complaint

Mr G has complained about advice he received from Portafina LLP to transfer a defined benefit occupational pension scheme (OPS) he held with his former employer to a Self-Invested Personal Pension (SIPP). The funds within the SIPP were then used to invest in several unregulated collective investment schemes (UCIS).

Mr G is being represented by a third party but for ease of reading the decision I'll refer to all representations as being made by Mr G.

background

I issued my provisional decision upholding this complaint in December 2020. A copy is attached and forms part of this final decision. In summary, I concluded that:

- Portafina needed to have an awareness of the intended investments in order to give suitable advice, even though it wasn't specifically intending to advise on the investments. I thought the regulator had made this position clear in its January 2013 alert. And I thought that in any event, the alert was relevant to firms in the position of Portafina in this case. The alert indicated such firms should not be giving advice on a restricted basis. It didn't consider a firm could reasonably separate out the two elements of the transaction; its advice on the suitability of the transfer should include consideration of the suitability of the underlying investments.

- The compliance and due diligence checks that Portafina had conducted at the outset of its relationship with Firm C, didn't negate the need for reasonable and ongoing due diligence, particularly where it had agreed to an ongoing relationship with an introducer in the position of Firm C.

- Portafina had failed to take adequate steps to consider the investment proposition for Mr G as a whole when assessing the suitability of the proposed transfer away from his OPS. I thought that if the appropriate steps had been taken to ask Firm C for its investment proposition, Portafina would've seen that the proposed investments were unsuitable for Mr G and the recommendation to transfer his pension on that basis wouldn't have been given.

- The pension transfer value analysis report (TVAS) showed that a critical yield of 8.1% pa was required to match benefits from the OPS. But this made no allowance for advice, plan charges or other ongoing charges, which meant the growth required to match the benefits being given up was understated. And even if the SIPP had achieved the regulator's highest rate of assumed future growth, which at that time was 8%, it was unlikely Mr G would receive a materially higher pension at retirement as a result of transferring. This was supported in Portafina's own suitability report where it estimated that, based on Mr G's attitude to risk, his personal pension would grow at a rate of 6.13%.

- It couldn't be said with certainty that Mr G would definitely take his benefits via income drawdown. So, I thought it was unreasonable for Portafina to have used the life time hurdle rate when comparing the OPS benefits with the SIPP. I was satisfied that the appropriate growth rate to use was the critical yield figure of 8.1%.

- If Portafina had given Mr G suitable advice (that he would be better off with his OPS) he wouldn't have transferred away from that scheme. And if Portafina had clarified the situation regarding his employer's scheme as well as clearly outlining what he stood to lose by transferring away from that scheme, I didn't think it likely that Mr G would've gone against that advice.

- The advice to transfer was unsuitable and I was satisfied that the losses suffered by Mr G were as a result of Portafina's inappropriate advice to Mr G to transfer his OPS to a SIPP. And had it not been for this unsuitable advice, Mr G wouldn't have been in a position to invest as he did through Firm C. Because of this I thought Portafina was wholly responsible for Mr G's resulting losses.

- I wasn't asking Portafina to account for loss that goes beyond the consequences of its failings. I was satisfied those failings have caused the full extent of the loss in question. But I recognised that Firm C's actions may also have contributed to Mr G's loss. So, I'd considered whether I should apportion only part of the responsibility for compensating the loss to Portafina. But in the circumstances, I thought it was fair to make an award for the whole loss against Portafina. I said this because I'd taken account of the fact that Firm C is now in liquidation and in turn any claim against that firm would need to be considered by the FSCS. As a scheme of last resort, I thought it was possible the FSCS wouldn't pay out if a third party could also be held liable. Which meant that an apportionment of only part of the loss to Portafina could risk leaving Mr G out of pocket.

Mr G responded to my provisional decision and confirmed that he accepts my provisional findings.

Portafina responded and confirmed that it didn't accept my provisional findings. It's provided detailed reasons for disagreeing. I've set out the main reasons below.

<u>Obligation to advise on underlying investments</u>

Portafina considers that the regulator's alert of 18 January 2013 has been taken out of context. It believes paragraph 2 of the alert makes it clear that it was for a specific context where members of the public sought to move their pension funds into high risk unregulated products that had been marketed by unregulated introducers. This was not the basis on which Mr G was introduced to Portafina. Firm C was an appointed representative (AR) of Firm S, which was authorised to provide investment advice.

Portafina says Firm C recommended investments only after it had advised on the transfer, which was based on a suggested investment portfolio in line with Mr G's risk profile. Portafina therefore considers that the circumstances of the complaint were not those at which the regulator's alert was aimed.

It says it's a fundamental principle of the financial services regulatory regime that one regulated firm is entitled to reasonably rely upon advice and information provided by another regulated entity. At the date of the alert, COBS 2.4.6R(2) provided that a firm would be taken *"to be in compliance with any rule in this sourcebook that requires it to obtain information to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person".*

Where that other person was authorised, Portafina says that COBS 2.4.8G advised that such reliance would be reasonable unless the firm in question was *"aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information*". Portafina considers this principle applies not only to information specifically given in relation to Mr G, but also about Firm S and Firm C's approach to investment advice generally.

Portafina was assured that neither firm recommended nor otherwise promoted UCIS but rather invested into risk-graded cash, equities and bonds. So, it considers the provisional findings are wrong to conclude that Portafina was not entitled to rely upon those assurances in advising on Mr G's pension transfer.

As matters stood at the time of Mr G's transaction, the rules ensured that the regulator had clarity on the scope of each firm's role in a transaction so as to be able to clearly apportion liability in the event of enforcement action. Further, Portafina says it served to define regulated firms' foreseeable liabilities for the purposes of Principle 4 (adequate resources) and COND 2.4 (appropriate resources), as well as more general considerations of liquidity, compliance and risk management. To require otherwise would mean that one regulated firm could be arbitrarily and unexpectedly held liable for the failings of another regulated firm.

Portafina says that the provisional decision criticises its suitability report on the basis that the table in the section headed "Your Funds Recommendation" was blank. However, this is incorrect. The report expressly stated: "*we would recommend that you invest in the following asset classes, however, Firm C will contact you in due course to discuss the actual fund investment portfolio*". Immediately thereunder the Asset allocation table suggested a split between Cash (10%), Equities (60%), Other fixed interest (12%) and Structured secured bonds (18%). So it did set out Portafina's expectations as to the types and blend of investments to be recommended by Firm C. That being so, Mr G could've questioned the discrepancy between Portafina's expectations and the actual recommendations made by Firm C. It was not part of Portafina's role to second guess recommendations (yet to be) made by Firm C as part of its distinct obligations to Mr G, still less to police the investments eventually made.

<u>Portafina's advice on the pension transfer</u>

It's Portafina's view that any recommendation it makes must be based on the most likely future circumstances of a client. It says it's unrealistic to suggest that a firm should only make a recommendation if certain of a client's future behaviour.

At the relevant time, COBS 1 9.1.2R(2) permitted Portafina to apply *"reasonable assumptions"* when comparing the benefits of Mr G's existing OPS and proposed SIPP. So, it believes it was reasonable to make a recommendation to Mr G based upon the lifetime hurdle rate. The differences between an annuity and income drawdown, and the lifetime hurdle rate and critical yield, were explained to Mr G during the fact-find call on 21 October 2014. Portafina doesn't accept that he didn't understand those explanations. And a clear written explanation was subsequently provided within the suitability report, along with a further explanation of risks. It was recorded that Mr G had said flexibility was important and that there was *a strong possibility that he'd utilise the drawdown option at least in the early years of retirement.* Having received that information, Mr G didn't raise any further queries or questions so it must be assumed that he accepted the recommendations made and understood the basis for them.

In addition to the reasons set out in the suitability report, Portafina considers that it was *"reasonable"* to proceed on the basis of the lifetime hurdle rate in light of the statistical probability that Mr G would draw on his pension by income drawdown. The FCA's 'Data Bulletin' from September 2018 (Issue 14) confirmed that between April 2015 and March 2018 new income drawdown policies outnumbered annuities by 435,769 to 186,818. Accordingly, Portafina applied reasonable assumptions when making its comparison under COBS 19.1.2R, both in light of the information provided by Mr G and market trends at around that time.

Portafina further noted that the provisional decision relied on a number of other factors to suggest that the pension transfer advice was wrong irrespective of the 'critical yield' issue. In Portafina's view all of the factors identified are only relevant by virtue of the high risk investments, which were ultimately recommended to Mr G by Firm C. Portafina had no obligation to investigate or second-guess Firm C's advice and no reason to think that high-risk investments would be recommended to Mr G. Consequently, in light of the information obtained Mr G's fact-find call, there was no reason to think that the pension transfer would not be appropriate for him.

In any event, Portafina's "Adviser Sign Off" sheet, which was completed following the fact finding call noted that Mr G:

- Considered access to his tax free cash and flexibility in his pension arrangements as *"Important";*
- Had strong concerns about his existing OPS but was only willing to take a *"Minimal Reduction"* in his pension to take control;
- Could only accept *"Minimal loss"* (around 10%) and was primarily interested in *"Liquid"* investments, however he was not interested in exploring *"investment strategies that limit volatility risk";*
- Did not want an annuity;
- Had other provisions for retirement by way of state pension, a second private pension, property and savings;
- Had received the appropriate explanation as to the loss of guarantees associated with moving from an OPS to a SIPP.
- Understood the lifetime hurdle rate.

