The new UCIS/ NMPI regime - a problem halved or a problem solved?

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The recent Court of Appeal ruling in the matter of FCA v Capital Alternatives Ltd (*The Financial Conduct Authority v Capital Alternatives Ltd & Ors [2015] EWCA Civ 284*) has emphasised the contentious nature of unregulated collective investments, their definition and promotion. The revised Financial Conduct Authority (FCA) rules on NMPI (Non Main Stream Pooled Investments) came into effect in January 2014. NMPI is the new preferred term for UCIS (Unregulated Collective Investment Schemes) and is a wider definition.

NMPI are effectively collective investment schemes that are not regulated by the FCA. They often take the form of investments in illiquid and speculative assets; examples include traded life insurance policies, tracts of land, carbon credits and shares in speculative enterprises such as plantations.

The new rules were introduced following the Financial Services Authority's (FSA) review of UCIS sales in 2010. Broadly speaking the review showed a significant number of non-compliant sales and poor practices. The result was the FSA's consultation and new guidance that effectively bans sales of NMPI to retail clients with some exceptions. In an attempt to prevent circumnavigation of the new rules, the FSA notably includes 'close substitutes' in the regulations.

The typical issues causing dispute concern suitability of the particular UCIS investment scheme. The correct classification and categorisation of the client as well as the assessment of their risk profile and appetite are often also in contention. Additionally poor documentation, internal systems and control have contributed to the problems.

The new exceptions introduced clarification of the rules, but do still provide pitfalls for the unwary. In summary, NMPI can still be promoted to certain High Net Worth investors, sophisticated investors and professional clients. There are a number of caveats and risks that manufacturers and distributors of NMPI need to be aware of. For example advice can be given where it is sought in respect of an existing NMPI, but a promotion cannot be made without a preliminary assessment of suitability. Where an investor has previous received a financial promotion in respect of a NMPI (and this can simply be reading of the a newsletter) they cannot have an NMPI promoted to them. This rule may well lead to inadvertent breaches by firms who are not aware of what their clientele have read.

The probity of the preliminarily assessment may give cause to future claims. If it is not correct there may breach of the prohibition of marketing UCIS. Of course promoters of NMPI will have to ensure that suitability has been correctly assessed and the investment is suitable for their clients. Investment managers may consider alternative investments before promotion an NMPI, as well as checking that their professional indemnity insurance is still effective.

It is perhaps a little early to be able to judge the long term effect of the new regulations, however there are a significant number of claims proceeding to litigation or which have settled originating from the period before and after the new regulations came into effect.

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