

## Where property investment and financial services regulation collide – key points

Adam Samuel, 15 December 2011

- If more than one person is involved in a property investment, always insist on being advised as to whether you have created a collective investment scheme. It is a crime to establish or operate a collective investment scheme while neither authorised nor exempt under the Financial Services and Markets Act (section 19). The definition of a collective investment scheme in section 235 of the Act is complex and broad as recent cases on land banking show (*FSA v. Watkins* and *Secretary of State v. Skyland Consultants*). The real risk here is being shut down by the authorities.
- It is also a crime to promote an investment unless authorised or exempt if the promotion has not been approved by an authorised firm. There are lots of exceptions contained in the Financial Promotions Order to this. If you are going to rely on one of them, make sure that you know exactly which one and can prove your entitlement to the exception.
- An unregulated collective investment scheme, one not authorised by the FSA, must not be promoted except where you have first identified the grounds within the PCIS Order of FSA COBS 4.12 for doing so.
- The FSA recently cracked down heavily on firms selling unregulated collective investment schemes, sometimes because of its illegality but also because the funds were far too high risk for the investors concerned.
- Generally, as investors, note who holds the assets, what are they, what regulators supervise them, what compensation arrangements are available, any restrictions on gaining access to the investment, charges, and [avoid] any gearing. Gearing requires the investment to grow by more than the amount of the interest payments just to break even. Pricing risk, the risk of paying too much for an asset or an investment fund doing so should also not be ignored.
- Introducers are fine but you always run the risk that the introducer will recommend the investment. A non-advised transaction, afterwards, can still leave you liable for the introducer's advice. Non-advised investment transactions are becoming increasingly rare. Even away from a regulated environment, the act of selling always carries a significant risk requiring PI cover of advice being given.
- Do not allow your client account to be used as a conduit through which the proceeds of crime and they don't have to be drug money are passed. You can end up being accused of

money laundering. Do, of course, make sure that you know where investment funds have come from for the same reasons.

- If you find yourself in trouble having invested in something, remember that individuals can complain to the firm and then the Financial Ombudsman Service regardless of how rich you or they are. Companies with group annual turnovers of up to £1.7 million and small numbers of employees may also qualify for this purpose as a micro-enterprise.
- Do check to see whether a promotion has been signed off by an authorised firm by checking any names on the document against the FSA Register and if no longer authorised, the FSCS website. On many occasions, it may be easier to prove that if the promotion had been clear, fair and not misleading you would not have invested, particularly if the promotion fails to disclose something like the criminal past of a key player in the investments. Do not allege that you have been advised to invest in something where you haven't been.
- The FSA is an under-resourced regulator. However, that does not stop it from deciding that an area to which it has paid scant attention in the past, is worthy of its attention now. It used not to be able to tell the public anything about individual firms under investigation until its decisions became final in that any appeal to what is now the Upper Tribunal have been concluded or become time-barred. Now, it can publicise a decision notice. There are Government proposals for the regulator to publish warning notices, (a bit like an indictment) but many people – not including me – think that this would involve prejudging cases.

*Adam Samuel really enjoyed meeting everyone for breakfast and was very impressed by a number of people who had already received what sounded like the right advice to be careful not to create a collective investment scheme by their lawyers.*