complaint

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

background

Mr S was introduced to Portafina in 2014, 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 neither it, nor Firm C were permitted to provide pension transfer advice.

Portafina completed fact finding calls with Mr S, following which they produced a suitability report setting out its advice. In summary the report said:

- Mr S's circumstances were:
  - He was 58 years old, single and unemployed with a monthly income of £411
  - He lived in rented accommodation
  - He had outstanding debts of £2,500, with monthly repayments of £61
  - He was not in good health and had a desired retirement age of 65
- Regarding Mr S's OPS:
  - His cash equivalent transfer value (CETV) was £76,382
  - If he transferred, he'd be giving up a pension of £2,477 per annum from age 60 (this is different to paperwork from the OPS provider, which showed the projected pension was £3,741 from age 60, with a lump sum of £11,224)
- It was noted that Mr S wanted to take tax free cash, but not income, in order to pay down debt and make home improvements
- Mr S's risk profile suggested he was a "moderately cautious" investor. Based on this risk classification, Portafina estimated a personal pension would grow at a rate of 4.81%, not including advice and plan charges
- The required growth rate (critical yield) needed for a new personal pension plan (PPP) to match the benefits Mr S was entitled to through his OPS was 26.6%. But if Mr S used income drawdown to access benefits, instead of purchasing an annuity, then over his lifetime the investment return needed to match his OPS was 3.23% per year
- It was noted that the difference between the hurdle rate and critical yield had arisen because *"the TVAS assumes you will use the CETV to purchase a poor value annuity and that there will be no change to today's low interest rates. In our opinion this is an unlikely outcome and therefore the critical yield shown by the TVAS may be far higher than the return you need"*

- Although Portafina wasn't providing advice regarding where Mr S's fund would be invested after a transfer – this would be given by Firm C – it set out its *"fund recommendations"* suggesting that, due to his risk profile, Mr S should invest in the following assets:

Cash	10%
Equities	40%
Other Fixed Interest	22%
Secured Structured Bonds	28%

Portafina explained that secured bonds weren't regulated collective investments and could only be recommended by authorised and regulated independent financial advisers (IFAs) such as itself. It said that while secured bonds weren't covered by the Financial Services Compensation Scheme (FSCS), its recommendations relating to them were. It added that secured bonds weren't unstable and therefore reduced the overall volatility of Mr S's portfolio.

The recommended SIPP was established in 2014 and Mr S's OPS CETV was transferred afterwards. The servicing rights for the SIPP were later transferred over to Firm C, who invested approximately 37% (£24,000) of Mr S's SIPP into the following UCIS funds:

UCIS
Brisa Investments – £3,600
Biomass Investments – £5,600
Lakeview UK Invest – £5,600
Real Estate USA – £5,600
Strategic Residential Development – £3,600

A small amount was left as cash and the remainder was allocated to regulated investments.

In 2018, Mr S complained to Portafina about the advice he received to transfer. He said the advice was negligent and unsuitable for someone with no investment experience, a low attitude to risk and low capacity for loss. He also considered that Portafina couldn't make its transfer recommendation without taking responsibility for assessing the underlying SIPP investments.

The business' original response was that Mr S did not have a complaint against Portafina. And it provided a call recording from 11 May 2018 which it said proved that Mr S's representative was exploiting his confusion about what was going on so . The adjudicator informed Portafina that, in spite of the call, a complaint had been raised against it and so it had eight weeks to respond. Portafina didn't issue a final response letter and the case was assessed by the adjudicator in the knowledge that it wouldn't be issuing one.

After considering the matter, the adjudicator concluded that Mr S's complaint should be upheld. She didn't think Portafina's advice was suitable. In summary, her view said:

- She could not see any comparison of the charges applied by the SIPP and those of the OPS
- The critical yield was very high and it should have been explained that the level of growth required to match his OPS benefits was unlikely to have been consistently achievable with his moderately cautious risk profile

- The risks were set out, but this doesn't mean that Portafina weren't required to give suitable advice. The risks were brief and non-specific and didn't adequately explain the potential implications of the transfer
- Portafina said it was only responsible for the advice to transfer and Firm C advised on the fund selection. Firm C had invested the monies into high risk funds. Had Mr S's attitude to risk been taken into account when Portafina advised him, it would have been aware that the advice would be unsuitable
- Mr S wasn't an experienced investor and therefore didn't require control of his retirement fund. Furthermore, Mr S was single and she didn't consider the transfer of 100% of his fund to named beneficiaries would've been a priority for him.

Portafina disagreed with the adjudicator's findings. In summary, it has said:

- There was no comparison of charges between the occupational scheme and the recommended plan as it's not possible to compare charges in a final salary scheme where the fees are implicit in the plan
- Mr S needed tax free cash earlier than normal scheme retirement age in order to pay off outstanding debt and make home improvements, but didn't need an income at that time. He liked the idea of Portafina facilitating the transfer into income drawdown in order to do so
- Portafina noted Mr S had a heart condition and if he annuitized later, might get an enhanced annuity on the open market. This could potentially outweigh or match the guarantees attached to his ceding scheme
- As income drawdown had been proposed, it had used the lifetime hurdle rate, 3.23%, as a more accurate means of measuring the ceding scheme benefits. It's model portfolio showed a growth rate of 4.81% was achievable for a moderately cautious investor
- The death benefits were very important to the customer. The fact find questionnaire showed that he'd confirmed it was "very important" to maximise death benefits for his beneficiaries
- The subsequent investment advice was the responsibility of Firm C

Portafina also provided a copy of the call recording from 2014. And since its final submissions, this service has written to Portafina to reference the regulator's update from 2013 for firms giving pension transfer advice.

The complaint has been passed to me to reach a final decision.

my findings

I've considered 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'm upholding the complaint. I'll explain why.