It's Portafina's view that this demonstrates that all proper enquiries were made as to Mr G's financial circumstances in order to enable it to make an appropriate recommendation in accordance with the requirements of COBS 19.1.2R. In doing so, it considered Mr G's *"relevant circumstances"* (for the purposes of COBS 19.1.3G(1)) and his *"attitude to risk"* (for the purposes of COBS 19.1.7G). Thereafter, the suitability report set out clear advice and information as to the comparative costs and benefits of moving from the OPS to the SIPP as required by COBS 19.1.7AG and 19.1.8G. It's a fundamental principle of the financial services regulatory regime that the consumer must take responsibility for his/her investment decisions. The fact that a recommendation was made, did not remove Mr G's responsibility to carefully consider whether he wished to proceed in light of the totality of information provided.

Redress

Portafina can't be *"wholly responsible"* for Mr G's losses insofar as the provisional decision also recognises that Firm C's actions *"contributed"* to his loss. Those conclusions are clearly inconsistent. Therefore, in the event the complaint is upheld, Portafina considers the proposed approach to apportionment of liability to be wrong in principle.

On the basis that the ombudsman considers Firm C is also at least partly responsible for Mr G's losses, it would be fair and reasonable to reduce Portafina's liability accordingly. This approach would be in line with the longstanding approach at common law and, notably, the provisional decision identifies no good reason to depart from it.

The suggestion that Portafina should be wholly liable simply because both Firm S and Firm C are no longer trading is wrong for a number of reasons:

- Such an approach requires Portafina to face liability for a proportion of the loss for which, on any view, it was not responsible. Firm S and Firm C made repeated assurances (on which Portafina was entitled to rely for the reasons set out above) as to the nature of the investments recommended. Those formed the basis of the suitability report and Portafina therefore made recommendations on the pension transfer accordingly. In the circumstances, there is no proper basis to require Portafina to bear responsibility for those losses resulting from Firm C's bad advice;
- The suggestion that Portafina should be held wholly responsible simply because Firm C has now been liquidated is wrong in principle. In effect, it means that one regulated firm which has successfully continued trading is required to underwrite the wrongdoing of one or more other regulated firms involved in a transaction. Such an approach fundamentally undermines common law principles of causation and loss and runs contrary to the relevant regulatory framework. Parliament expressly provided for the creation of the Financial Services Compensation Scheme ("FSCS") to compensate consumers who have claims against firms that *"are unable, or likely to be unable, to satisfy claims against them"* (s. 213(1)(a) FSMA);
- The provisional decision fundamentally undermines that statutory scheme, on the basis that it's possible the FSCS won't pay out. But no evidence or further explanation has been provided to support this suggestion. Portafina assumes that that is because there is no basis on which to do so. Similarly to the Ombudsman Service, the FSCS has a clear statutory remit and is obliged to consider claims made to it insofar as they fall within its jurisdiction. Where it is required to pay compensation pursuant to the relevant Handbook rules, it will do so. If it improperly declines a claim, the decision can be challenged by way of judicial review. Accordingly, if the FSCS were to decline a claim against Firm C, that will be because it is properly entitled to do so. Thus, the effect of the approach in the provisional decision is that Portafina is required to provide Mr G with an indemnity even beyond that of the statutory compensation scheme.

Portafina considers the approach entirely arbitrary and says it can't be justified on any grounds as *"fair and reasonable in all the circumstances".*

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In doing this, I've taken into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice and what I consider to have been good industry practice at the relevant time. Having done so, I remain of the view that the fair and reasonable outcome is that the complaint should be upheld. I'll explain why.

Portafina has raised many points in support of why it disagrees the complaint should be upheld, many of which have already been addressed in my provisional decision, which forms part of this final decision. I want to assure Portafina that, while I've considered everything it's submitted, I don't intend to respond to each point individually where those points have already been addressed and new points have not been made.

Obligation to advise on underlying investments

Portafina believes that I've taken the regulator's alert from January 2013 out of context. It considers it was only applicable when an unregulated introducer was involved in the transaction.

I envisaged that Portafina would raise this as a concern, so I did acknowledge the difference in scenarios in my provisional findings and I also set out detailed reasons explaining why I thought the alert was also aimed at firms in the position of Portafina.

My position on this is further supported by a subsequent alert issued by the regulator on 28 April 2014 regarding pension transfers and switches. Again, this alert didn't follow the introduction of new regulations but restated the existing position. The regulator said it was '*alerting firms to our requirements when they give advice on self-invested personal pensions (SIPPS), giving our view and key messages*'. It included the following: '*Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable. If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole*.'

The alert went on to reiterate that suitable advice generally required consideration of the overall transaction, that is the vehicle, the wrapper and the expected underlying investments and whether or not such investments were regulated products. It said, despite the initial alert (in January 2013), some firms continued to adopt a model which purportedly restricted advice to the merits of the SIPP wrapper. But advising on the suitability of a pension transfer or switch couldn't reasonably be done without considering the existing pension arrangement and the underlying investments intended to be held in the SIPP.

Crucially, there is nothing in this alert to suggest that it only applies when a firm is giving advice where an unregulated introducer is involved. So, I'm satisfied that, even if the investment advice to Mr G was being provided by another regulated firm, Portafina was reasonably required to consider the proposed underlying investments before advising on the transfer. I'm conscious that both the 2013 and 2014 alerts were issued prior to Mr G receiving advice and so Portafina ought to have known that it needed to do this. As I have previously acknowledged, the alert does not have the status of a Handbook 'rule' as such, nonetheless I consider it to be a relevant indicator of the standards expected by the regulator in these circumstances, as well as a helpful indicator of what good industry practice looked like at the time.

Portafina has said that it was only after it gave advice that Firm C recommended the investments and that therefore the responsibility for the advice lies only with Firm C. However, the alert makes it clear that a firm that is asked to advise on a pension transfer needs to be aware of the intended investments *before* it advises on the transfer, in order to provide suitable advice. So, it should've requested this information from Firm C before providing advice. And, as confirmed in the alert, if it didn't '*fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all'.*

I appreciate the regulator's rules allow for situations where two regulated firms are involved. In particular, Portafina has referenced:

COBS 2.4.6R(2).

> *A firm will be taken to be in compliance with any rule in this sourcebook that requires it to obtain information to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person.*

COBS 2.4.8G

> *It will generally be reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information.'*

These rules essentially mean that a firm can rely on information provided to it by another regulated firm, where it is reasonable to do so. The rule is stated to apply to situations where a firm is *required by a handbook rule* to obtain the information in question from another person. Portafina says it was therefore entitled to rely on information given to it by Firm C at the outset of their relationship in which Firm C confirmed it would not recommend or otherwise promote UCIS and that it would instead invest in risk-graded cash, equities and bonds.

Whilst I note that COBS 2.4.6R(2) is unlikely to apply in these circumstances (as we are not concerned with a situation in which Portafina was *required by a handbook rule* as such to obtain the information it received from Firm C), I nonetheless agree with Portafina that, in the absence of any evidence to the contrary, it was entitled to take that information from Firm C at face value. It was reasonably entitled to rely on that statement, *as far is it went*.

The difficulty for Portafina is that the statement did not tell it anything meaningful about the intended investment proposition *for Mr G*. No information at all regarding the proposed investments for Mr G was passed on to Portafina by Firm C. Instead, Portafina chose to rely on a general statement, given two years previously, that said recommendations of broad categories of investments, with potentially broad gradings of risk, might or might not be made in a given case and that UCIS would not be recommended. I don't think that was a reasonable basis on which Portafina should have assessed the suitability of the pension transfer for Mr G.

Mr G was one of many clients that Firm C referred to Portafina for pension transfer advice. Portafina indicates that roughly two to three cases a month were intended to be referred to it by Firm C over the course of a year. And as I said in my provisional findings, it seems the confirmation that Firm C wouldn't be recommending UCIS came from a compliance health check that was completed prior to Firm C approaching Portafina in late 2013. I've not been provided with any information to demonstrate that Portafina checked this was still the position when it was making other enquiries with Firm C. I think it was important that this was confirmed. But in any event, as I've explained above, because Portafina needed to consider the proposed investment *for Mr G* – and it didn't do this - I don't think it did enough to assess the overall suitability of the advice given to Mr G.

This doesn't mean that I'm holding Portafina responsible for the failings of another regulated firm, as it has said in its submissions. I've focused on Portafina's own responsibilities as the business involved with the capacity to 'unlock' the funds held in Mr G's OPS. There's no dispute that Portafina gave that advice and that it incorrectly thought it could limit its advice to the transfer without seeking information about the investments Firm C intended and eventually arranged for Mr G.

I acknowledged in my provisional findings that Portafina's suitability report for Mr G outlined its recommendations based on a model portfolio for an investor with Mr G's risk profile. However, I incorrectly stated that the table had been left blank. The table was in fact completed showing a suggested spread of investments as follows:

Cash (10%),
Equities (60%)
Other fixed interest (2%); and
structured secured bonds (18%).

