punitive awards based on a firm allegedly breaching its regulatory obligations. Our remit, in the context of investment cases, is generally to consider the merits (or otherwise) of a complainant about financial loss that has been incurred from an unsuitable investment(s). I have noted the references made by Mrs G's representative to regulatory principles and rules. Those that relate to FXCM's duty to make suitable recommendations are relevant to my consideration of the complaint. However, it is arguable that those that go beyond the issue of (un)suitability also go beyond the considerations that are required in order to determine Mrs G's claim for compensation.

- The other issue arising from Mrs G's complaint and distinct from the matter of (un)suitability, is her assertion that she did not receive the managed account service

that she ought to have received. Our approach for complaints about alleged failed services is to consider whether (or not) there is merit in the complaint and, if so, to consider an order for a refund of the charges or fees incurred by the complainant for the relevant service. The idea is that the complainant should be entitled to a refund of all such relevant fees if the service, as promised/contracted, was not delivered. In Mrs G's case no management or performance related fees appear to have been applied to her account. This is re-affirmed by the literature for the PIOPT strategy/service which confirms that no such fees will apply and by the fact that Mrs G has not claimed for a refund of any fees. It appears that FXCM's transaction related fees applied for investment activity within the account, however they were unrelated to management. It follows that the issue about the managed account *service* lacks a basis for potential compensation to Mrs G.

- Mrs G's representative presented *additional claims* related to damages under section 138D(2) of the Financial Services and Markets Act 2000 (FSMA), alleged negligent misstatement, alleged professional negligence, alleged breach of fiduciary duty and alleged fraudulent and/or negligent misrepresentation. The first additional claim, related to section 138D(2) of FSMA, is about a firm allegedly breaching a regulatory rule and causing a loss to a client. This duplicates Mrs G's claim for compensation for loss arising from FXCM's allegedly unsuitable PIOPT strategy. The other additional claims might or might not lend themselves to the consideration of the issue of alleged unsuitability, but no separate financial loss (or claim for compensation) has been presented in relation to them. The crux of the complaint remains Mrs G's pursuit for compensation for loss arising from the allegedly unsuitable PIOPT strategy.

Suitability

I have noted the points that Mrs G's representative quoted and explained in relation to the regulator's Conduct of Business Sourcebook (COBS) rules and guidance. Reference was made to COBS 9, with which I am familiar. In straightforward terms, FXCM was required to know enough about Mrs G's investor profile in order to ensure that the PIOPT strategy was suitable for her and it would be responsible for her financial loss if it was unsuitable for her.

As I mentioned above, there is evidence of a basic assessment of Mrs G and then of a more detailed assessment. The latter is headed "Suitability/Appropriateness Questionnaire" – which I will refer to as "the SAQ". Overall, and as the adjudicator noted, record of FXCM's suitability assessment does not appear to have been documented to the extent that it could or should have been. Nevertheless, I consider there is enough evidence to determine whether (or not) its assessment complied with the suitability and client's best interests rules and arguments that Mrs G's representative has presented. In this respect I also consider that, on balance, the SAQ is broadly reliable because its contents appear to be broadly consistent with other evidence about Mrs G and about her profile as an investor at the time.

I consider the following:

- The SAQ has a review date in August 2014 – before the three capital deposits Mrs G made into the account between October 2014 and January 2015. Portrayal, within the SAQ, of Mrs G as a high net worth investor with substantial liquid assets is supported by the substantial total deposit (around £310,000) that she made into the account within three months and by email evidence suggesting additional deposits that appear to have been considered.

- Mrs G's representative referred to investment she had, at the time, in the Alternative Investment Market (AIM). AIM investments arguably carry higher risks than those in the mainstream market(s). It is not in dispute that in July 2015, around six months after Mrs G completed her deposit of around £310,000 into the account, her agent was informed that the account balance was only around £60,000 – so, around £250,000 appears to have been lost by this time. Despite such a substantial loss, Mrs G continued with the PIOPT account (and trading). Her representative says this was in aid of recovering her losses. That might well have been the case, but it is also arguably fair to say that an investor is more likely (than not) to be a high risk taker where she/he loses around £250,000 over around six months and then continues with the same trading thereafter – as opposed to *cutting her/his losses* and withdrawing from the trading. I do not consider that Mrs G was under undue influence or pressure, from FXCM, to do this so it appears to have been her (and/or her agent's) choice. Overall and on balance, I am persuaded that the SAQ's portrayal of Mrs G as an investor with a high risk ("*aggressive*") risk profile and speculative objective is reliable.