This doesn't alter my decision; I still think Portafina needed to do more to satisfy itself that its recommendation was based on the expected investment proposition that Firm C intended for Mr G. It needed, at the very least, to ask Firm C for an outline of that proposition.

Portafina says the asset allocation table outlined its expectations as to the types and blend of investments to be recommended by Firm C, and says it enabled Mr G to question any discrepancy between its expectations and the actual recommendations made by firm C. It said it was no part of its role to second guess recommendations (yet to be made) by Firm C or to police the investments ultimately made.

I don't agree with Portafina. It is clear that Firm C and Portafina had come to an agreement about their working relationship. Firm C did not have the required regulatory authorisations to give pension transfer advice whereas Portafina did, and an agreement to work together

for pension-release clients came about. Portafina has stressed it had never before agreed to work with another authorised firm, as the processes and controls required to set up the relationship would be disproportionate to the level of business it might bring about. However, an exception was made for Firm C, as it had proposed to send significant levels of business to Portafina (two to three cases a month for a year).

In those circumstances it seems to me that Portafina needed to do more to ensure that the two firms worked together to give suitable pension transfer advice to clients. Aside from the initial due diligence checks carried out in 2013 at the outset of the relationship, I have not seen any evidence that further checks were made by Portafina to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from firm C. The need to do so was, as I say, a necessary part of the suitability assessment carried out by Portafina on a case by case basis for individual clients. But it was also, in my view, a reasonable due diligence requirement brought about by the ongoing relationship itself, so that any patterns of unsuitable or unaligned advice could be identified and addressed.

I don't agree that this requires Portafina to 'police' the activities of firm C, but it does require Portafina to take reasonable steps to ensure that both firms were acting, together, in their clients' best interests.

With that in mind, I don't agree that it was sufficient for Portafina simply to recommend a broad spread of investments in its suitability report for Mr G in the expectation that that would bring about the necessary alignment with Firm C's investment recommendations. Further, I do not agree that broad references to investment classes, (such as 'equities' and 'other fixed interest'), would give consumers in the position of Mr G sufficient information to enable them to spot discrepancies. As things transpired for Mr G, and in the absence of any further checks by Portafina, the investments he was eventually advised to purchase were significantly removed from the investments Portafina contemplated when it advised him to transfer away from his DB scheme in the first place.

Further, I should add that even if I was satisfied Portafina could adequately assess the suitability of the transfer by merely recommending potential investments into broad asset classes, with no further steps taken to align its advice with Firm Cs recommendations, I don't think the asset allocation set out in the table would in any event have been suitable for Mr G. I say this because the model portfolio suggested that 18% of the pension fund should be invested in '*secure structured bonds*'. These are described in the suitability report as asset back debt securities that are issued for a fix term. The report goes on to explain that these are not covered by the Financial Services Compensation Scheme (FSCS). And that there are credit risks - due to the possibility of the company borrowing the money going into default - and liquidity risks. In my view, this puts them at the higher end of the risk spectrum and would generally mean that they're unsuitable for an inexperienced investor, with a fairly modest pension fund. So, I'm not satisfied that a portfolio that would've invested 18% of Mr G's pension fund in unregulated and potentially illiquid funds, would've been suitable for a client in Mr G's position in any event.

<u>Portafina's advice on the pension transfer</u>

Much of what Portafina has said regarding the suitability of the transfer isn't new and has already been addressed in my provisional findings. I appreciate Portafina doesn't agree but I don't see the benefit in repeating everything I said in my provisional findings

here. Instead I've focussed on what I consider to be Portafina's main points regarding suitability, as well as any new points they have raised.

Portafina maintains that it was appropriate for it to base its suitability assessment on the assumption that Mr G would opt to take his pension benefits via income drawdown, when he retired. So, it believes the life time hurdle rate, set out in the transfer value analysis report (TVAS), is the appropriate measure for assessing whether the transfer was financially viable. Portafina believes that this was a 'reasonable assumption' to make, which COBS 19.1.2R(2) permitted when comparing the benefits of the OPS with the proposed SIPP.

In support of this assumption, Portafina has referenced an FCA 'Data Bulletin' from September 2018 which focused on the latest trends in the retirement income market.

I have carefully read this bulletin, which highlights that between 2015 (when the pension freedoms legislation was introduced) and 2018, there was an increase in consumers accessing their pension pots via income drawdown. Only 13% of the pension pots accessed during this time were used to purchase annuities. However, I should point out that this figure was much higher when the pension pot had guarantees; almost 40% of pensions pots with guarantees attached were used to purchase annuities. And 60% of the pension pots going into drawdown, were used solely to access tax free cash; no income had been taken. So, the number of those pots that are ultimately used to secure a guaranteed income is unknown. As such, even if I was satisfied that it would be appropriate to assess the advice provided to Mr G based on market trends - which I'm not - I don't think the bulletin supports Portafina's argument.

I'm also conscious this data bulletin relates solely to defined contribution plans, which (unless there are guarantees built in) are subject to current annuity rates. Current annuity rates (the rate that determines the amount of regular income an individual will get in return for their pension pot) have fallen in recent years. And so this may explain the reduction in the number of individuals with defined contribution plans using their pension pots to purchase an annuity. However, Mr G's OPS was a defined benefit plan. This meant that what he would've received from his pension was guaranteed, based on his final salary and number of years' service within the scheme, and wasn't dependent on current annuity rates. So any changes in current annuity rates, wouldn't have impacted what he would've received from his plan. So I don't think trends in the defined contribution market apply in Mr G's case.

Even if it were appropriate for Portafina to take account of market trends, I don't think it reasonably follows that Mr G himself was likely to have taken his benefits via income drawdown. I agree that Portafina didn't need to be *certain* of the course Mr G might have taken, but I'm not sure there was a reasonable basis upon which Portafina assumed he was more likely than not to have taken income drawdown.

I acknowledge that when asked by the adviser during the fact finding call if "*there was any particular reason you think you might like to get an annuity at some point*", Mr G said "*no, not really*". And he also said he'd like flexibility. It's not unreasonable that he said this, particularly as just before this the adviser had said that "even the Government don't think annuities are good value for money". But I think it ought to have been explained that in this situation, flexibility is of questionable benefit considering the guaranteed income that is being given up.

I also note in the 'Planning Assumptions' section of the suitability report, under 'Attitude to drawdown/annuity', it was noted that it had been agreed with Mr G that it should be assumed he will maintain as much flexibility in his pension planning as possible. So Portafina said it had assumed that Mr G would utilise drawdown, at least in the early years of his retirement. However, I don't agree that ruling out an annuity provided Mr G with as much flexibility as possible; it ought to have been assumed that there was a possibility Mr G may take an annuity at retirement and Portafina's assessment of the benefits should've taken this into account, not ruled it out as it appears to have done.

Mr G wasn't expecting to receive any additional guaranteed income in retirement, other than his state pension. So I don't think it was right to make the assumption that he would, more likely than not, take his benefits via drawdown when he retired. I think Portafina ought to have advised him that, it would be more suitable for Mr G to secure a guaranteed income, particularly as this pension was to provide the majority of his retirement income. And so Portafina should've based its comparison of benefits on the critical yield rather than the life time hurdle rate. Instead it seems to have based its recommendation on the life time hurdle rate because this is what made the transfer appear viable. This is supported by the adviser's comments to Mr G during the fact finding call, when he said this was the way they "could match the income you would've had from the final salary because if you buy an annuity the figures didn't come out as well".

In any event, I explained in my provisional findings that I didn't think the regulator was satisfied that the life time hurdle rate was an appropriate comparator when comparing the OPS benefits with the SIPP in cases where that rate fails to take proper account of the benefits and options available under the DB scheme (COBS19.1.3G(2)). As I have said, the rate used by Portafina failed to take proper account of the benefits offered by the ceding scheme, such as a 50% spouse's pension which escalated in retirement. It failed to take account of the advice and plan charges of the SIPP and the individual investments. And it appears to have been calculated on the basis of Mr G living to 83, not to age 90 as the adviser said. All of this meant the hurdle rate of 2.79% used by Portafina was understated and therefore wasn't a reasonable comparator in the circumstances.

Further, and as the regulator has made plain, when considering whether to make a personal recommendation to transfer away from a DB scheme, a firm should not regard a rate of return which may replicate the benefits being given up from the defined benefits pension scheme as sufficient in itself (COBS19.1.7B G). In light of that, I think it's important to emphasise that the starting point for the transfer advice in this case ought to have been that it was unsuitable (COBS19.1.6G). And Portafina ought to have made Mr G aware that it was in his best interest to preserve his OPS benefits. It didn't do that and it failed to investigate Mr G's savings and his other pension, as alternatives he had for raising capital to complete his house renovations.

Mr G was seven years away from retirement. The OPS offered a guaranteed income that he'd receive in retirement that wasn't subject to risk or market fluctuations. Whilst there was some mention of the guaranteed nature of the OPS during the call, there was no context around this, nor was there a discussion about what this transfer would mean in terms of Mr G's future security and what was being given up.

I've also given careful regard to the suitability report and note that although the report did mention certain benefits that were provided by the OPS, there was little explanation or weight given to the extent to which those benefits would be lost by transferring away.

Again, the significance of losing the *guaranteed income* provided by the OPS was not given the weight I would expect to see in a suitability report in these circumstances. I can see that there was a brief mention in the conclusion of the report that a transfer would mean giving up a guaranteed pension, but in my view this doesn't give that outcome the prominence it requires, nor does it give Mr G a reasonable explanation of the impact of losing such benefits so close to his own retirement.

Mr G may have said he understood the difference between the critical yield and the life time hurdle rate (although for the reasons set out in my provisional findings, I don't think he necessarily did). But Mr G's objectives and understanding of matters needed to be weighed up against what was suitable advice. The benefits Mr G had within his OPS were guaranteed and would form a very significant part of his pension income. Therefore, the transfer represented a very significant risk for him. And in his circumstances, I don't think giving up a guaranteed income was in his best interests. The fact that the suitability report set out the advice, and that Mr G may have said he understood the advice, doesn't make unsuitable advice suitable.

Portafina considers that it complied with its obligations under COBS 19.1 and made an appropriate recommendation. But for the reasons I've explained, I don't think it did. Mr G relied on Portafina to give suitable advice on whether to transfer his pension, and in doing so it had an obligation to act in his best interests. Had Portafina given suitable advice to Mr G, it would have advised against transferring his pension. I'm satisfied that had it done so, and explained and discussed in a balanced way the disadvantages of transferring, the transfer wouldn't have gone ahead and Mr G would've retained his OPS benefits.

All in all, and as outlined above, it is my view that Portafina failed to put reasonable checks in place to ensure its transfer advice was aligned with the investment recommendations made by Firm C. Further, even if I am wrong about that so that it was sufficient for Portafina to base its advice only on the recommended spread of asset classes it outlined in its suitability report, it is nonetheless my view that Portafina's transfer advice was not suitable in any event as Mr G would've been better off remaining in his OPS.

Redress

Portafina disagrees that it can be held wholly responsible for the losses Mr G has suffered as a result of its unsuitable advice. And because I acknowledged in my provisional findings that Firm C's actions contributed to his losses, it believes I'm being inconsistent and that my approach to apportionment of liability is wrong in principle. As such, it doesn't think my decision is fair and reasonable.

I think it's important to emphasise that Firm C and Portafina were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients – pension-release advice and investment. Because Firm C wasn't authorised to advise about the transfer of deferred OPS benefits, it referred Mr G to Portafina. Portafina advised Mr G to transfer to a SIPP, it set up the SIPP and arranged for the OPS to be transferred. I acknowledge that Firm C advised Mr G to invest a significant share of his SIPP funds in UCIS. But, as I've explained, Portafina's understanding that it could reasonably limit its advice to just the transfer and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Mr G on the investments. It was only as a result of Portafina's involvement that Mr G accessed the funds in his OPS. Portafina's role was pivotal, since the eventual investments were fully reliant on the transfer taking place; if Mr G hadn't transferred, he couldn't have invested as he did.

Portafina says that Firm S and Firm C made repeated assurances as to the nature of the investments recommended. But, as I've previously explained, it's my understanding that Portafina relied on information set out in a compliance health check that was completed some time before Firm C referred Mr G to Portafina. I think Portafina needed to have confirmed that this information was still current when it was assessing whether to accept referrals from Firm C. Portafina hasn't provided any further evidence to suggest it did this, and I've not been provided with any evidence of *repeated* assurances provided by Firm S or Firm C. I've further found that once the business relationship commenced, Portafina failed to take adequate steps to liaise with Firm C to ensure that its transfer advice was aligned with the investment advice Firm C was giving to clients, and to monitor the business on an ongoing basis, so that any patterns of unsuitable advice might be identified and addressed. In any event, as was clearly set out in the regulator's alerts in both 2013 and 2014, Portafina couldn't restrict its advice merely to the transfer; it had to consider the proposed investments for Mr G, which it didn't do.

As I've said above, I'm also not satisfied that the suggested portfolio that was set out in the suitability report was suitable for Mr G. So, while I accept that Firm C might also bear some responsibility for Mr G's losses, I'm satisfied that had it not been for Portafina's failings, Mr G wouldn't have suffered a loss at all.

In terms of the FSCS, I am aware that, as a fund of last resort, the FSCS won't pay out on claims where it is aware that another firm was involved in the transaction, and it considers that firm might *also* be responsible for a consumer's losses. I think it's important to point out that I'm not saying Portafina is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portafina gave unsuitable advice and it is responsible for the losses Mr G suffered in transferring to the SIPP and investing as he did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position. Portafina could've prevented the transfer and the investments. Instead it facilitated them, having given unsuitable advice to Mr G that he should transfer. Mr G hasn't complained about Firm C or Firm S and in light of their liquidation, there would be little point in him doing so. He has complained about Portafina and because of what I have said, it is, in my view, fair and reasonable that Portafina should account to him for the full extent of his losses.

So, for the reasons given, I remain of the view that Portafina is responsible for Mr G's losses.

Putting things right

A fair and reasonable outcome would be for the business to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the occupational scheme. Portafina must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

The FCA has announced it intends this month to update the inflation assumptions used in this guidance. This could materially affect the amount of compensation due. Portafina must therefore take into account any amendments to the regulator's Finalised Guidance FG 17/9.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr G's acceptance of the decision.

If this is completed before publication of the FCA's intended amendments to the guidance, Portafina must re-run the calculation within a month of the amended guidance being published – ensuring that any shortfall this shows in the original calculation is promptly made up to Mr G. Portafina need only re-run the calculation once, to take account of amendments currently planned by the FCA. Portafina does not subsequently need to recalculate following any further amendments the regulator might later make.

Alternatively, Portafina may wait until publication of the FCA's amended Finalised Guidance (expected in March 2021) before calculating and paying the compensation due to Mr G in this case.

Portafina may wish to contact the Department for Work and Pensions (DWP) to obtain Mr G's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr G's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr G's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr G as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. The compensation amount must where possible be paid to Mr G within 90 days of the date Portafina receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portafina to pay Mr G.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

My aim is to return Mr G to the position he would have been in but for the actions of Portafina. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market), as their value can't be determined. That appears to be the case here.

To calculate the compensation, Portafina should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If Portafina is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portafina has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portafina may ask Mr G to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. Portafina will need to meet any costs in drawing up the undertaking. If Portafina asks Mr G to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

Determination and money award: I require Portafina to pay Mr G the compensation amount as set out in the steps above, up to a maximum of £150,000.

Where the compensation amount does not exceed £150,000, I additionally require Portafina to pay Mr G any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £150,000, I can only require Portafina to pay Mr G any interest as set out above on the sum of £150,000.

Recommendation: If the compensation amount exceeds £150,000, I also recommend that Portafina pays Mr G the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr G.

If Mr G accepts my final decision, the money award is binding on Portafina. My recommendation is not binding on Portafina. Further, it’s unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G may want to consider getting independent legal advice before deciding whether to accept this decision.

my final decision

For the reason explained, I'm upholding this complaint and I intend to direct Portafina LLP to pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 25 April 2021.

Lorna Goulding
Ombudsman

Provisional decision dated 23 December 2020

complaint

Mr G has complained about advice he received from Portafina LLP to transfer a defined benefit occupational pension scheme (OPS) he held with his former employer to a Self- Invested Personal Pension (SIPP). The funds within the SIPP were then used to invest in several unregulated collective investment schemes (UCIS).

Mr G is being represented by a third party but for ease of reading the decision I'll refer to all representations as being made by Mr G.

background

In 2014, Mr G was introduced to Portafina after he'd been in contact with another business, from here on referred to as Firm C.

At the time, Firm C was an appointed representative (AR) of a regulated business, Firm S. Firm S was authorised by the Financial Conduct Authority to provide investment advice but it wasn't permitted, nor was Firm C, to provide pension transfer advice.

Portafina has explained that it was first approached by Firm C in late 2013. As Firm C was proposing to refer a number of clients each month to Portafina for pension transfer advice, before agreeing to accept referrals, Portafina says that it carried out due diligence on a number of levels:

1. Checking Firm S's authorisation and Firm C's status as its AR. These checks led to Portafina concluding that Firm C was able to introduce clients for pension transfer advice and subsequently advise on investments. In doing so it was required to follow the regulator's rules. And Firm S was obliged to supervise and monitor Firm C. In addition, these clients would have the protection of the Ombudsman Service and the Financial Services Compensation Scheme (FSCS).

2. Public searches of the Financial Services Register, Google, the press and published Financial Ombudsman's Services decisions. These searches revealed no adverse information or disciplinary actions recorded against Firms S, Firm C or key individuals involved with the firms; instead the information showed good quality and compliant businesses.