- Evidence of what appears to have been the platform checklist shows that trading permissions were given, for Mrs G's account, in relation to equities, options, futures and CFDs. In contrast, the SAQ says she had previous experience only in "*securities*" – the suggestion appears to be equities – and no previous experience in the other products. However, I do not consider that the account was unsuitable for this reason. Her experience in equities (including the AIM experience) would have meant she knew about investment risks. The SAQ suggests that she would not have known about trading in the other products but her account was managed and advised. An additional layer of guidance, for her, existed in the form of her agent who appears to have had a measure of investment knowledge and experience, who had the power to give instructions to FXCM on her behalf and who, upon his emailed request, was given the opportunity to make execution only trades on her behalf. Overall and on balance, in these circumstances I do not consider that the type of trading in the account was unsuitable for Mrs G – especially in light of her speculative objective and high risk profile.

- The type of trading in the account was based on the PIOPT strategy. No guarantees were given with this strategy or with the account. FXCM has correctly referred to a number of risk related warnings in the introducing broker disclosure form (which Mrs G signed), the PIOPT presentation (which she received before her investments), the PIOPT data sheet (which she also received) and FXCM's terms of business for Mrs G's account. Overall, I consider that the risk warnings were sufficient and that they were not diluted by the *selling points* of the PIOPT strategy. Those selling points were indeed positive and aspirational but they were not guaranteed and they were qualified by reference to what was termed a "*limited downside environment*" for which the strategy was designed. In addition, the presentation for the strategy concluded with a reasonably sized disclaimer section in which the risks were addressed. The strategy does not appear to have mismatched Mrs G's speculative objective or high risk investor profile.

- Mrs G's representative argues that the word "protected" within the strategy's name was misleading and that guidance from the regulator is that such a word should be avoided in the promotion or description of a financial product. Reference to the regulator's guidance on this point is correct, but I disagree with the argument or suggestion that the word misled Mrs G. The risk warnings in the PIOPT literature and

the absence of an express guarantee made it reasonably clear that the strategy was not risk free; I have not seen evidence that the word "protected" led Mrs G to think all or part of her capital was safe and, I repeat, the risk warnings declared the opposite; I have seen an update email from her broker in which the word "protected" is defined as the way in which the strategy allows "*… headroom and time to run positions and wait for markets to stabilise following major moves against us*"; the word "protected" was used in the context of the strategy's approach, in which loss exposure was predetermined in order to know the maximum potential loss in a trade at the outset. Reference to and explanation of "maximum loss" in the PIOPT's literature would also have made Mrs G aware that there was no protection against losses and that the aspiration (not guarantee) was for the *management* of losses. An overall aim of the strategy, as presented in its literature, was the predetermined management of losses and profits. In addition, and as I said above, even if the promotion of the PIOPT was flawed or unlawful the core issue is whether (or not) it was suitable for Mrs G.

- In terms of Mrs G's ability to withdraw or exit from the account/strategy, the balance of evidence does not support her representative's argument that this was hindered (or hindered by liquidity issues). It is not in dispute that Mrs G withdrew a substantial total of around £110,000 from the venture and I have not seen evidence that any of the withdrawals were difficult or that any withdrawal requests were declined against her wishes. There is evidence of her agent being concerned about the effect of a withdrawal(s) on existing open positions at a certain time but his concern appears to have been allayed. The strategy does not appear to have had a withdrawal or exit penalty. As FXCM says, it would appear that Mrs G could have withdrawn and exited from the strategy and account when she wished.

Overall and on balance, I am persuaded that suitability for Mrs G was assessed with regards to the PIOPT strategy and that the strategy/account was not unsuitable for her. I also do not consider that FXCM acted against her best interests in this respect.

my final decision

For the reasons given above, I do not uphold Mrs G's complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 15 February 2019.

Roy Kuku
ombudsman