3. Direct enquiries with Firm S and Firm C. Portafina says that during these enquiries it was assured that Firm S maintained structured plans for Firm C's compliance and training. The management of compliance was supplemented by the use of external compliance support. Firm C's advisers held the Statement of Professional Standing via the Chartered Insurance Institute. Firm S had arrangements in place, explicitly covering Firm C, for conflicts of interest. And a previous compliance health check that had been conducted by external consults said that neither Firm S nor Firm C recommended or promoted unregulated collected investments schemes. From 2012 Firm C had being using the Finametrica risk profiling questionnaire so it could ensure its recommendations wouldn't exceed the client's attitude and capacity for investment loss. It was assured that Firm C invested clients' portfolios into risk-graded portfolios of cash, equities and bonds.

Portafina has explained that referrals would be made if Firm C identified that a client had a defined benefit pension with which they might have an objective or need. Portafina would complete any information gathering and fact finding, before making a recommendation. If it considered it might be suitable for the client to transfer their pension, it would issue a suitability report. This report would include details of the high-level investment asset allocation that Portafina considered

suitable for the client. Should the client wish to proceed, Portafina would complete the administration in respect of the transfer and once the funds had been received by the new pension provider, they would be held 100% in cash. The agency for the new pension plan would then be changed to Firm C, who would give definitive recommendations on the investments.

In the case of Mr G, he spoke to Firm C about his pension. Firm C completed a fact-find and requested details from Mr G's former employer as to his entitlement under the OPS. After information was received from the OPS, Mr G was referred to Portafina for pension transfer advice.

Portafina completed its own fact-find. This recorded that:

- Mr G was 57, with an expected retirement age of 65.
- He was married with children.
- He was unemployed with a gross monthly income of £1,100. His expenditure and disposable income were unknown.
- He had an outstanding mortgage.
- He had a balanced attitude to risk.
- His final salary OPS would provide an annual income of £3,501 but he was currently being offered a cash equivalent transfer value of £66,650.
- He wanted to take maximum tax-free cash to refurbish a house he'd inherited and he didn't want to use his emergency fund to do this.
- He didn't require an income at that time.
- He was particularly eager to get his money away from his former employer as he didn't like or trust them.
- He was very unhappy with the funding position of the OPS.

Portafina also provided a copy of Firm C's fact-find. This contained limited information but does confirm that Mr G was receiving £1,100 per month in state benefits and his total monthly expenditure was £800. It also stated that he had £500 in a deposit account and £5,000 on a credit card. It reiterated Mr G's concerns about his former employer.

In its suitability report, Portafina explained that a growth rate of 8.1% was required for the new personal pension to match the benefits Mr G was entitled to through his OPS. But the report said that if Mr G used income drawdown to access his benefits, as opposed to purchasing an annuity, then over Mr G's entire lifetime the actual investment return needed to match the scheme pensions was 2.79% per year.

Based on Mr G's risk classification, Portafina estimated the personal pension would grow at a rate of 6.13%, not including the advice and plan charges. Having considered all the information, Portafina recommended that Mr G transfer his OPS to a SIPP. The report explained that Portafina wasn't providing advice regarding the investments within the SIPP as this was to be done by Firm C.

It's not clear if Mr G spoke to Firm C before accepting Portafina's advice and before the SIPP was established in November 2014. The OPS transfer completed in January 2015 and Mr G immediately took 25% as a tax-free lump sum (£16,662.50), leaving the remaining funds in cash. The servicing rights for the SIPP were then transferred over to Firm C on 29 January 2015. In February 2015 Firm C invested the remaining funds as follows:

UCIS
£4,700 - Biomass Investment Plc
£4,700 - Brisa Investments Plc
£4,700 - Strategic Residential Dev
£4,700 - Lakeview UK Investments
£4,700 - Real Estate Investments

Regulated investments
£13,980.70 - Marlborough ETF Global
£2,329.77 - Thesis Spectrum Green
£4,659.53 - Thesis Spectrum Orange

In 2018, Mr G complained to Portafina about the advice he received to transfer his OPS to a SIPP. He said that the advice was negligent and wasn't suitable for someone with no investment experience. He thought that Portafina should've had a system in place to ensure that Firm C's investment recommendations were in line with his attitude to risk and capacity for loss. These factors were clearly ignored when Firm C advised him to invest in excess of 35% of his fund in high-risk unregulated investments.

Portafina reviewed the complaint but it didn't think it had done anything wrong. In its final response it said that it had only provided transfer advice to Mr G; it hadn't provided specific investment advice, that had been provided by Firm C. It was therefore unable to comment on the nature of the investments.

In terms of the transfer, Portafina said that it had facilitated this as Mr G had wanted to transfer out of his OPS as soon as possible. And it had also ensured that the transfer was suitable for him. In terms of the concerns about the investments, as both Firm S and Firm C were in liquidation, Portafina confirmed that it had forwarded these concerns to the liquidators.

Mr G was unhappy with Portafina's response so he referred the matter to this service for an independent review.

The complaint was considered by one of our adjudicators. During a telephone call with the adjudicator, Mr G confirmed that he needed to access his tax-free cash to support his son at university and for everyday living expenses. Having reviewed everything provided at that time, the adjudicator thought the complaint against Portafina should be upheld. In summary he thought that:

- Portafina had failed to suitably assess Mr G's circumstances or to discuss the consequences of transferring.
- One of Mr G's objectives had been to preserve his death benefits, this was unlikely to happen if this was his only pension provision.
- Mr G was receiving £1,100 per month in state support but if this was insufficient for him and he was considering using his pension to supplement his income, this wasn't factored in when calculating the critical yield, hurdle rates or future assumed investment returns.
- The critical yield was carried out assuming Mr G took his retirement benefits at age 65. The transfer value analysis sheet (TVAS) stated that a critical yield of 8.1% was required if all benefits were taken as income. But Portafina didn't provide a critical yield figure to reflect the scenario that Mr G had an immediate need to take tax-free cash.
- The regulator publishes discount rates for the purposes of the industry wide pension review. Although this transfer is outside of the review remit, these rates could be used to give an indication of what rates of growth would have been considered reasonable at the time. Based on the term to retirement at the time of advice, that being 8 years, and a transfer date of January 2015, the suggested rate would be 3.9% per annum. Therefore, it would seem that the critical yield required to match the income available from the ceding scheme at age 65 was far in excess of what the regulator would consider reasonable. And to make a transfer worth considering, it needed to be demonstrated that there was a good chance the receiving scheme would provide greater benefits in retirement, to make up for the loss of the guarantees which would be given up on transfer, and therefore a further 2% should be added. So a critical yield rate of 10.10% would more accurately reflect a rate that would provide an increase in benefits for Mr G.
- In the suitability report, Portafina stated, *"Due to your risk rating of ATR [sic], your stated age of retirement and your needs and objectives we would recommend that you invest in*

the following fund asset classes, however, Firm C will contact you in due course to discuss the actual fund investment portfolio". Portafina couldn't provide suitable transfer advice without knowing where the investments would be held, even if the formal investment advice was provided by another regulated entity.

Portafina didn't accept the adjudicator's findings so the complaint has now been passed to me to review everything afresh.

Since the matter has been with me for consideration, further information has been received. Portafina has provided information regarding its relationship with Firm C. And details of the due diligence checks it completed on Firm S and Firm C before accepting clients it referred for pension advice.

It’s also provided a recording of the fact-finding telephone call with Mr G that was previously unavailable. In this telephone call Mr G explained that he was currently living in a house he’d inherited but it needed extensive refurbishment. Portafina’s adviser asked Mr G if he had any other pensions or means to pay for the work. Mr G explained that he did have other savings, which he didn’t want to access, and a smaller pension plan. He also explained that the reason for moving his pension was twofold, not only did he want access to his tax-free cash but he also wanted to move his OPS away from his former employer. He’d not left employment on good terms and he didn’t trust his former employer with his pension. In response to this the adviser mentioned that the OPS was only 44% funded.

During the call Mr G also confirmed to the adviser that he’d previously invested in the stock market when he was trying to build up money to help his daughter purchase a house. But he’d only ever invested in blue chip companies. And he said that he didn’t want to take much of a risk with his pension, he’d only be willing to accept short term losses of 10% as a maximum. And he wanted to invest in liquid assets only. He also said that if his pension income dropped by a maximum of 10%, he would still be able to maintain his standard of living as he had other savings he could access.

The OPS administrator has confirmed that the scheme is no longer with Mr G’s former employer. And a new sponsoring employer had already taken over at the time of advice and a plan had been put in place to address the scheme’s underfunding.

I’ve now considered this further information, along with all the submissions provided by both parties and I’m in a position to set out my provisional findings.

my provisional 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’m currently minded to uphold the complaint. I’ll explain why.

Portafina recommended that Mr G transfer his OPS to a SIPP but it says that it didn’t provide advice as to the investments within the SIPP because this was being provided by Firm C. So, in the suitability letter Portafina based its recommendation on an example portfolio for a balanced risk investor.

Mr G accepted the recommendation and Portafina arranged for the SIPP to be set up, the OPS to be transferred and for the funds to be fully invested in cash. Shortly after this was completed, the servicing rights for the SIPP were transferred to Firm C. Firm C subsequently arranged for the SIPP funds to purchase a number of investments, five of which were unregulated.

I’ve thought about this carefully. Even if it wasn’t specifically intending to advise on the investments, Portafina needed to have an awareness of the intended investments in order to give suitable advice. This remains the case even if Firm C was actually providing that advice. It is, in my view, reasonable to expect a firm that is assessing the suitability of a pension transfer to consider the overall investment strategy that applies to that proposed transfer, including a broad understanding of the proposed investments, before it could determine whether the transfer was in Mr G’s best interest.

In forming this view, I have taken account of relevant laws and regulations; regulators’ rules, guidance and standards, and what I consider to be relevant industry practice at the relevant time.

As the adjudicator explained in his opinion, on 18 January 2013 the regulator at the time issued an alert about advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP.

The regulator made its position clear in the alert, where it said:

"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 (…)

If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements."

I acknowledge that the regulators' statement in the alert is not 'guidance' or 'rules' or 'standards' in the sense that such requirements are specified by the regulator in its Handbook. Nonetheless, I regard it as a relevant consideration when determining this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case.

In doing so, I also acknowledge that in the scenario set out in the alert, the other firm that made the investment recommendations for the underlying assets of the SIPP was an unregulated introducer. Whereas in Mr G's case, Firm C was authorised to conduct investment business under its AR agreement with Firm S, and in turn Firm C could itself be pursued for compensation by a consumer within the financial services regulatory regime.

Portafina may believe that this in turn distinguished the circumstances of Mr G's transaction from the scenario that the alert was aimed at, and as a result absolved it from its duty to assess the overall suitability of the proposed investments. It might say that was particularly the case as it had said to Mr G that it wasn't providing any advice on the underlying investments as Firm C was doing that. Whilst I've given that possibility careful thought, I don't agree that the alert was limited to those very specific circumstances.

I can see that the alert makes it clear that suitable investment advice '*generally'* requires consideration of the other investments held by the customer, as well as the suitability of the overall proposition when advice is given on a product that is a vehicle for investment in other products (such as the SIPP in Mr G's case). It further refers to the broadly applicable rules and guidance that ensure that in *all* instances of advice, a firm must first take time to familiarise itself with the wider investment and financial circumstances. In saying that, I don't think the FCA intended that in pension transfer cases, regard to the overall proposition was only required where the introducing firm was unregulated, or where the assets contemplated included unregulated investments. In my view, the regulator was indicating that these are standards that have broad application to pension transfer advice, but pointing out that it had particular concern about cases in which unregulated firms and unregulated products put the consumer at risk. I think the alert is relevant to firms in the position of Portafina in this case. It indicates such firms should not be giving advice on a restricted basis. It didn't consider a firm could reasonably separate out the two elements of the transaction; its advice on the suitability of the transfer should include consideration of the suitability of the underlying investments.

Portafina says that it satisfied itself that Firm C was able to introduce clients and advise on investments without breaching the relevant rules. And it says that as Firm C and Firm S were bound by the then regulator's rules, they had a duty to provide suitable advice and their clients would have recourse through the FSCS.

I agree that by virtue of its AR agreement, Firm C was required to give suitable advice; but this didn't absolve Portafina from its responsibility to do the same. And in my view, it could only reasonably assess the suitability of the transfer if consideration was given to the expected underlying assets of the SIPP.

> Prior to the introduction to Portafina, Firm C had already completed a fact find for Mr G. So I think it's likely that Firm C had in mind a portfolio of intended investments before Portafina was involved. Firm C advised Mr G to invest a significant proportion of his SIPP in unregulated investments. Portafina says it did not know this was Firms C's intention - but it would have, had it found out about the intended investments as I consider it was required to do; they were part and parcel of the transfer. But it appears that in giving its advice to transfer, Portafina failed to check how Firm C broadly proposed to invest Mr G's money.

Portafina has explained that part of its due diligence checks into Firm C included information from a previous compliance health check completed by external consultants. This confirmed that neither Firm S nor Firm C recommended nor otherwise promoted UCIS.

I've thought carefully about this, but it seems this health check was completed before Firm C approached Portafina in late 2013 to discuss referring clients to it for pension transfer advice. And despite Portafina making other enquiries with Firm C before agreeing to accept referrals, it doesn't appear it specifically asked for confirmation that the information in the previous health check was current and that Firm C wouldn't be recommending or promoting UCIS. I think it was important for this to be confirmed.

In any event, the previous health check seems to have been the extent of Portafina's enquiries into recommendations of UCIS – and this was some time prior to Mr G's transaction. In my view, it should've done more to ensure it understood the types of investments Firm C would be recommending, and in particular in connection with Mr G's proposed transfer.

Often investment advisers will have a model portfolio for each category of investor. Portafina has said that it was assured that Firm C had adopted use of the Finametrica risk profiling questionnaire from April 2012 so as to ensure its investment recommendations wouldn't exceed a client's attitude & capacity for investment risk. And it was assured that Firm C invested clients' portfolios into risk-graded portfolios of cash, equities & bonds. But this seems to have been the extent of Portafina's enquiries into the types of investments Firm C would be recommending. It didn't ask to see model portfolios for the various risk categories so it could check that these were in line with what it considered to suit each risk group. And, even if it had seen these, I would still have expected Portafina to request details upfront from Firm C as to the intended portfolio for Mr G. Portafina should've asked about the proposed investments and Firms C's risk rating for Mr G. Without this information, I'm not satisfied that Portafina could reasonably assess the suitability of the transfer.

Had Portafina requested this information and it had been advised that Firm C intended to invest Mr G in a number of UCIS, then it could've questioned this, given how at odds it was with his established attitude to risk. And in the event that Portafina had been misled by Firm C as to the proposed investments, then it's likely Mr G would've realised that the investments Firm C went on to arrange differed to those Portafina had based its suitability assessment on. And Mr G could've taken action accordingly.

In reaching this view, I've also taken account of the relevant rules set out by the regulator. These include the overarching Principles for Businesses. Principles 1 (*integrity*), 2 (*skill, care and diligence*), 6 (*customers' interests*) and 9 (*reasonable care)* are of particular relevance here.

The Conduct of Business Sourcebook (COBS) in the regulator's handbook, set out the rules regulated businesses have to follow. At the relevant time, COBS 9.2.1R required Portafina to take reasonable steps to ensure that a personal recommendation was suitable for Mr G. It had to obtain information as to Mr G's knowledge and experience (relevant to the specific type of designated investment), his financial situation and investment objectives.

COBS 9.2.2R required Portafina to gather sufficient information from Mr G to ensure the recommendation met his objectives, that he could bear the risks involved and that he had the necessary experience and knowledge to understand the risks involved in the transaction.

Under COBS 2.1.1R Portafina had to act *"honestly, fairly and professionally in accordance with the best interests of its client."*

In my view, the FCA had rules of this nature in mind when it said in the alert:

> *There are clear requirements under the FSA Principles and Conduct of Business rules and also in established case law for any adviser, in the giving of advice, to first take time to familiarise themselves with the wider investment and financial circumstances. Unless the adviser has done so, they will not be in a position to make recommendations on new products.*

To my mind, the combined effect of these rules, standards and statements is that, when giving advice on a pension transfer, the regulator expects the advising firm to consider the suitability of the transaction as a whole, including the investments that are expected to comprise the underlying assets of the pension scheme.

I've taken the regulator's statement and the relevant rules into account when considering my view of the fair and reasonable outcome in this case. In my view, Portafina failed reasonably to take account of the overall investment proposition for Mr G when it advised him to transfer away from his OPS.

In saying that, I acknowledge that Portafina's suitability report for Mr G did outline its recommendations based on a model portfolio for an investor with Mr G's risk profile. The report spoke of a 'recommended portfolio' for Mr G that avoided too much volatility and spread the risks over a number of investment types. I can see that a section of the report was headed 'Your Fund Recommendations' and included an asset allocation table that was intended to indicate the spread of investments across a range of classes including equities, cash, fixed interest, property, and secured structured bonds. However, I note that the table was left blank. More to the point, there was a significant disconnect between the 'recommended' investment portfolio on which Portafina's suitability report was based and the investment portfolio that was eventually arranged for Mr G by Firm C. I think Portafina needed to do more to satisfy itself that its recommendation was based on the expected investment proposition that Firm C intended for Mr G. It needed at the very least, to ask Firm C for an outline of that proposition. It appears that Portafina failed to do that and as a result, Mr G ended up with high risk investments in his pension that were not contemplated by Portafina when it recommended the transfer.

As I say, I would expect Firm C to give a clear and honest outline of Mr G's investment proposition when asked to do so by Portafina. On receipt of that, I would further expect Portafina to have told Mr G that it couldn't recommend a transfer away from his OPS in those circumstances.

I accept, of course, that there is a possibility that Firm C may not have been entirely forthcoming to Portafina about its plans to spread a significant portion of Mr G's portfolio over high risk unregulated investments. Nonetheless, I do think that if Portafina's suitability report had clearly outlined the investment portfolio Firm C had *said* it expected to recommend, this would at least have given Mr G an opportunity to raise any discrepancies between that expectation and the actual investments arranged with Firm C and/or Portafina.

Portafina has pointed to what it regards as significant compliance and due diligence checks at the outset of its relationship with Firm C. Whilst those checks are important and helpful, I don't think they negate the need for reasonable and ongoing due diligence in connection with particular transactions, and this is particularly the case where it has agreed to an ongoing relationship with an introducer in the position of Firm C.

Mr G has complained that Portafina failed in its duty of care as it didn't have a system in place to follow up with Firm C to ensure its recommendation was in line with Mr G's attitude to risk and capacity for loss. I don't think it's unreasonable to suggest that, as part of Portafina's compliance checks, it should've followed up its recommendations by asking to see Firm C's own suitability report for Mr G regarding the underlying investments before the investments were arranged. That way it could've satisfied itself that the transaction was proceeding in line with the investment proposition on

which its recommendation had been base and that it was aligned to Mr G's attitude to risk. If it had done so, it could have taken steps to ensure that the high-risk unregulated investments, which had not been contemplated when recommending the transfer, were not made.

As it stands, such checks were not undertaken by Portafina, and the model investment portfolio on which Portafina's suitability report was based was only very loosely described in the report. That meant that a person in Mr G's position couldn't reasonably have known that the class and mix of investments that Portafina was anticipating, and on which its transfer recommendation was based, was quite different to the investments that were eventually recommended and arranged for him, so that he was not reasonably in a position to spot that discrepancy and take steps to address it.

All in all, it is my view that Portafina failed to take adequate steps to consider the investment proposition for Mr G as a whole when assessing the suitability of Mr G's proposed transfer away from his OPS. I'm satisfied that if the appropriate steps had been taken to ask Firm C for its investment proposition, Portafina would've seen that the proposed investments were unsuitable for Mr G and the recommendation to transfer his pension on that basis wouldn't have been given.

Was the advice to transfer the OPS suitable?

Having considered whether, in recommending the transfer, Portafina reasonably had regard to the expected investment proposition for Mr G as a whole, I'll now consider whether the transfer ought to have been recommended in any event. In other words, even if Firm C's expected investment proposition for Mr G *had been* aligned with the model portfolio contemplated by Portafina in its suitability report, was the transfer likely to have been suitable for Mr G in any event?

Mr G's OPS was a final salary scheme which provided benefits based on his salary whilst in employment. It provided a guaranteed income for the future and a spouse's pension that wasn't based on investment returns. Giving up the benefits and guarantees available under an OPS and subjecting future pension income to the risks associated with unpredictable investment returns should only be done where it can be shown that it was clearly in the best interests of the consumer. The COBS guidance (COBS19.1.6G) at the time of the advice, stated:

> *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer, convert or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests."*

So, the starting point is that a transfer won't usually be suitable. Generally, a transfer will only be in the consumer's best interests if there's a reasonable prospect that the new arrangement will provide better retirement benefits. The transfer will also need to be suitable, taking into account the individual's particular circumstances.

The adjudicator's assessment of Mr G's circumstances took account of the limited information that was contained in the sales paperwork from the time of the sale, and Mr G's recollections of his circumstances at that time. This information was incomplete, contradictory and Mr G's reasons for wishing to access his benefits were unclear.

Portafina has now provided a copy of the fact-finding telephone call between its adviser and Mr G. As this is a call from the time of the sale, I'm satisfied that it provides an accurate reflection of Mr G's circumstances at that time.

From that call, it's evident that Mr G had very negative feelings towards his former employer. He didn't trust it with his pension and wanted to move it away. Mr G had also recently inherited a house, that he was living in at that time but it needed refurbishment work. So as well as moving his pension away from his former employer, Mr G wanted to access his tax-free cash to carry out the work. When asked how important the OPS was for his retirement, Mr G said he had one other

pension, which was smaller than the OPS. He also confirmed that "*between other savings and things that we have, we'll be ok*". Mr G also said that he didn't want to use his savings plans to pay for the refurbishment work.

COBS 19.1.2R states that a firm must:

> *"(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme, before it advises a retail client to transfer out of a defined benefits pension scheme;*
>
> *(2) ensure that that comparison includes enough information for the client to be able to make an informed decision;*
>
> *(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, no later than when the key features document is provided; and*
>
> *(4) take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

There was a pension transfer value analysis report (TVAS) completed at the time by Portafina that showed that a critical yield of 8.1% pa was required to match benefits from the OPS. But this was based on the full transfer value. So it made no allowance for advice, plan or other ongoing charges. This meant the growth needed just to match the benefits being given up was understated. Like the adjudicator, I feel the growth required to provide an increase in benefits for Mr G was too high to make the transfer viable.

The advice was given at a time when there were no industry standard projection rates to assess the likelihood of the critical yield being achieved. But at the time the regulator's assumed future growth rates for personal pensions illustrations were 2% (lower); 5% (intermediate); and 8% (higher). So even if the personal pension had achieved the highest maximum projected growth at that time, it was unlikely Mr G would receive a materially higher pension at retirement as a result of transferring. This was supported in Portafina's own suitability report where it estimated that, based on Mr G's attitude to risk, his personal pension would grow at a rate of 6.13%.

However, Portafina based its recommendation on the life time hurdle rate, which was 2.79%, rather than the critical yield. It did this because it assumed Mr G wouldn't opt to buy an annuity with his fund and would instead take his benefits via income drawdown.

The guidance under COBS 19.1.3 G states that the comparison should:

> *"(1) take into account all of the retail client's relevant circumstances;*
>
> *(2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;*
>
> *(3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up; and*
>
> *(4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested"*

Having thought carefully, I'm not satisfied that using the hurdle rate was appropriate in Mr G's case. Firstly, the hurdle rate is used to determine the growth required to match he starting pension of the OPS, without increases and without a spouse's pension being included. Mr G's OPS provided a 50% spouse's pension and it escalated in retirement. So the hurdle rate doesn't *replicate*

the benefits Mr G was giving up, which, as can be seen from the above guidance, was what the regulator wanted businesses to do when comparing schemes.

I accept that Mr G may not have had an immediate need for income at the time of advice and that he may have shown a preference for "flexibility" during the fact-finding call. But I don't think Portafina, or Mr G, could say with any certainty, 8 years before he planned to retire, that he was *definitely* going to take his benefits via income drawdown. So, even if the regulator was satisfied that the hurdle rate was an appropriate comparison - which it wasn't - it seems unreasonable to use the hurdle rate when comparing the OPS benefits with the SIPP. So I'm satisfied that the appropriate growth rate to use was the critical yield figure of 8.1%. And as explained above, this was greater than the highest of the regulator's assumed future growth rates and so I think Mr G was likely to receive benefits of a substantially lower overall value than the OPS at retirement, as a result of transferring his OPS.

I note that Portafina considers Mr G understood and accepted why Portafina was using the hurdle rate and not the critical yield. But having listened to the call, I'm not satisfied he fully understood what he was being told during the call.

I say this because when the adviser explained that the critical yield was 8.1%, Mr G said "good", which to my mind suggests that he thought this was the growth he would receive on the plan, not the growth that was required to meet the benefits. And in terms of the hurdle rate, the adviser said that this was based on Mr G living until age 90, when in fact the hurdle rate calculation appears to have been based on Mr G living to 83, which was the average life expectancy for someone of Mr G's age. So as well as the advice and plan charges not being taken into account when the hurdle rate was calculated, the actual growth required if Mr G lived until age 90, would've been higher. So the hurdled rate of 2.79% was understated. In any event, even if this hadn't been the case, for the reasons I've explained, I'm not persuaded the use of the hurdle rate meets the regulator's requirements or was appropriate in Mr G's circumstances. So even if Mr G had understood and accepted Portafina using the hurdle rate, it doesn't make its use as a method of comparing the two different arrangements appropriate.

The critical yield isn't the only factor that needed to be taken into account when assessing whether Mr G should transfer his benefits. Consideration also had to be given to Mr G's attitude to risk.

Mr G has said that he had a balanced attitude to risk. And Portafina also assessed him as balanced. This was established using risk profile forms, which posed a number of questions and Mr G's answers determined his risk profile. These tools can be useful but I don't think Mr G's attitude to risk should have been based solely on this. Other factors also needed to be taken into account when assessing this, including an analysis of Mr G's overall circumstances and existing investments.

Aside from his OPS and his state pension entitlement, Mr G had one other pension, which he said was smaller than the OPS. He also said that he had other savings plans. But Mr G wasn't working and so didn't have the means to top up his pension provision or savings. And although he said that he had experience of the stock market, his own comments during the fact-finding call suggest that this was quite limited and solely involving blue chip companies. And he didn't currently have any investments. So, although I appreciate Mr G was willing to accept some degree of risk with his pension benefits, I think Portafina should've noted that Mr G didn't have the capacity for loss that a medium risking rating brought with it.

During the fact-finding call Mr G explained that he and his wife had recently inherited a property from his in-laws. He was renting out his own home and living in the inherited property. But it needed extensive refurbishment. So, he needed access to funds to pay for the work to be completed. So I've thought about whether Mr G should've been advised to transfer, regardless of the critical yield, his attitude to risk and capacity for loss.

The benefits that Mr G had accrued in his OPS represented much of his pension provision. I would've expected Portafina to have obtained details of Mr G's other pension plan so it could fully assess his situation and consider whether there was an alternative option that meant he wouldn't have needed to give up the valuable benefits within his OPS. Particularly as the advice was provided not long after the government announced major changes to pension laws allowing people more flexibility in the way they accessed their pension benefits – notably being able (subject to certain restrictions) to take them as a lump sum.

Although these new rules didn't come into effect until April 2015, they were announced in April 2014 so Portafina ought to have been aware that they were being introduced. However, it failed to obtain details of Mr G's other pension or to investigate whether it would've been possible for him to access the benefits of that plan under the new rules, which came into force within a few months of the transfer completing.

Whilst Mr G explained during the call that the house he'd inherited needed renovations, there's nothing to suggest that the work was so urgent that it couldn't have waited a matter of months until these new rules had been introduced. Had Portafina investigated this fully, as it should've done, it may have been the case that Mr G would've been able to access his smaller pension as a lump sum and leave his larger guaranteed pension untouched.

Portafina also failed to obtain further details of Mr G's savings. I can see that Firm C noted on its own fact-find that Mr G had £500 in a deposit account. But during the fact-finding call with Portafina, Mr G said that he'd be ok in retirement because of his savings. So I'm not persuaded £500 was the extent of his savings. And I think it's possible Mr G could've raised the funds needed for the refurbishment works by other means, such as accessing his smaller pension or using his savings plans, rather than accessing his OPS. I appreciate that Mr G said he didn't want to access his savings plans to complete the work. But Portafina failed to investigate this option, or to explain the importance of what Mr G was giving up by moving his OPS. Portafina also failed to ask about Mrs G's circumstances so it's not known whether she was in a position to fund the refurbishment of her parent's house. Although Portafina were providing advice to Mr G on his pension, I think it needed this information in order to get the full picture of Mr G's circumstances.

Whilst Mr G required funds for house renovations, I agree with Portafina that a significant motivation for him wishing to transfer his OPS appears to have been a desire to move the fund away from his former employer. In the fact-finding call Mr G said he didn't trust it with his pension. I accept Mr G may have had genuine concerns and that's not unusual when an individual leaves employment on bad terms. But those concerns should only have comprised one of a number of relevant circumstances and objectives to take into account when assessing the suitability of a transfer away from his OPS benefits. This wasn't a situation where Mr G was simply giving Portafina an instruction. He went to Portafina for advice and it had to take reasonable steps to ensure that any advice it gave him was suitable. And in providing that advice, it needed to make sure that it didn't just facilitate what Mr G thought he might like to do.

In saying this, I note from the call recording that in response to Mr G's comments about his employer, the adviser explained that the OPS was only 44% funded, and that he'd never seen a scheme with such low funding that hadn't been taken over by the Pension Protection Fund. However, I'm not sure that those comments were accurate. The scheme administrator has confirmed that the pension scheme had a different sponsoring employer by the time of the advice and there was a plan in place to address the scheme's underfunding. Portafina ought to have been aware of this and should've given Mr G correct information on the position of the OPS, including that it was a separate entity from the former employer. Had it done so, then what appears to have been Mr G's main driver for wishing to move his pension, may no longer have been relevant.

Mr G has also complained that he was told his wife would receive the full fund on his death if he transferred his OPS to a SIPP. And while I acknowledge he was initially told this by the adviser, the adviser did correct this and explained that as Mr G was taking tax free cash, the fund would be

reduced to reflect this. However, it wasn't explained during this call that any lump sum payable to his wife would be dependent on what remained in the fund when Mr G died. And that this amount, if any, would be subject to a 55% tax charge. The suitability report did explain this but this was important information that may have impacted Mr G's decision making. So, I think Portafina ought to have been clearer during the call when they explained this to Mr G so as to ensure he was fully informed.

So overall, I'm not persuaded the advice to transfer was suitable. Further, it is my view that that would be the case even if the underlying investments arranged by Firm C were properly aligned with the investment portfolio contemplated by Portafina in its suitability report.

Would Mr G have gone ahead with the transfer in any event?

I've given careful thought as to whether, if he'd been correctly advised by Portafina not to transfer, Mr G might have gone ahead with the transfer anyway.

Mr G has suggested in his complaint letter that if it had been explained, he'd have taken tax free cash from his OPS and a reduced pension but this option wasn't discussed. However, this is said now with the benefit of hindsight and I can see that there are features of the sale that might suggest a determination on Mr G's part to transfer. In particular, it's clear that he had a strong motivation to move his pension away from his former employer. As mentioned previously he'd said that he wasn't leaving his money where it was.

However, I also note that Mr G was originally contacted by way of a cold call by a marketing company on behalf of Portafina in which he was offered a free pension review. It was from that starting point that the eventual transfer advice came about, and that to my mind makes the suggestion that he was insistent on moving his pension away less compelling than it would be if he had approached Portafina himself. In any event, it's clear that when Portafina conducted its fact find call with Mr G, he listed his objectives as including better performance of his pension, access to his tax-free cash and his desire to move away from his employer.

This suggests to me that although he was certainly keen to move his pension away from his former employer, he nonetheless also had other motivations for wanting to transfer; primarily, he wanted advice about whether he could achieve better pension performance with a personal pension plan.

In that regard, it's evident from the fact-finding call that Mr G was only willing to suffer a maximum reduction of 10% in his pension. However, looking at the figures on the TVAS, Mr G was entitled to an annual pension from his OPS of £3,501 at the age of 65. Yet it was estimated that if he took the benefits at the same age from his personal pension, he'd receive £2,884, a reduction of almost 20% in his pension. Although this was set out in the TVAS, it was explained in the suitability report. This was important information that Mr G needed to be made aware of in order to make a fully informed decision.

Further, and as I've said, the Portafina adviser in his fact-finding phone call with Mr G appeared to endorse Mr G's concerns about the former employer's scheme by making comments about the scheme that appear to have been misleading. If Portafina had taken reasonable steps to investigate Mr G's concerns about the scheme, it would've discovered that the position had changed. The scheme was no longer in the hands of his former employer and a plan had been put in place to address its underfunding – and whilst I don't think such information would've entirely put Mr G's mind at rest about the scheme, I do think it would've given him some comfort when considering whether he might be better off by keeping his pension provision where it was.

As things stand, it is my view that if Portafina had given Mr G suitable advice (that he would be better off with his OPS) he wouldn't have transferred away from that scheme. If Portafina had clarified the situation regarding his employer's scheme as well as clearly outlining what he stood to lose by transferring away from that scheme, I don't think it likely that Mr G would've gone against that advice.

Is Portafina wholly responsible for Mr G's loss?

I'm currently minded to conclude that the advice to transfer was unsuitable. I'm satisfied that the losses suffered by Mr G are as a result of its inappropriate advice to Mr G to transfer his OPS to a SIPP. And had it not been for this unsuitable advice, Mr G wouldn't have been in a position to invest as he did through Firm C. Because of this I consider Portafina wholly responsible for Mr G's resulting losses.

I'm not asking Portafina to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question.

I recognise that Firm C's actions may also have contributed to Mr G's loss. So I have considered whether I should apportion only part of the responsibility for compensating the loss to Portafina. In the circumstances, though, I think it's fair to make an award for the whole loss against Portafina.

In saying this I take account of the fact that Firm C is now in liquidation and in turn any claim against that firm would need to be considered by the FSCS. As a scheme of last resort, it's possible the FSCS wouldn't pay out if a third party could also be held liable. Which means an apportionment of only part of the loss to Portafina could risk leaving Mr G out of pocket.

But in any event, as I have said, I consider that Mr G wouldn't have lost out at all but for Portafina's failings and that in turn, it is fair and reasonable that Portafina should account to Mr G for the full extent of his loss.

Putting things right

A fair and reasonable outcome would be for the business to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the OPS. So I intend to recommend that Portafina undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

Assuming no further submissions are provided that change my provisional decision, a calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr G's acceptance of the decision.

Portafina may wish to contact the Department for Work and Pensions (DWP) to obtain Mr G's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr G's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr G's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr G as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

The payment resulting from all the steps above is the 'compensation amount'. The compensation amount must where possible be paid to Mr G within 90 days of the date Portafina receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portafina to pay Mr G.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

My aim is to return Mr G to the position he would have been in but for the actions of Portafina. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market), as their value can't be determined. That appears to be the case here.

To calculate the compensation, Portafina should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If Portafina is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything Portafina has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, Portafina may ask Mr G to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. Portafina will need to meet any costs in drawing up the undertaking. If Portafina asks Mr G to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

Determination and money award: I intend to require Portafina to pay Mr G the compensation amount as set out in the steps above, up to a maximum of £150,000.

Where the compensation amount does not exceed £150,000, I additionally require Portafina to pay Mr G any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £150,000, I can only require Portafina to pay Mr G any interest as set out above on the sum of £150,000.

Recommendation: If the compensation amount exceeds £150,000, I also recommend that Portafina pays Mr G the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr G.

If Mr G accepts my final decision, the money award is binding on Portafina. My recommendation is not binding on Portafina. Further, it's unlikely that Mr G can accept my decision and go to court to ask for the balance. Mr G may want to consider getting independent legal advice before deciding whether to accept this decision.

my provisional decision

For the reason explained, I’m currently minded to uphold this complaint and I intend to direct Portafina LLP to pay redress as set out above.

Lorna Goulding
Ombudsman