Portafina recommended that Mr S 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 S 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. This remains the case even if Firm C was actually providing that advice. This is a fundamental requirement of advising on a transfer into a SIPP. Portafina can't say that it's only responsible for the SIPP transfer itself; it needed to have an understanding of the proposed investments before it could determine the transfer was in Mr S's best interest.

In 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. This alert was issued because it had come to the regulator's notice that some firms were adopting advice models which didn't comply with the existing obligations and so there was a potential for consumer detriment.

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"*

In the scenario set out in this alert, the other firm involved was unregulated. In Mr S's case, Firm C was authorised to conduct investment business under its AR agreement with Firm S. Portafina may believe that this absolved it from its duty to assess the suitability of the investments, particularly as it may have said to Mr S that it wasn't providing any advice on the underlying investments as Firm C was doing that. But the update makes it clear that it wasn't open to Portafina to provide advice on a restricted basis. It couldn't separate out the two elements; its advice on the suitability of the transfer had to include the suitability of the underlying investments.

The position on this is further supported by a subsequent alert issued by the regulator, on 28 April 2014, regarding pension transfer 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.

I'm conscious that both the 2013 and 2014 alert were issued prior to Mr S receiving advice and so Portafina ought to have known that it needed to do this.

As it told Mr S it wasn't providing any advice on the underlying investments, Portafina may have been under the impression that this enabled it to provide advice on a restricted basis; this wasn't right. It couldn't separate out the two elements. Its advice on the suitability of the transfer had to include the suitability of the underlying investments. I don't think there was any ambiguity regarding the regulator's position on the matter.

These alerts don't have the status of a Handbook 'rule' as such, nonetheless I consider them 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. And both alerts specifically referred to the regulator's overarching Principles for Businesses (PRIN) and Conduct of Business Rules (COBS), which Portafina was subject to. And with reference to PRIN and COBS the alerts said a firm would fall short of its obligations under these precepts if it didn't familiarise itself with the intended investment strategy and that it wouldn't be able to recommend a new product, like a SIPP, without doing so.

Under COBS 2.1.2 Portafina also couldn't seek to exclude or restrict its duty or liability to Mr S under the regulatory system. So, even if it said it was operating under a limited retainer, this didn't absolve it of its duty of care to ensure the advice it was providing was suitable – again, this had to include consideration of how Mr S's funds would be invested.

COBS 9.2 required Portafina to take reasonable steps to make sure its recommendation was suitable for Mr S. To achieve this, COBS 9.2.2R said Portafina had to obtain enough information from Mr S to ensure its recommendation met his objectives, that he could bear the related investment risks consistent with these objectives and that he had the necessary experience and knowledge to understand the risks involved in the transaction. COBS 9.2.2R included the following wording:

> *"(…) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment."*

So as part of the fact-finding process Portafina had to understand Mr S's objectives – two of which were recorded as a willingness to take more risk and to take ownership and control –

and the related risks. If Mr S wanted to take on more risk, it is reasonable to have investigated what additional level of risk Firm C was going to expose him to. It wasn't free to ignore how Mr S's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Mr S would invest in within the wrapper, doesn't in my mind seem reasonably possible.

After Portafina gave advice the agency for Mr S's SIPP was transferred to Firm C and it was Firm C that recommended the high risk and Illiquid investments. However, the alerts make 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, Portafina 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'.*

The regulator's rules do allow for situations where two regulated firms are involved. In particular, the rules state:

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. However, in this case, Portafina failed to obtain any information from Firm C about the intended investment proposition for Mr S.

I accept that as a result of its AR agreement with Firm S, Firm C was required to give suitable advice. However, I don't agree that this negated Portafina's duty to do the same. As Mr S's appointed financial adviser, it had a significant responsibility to provide suitable advice and act in Mr S's best interests. And as I've said, this had to include an awareness of where Mr S's funds would be invested.

Even if Portafina completed due diligence checks on Firm C before agreeing to accept client referrals from it, this in my view would haven't have been enough. It couldn't rely on general information provided to it; that wouldn't have been a reasonable basis for Portafina to have assessed the suitability of the pension transfer for Mr S. I would've expected Portafina to request details upfront from Firm C as to the intended portfolio for Mr S and Firm C's risk rating. 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 S 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 S would've realised that the investments Firm C went on to arrange differed to those Portafina had based its suitability assessment on. And Mr S could've taken action accordingly.

I'm conscious that, despite Portafina saying that Firm C was to provide the investment advice, it did set out in in its suitability report its recommendations for the asset classes Mr S should invest in and to what extent. The recommendations made up a model portfolio for a moderately cautious investor, which Portafina satisfied itself Mr S was.

However, I don't agree the model portfolio was suitable Mr S's attitude to risk in any event. I say this because the model portfolio suggested that 28% 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 28% of Mr S's pension fund in unregulated and potentially illiquid funds, would've been suitable for a client in Mr S's position.

What was Portafina required to do?

I think it's important to explain that regardless of anyone else's part in the matter Portafina had to follow 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 S. It had to obtain information as to Mr S's knowledge and experience (relevant to the specific type of designated investment), his financial situation and investment objectives.

As set above, COBS 9.2.2R required Portafina to gather sufficient information from Mr S to ensure the recommendation met his objectives, he could bear the risks involved and 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."*

The advice to transfer the OPS

Having considered whether, in recommending the transfer, Portafina reasonably had regard to the expected investment proposition for Mr S as a whole, I'll now consider whether the transfer ought to have been recommended in any event. In other words, even if Portafina

had considered the intended investments, was the transfer likely to have been suitable for Mr S in any event?

OPS' typically have significant benefits and guarantees. Giving these up 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."

Given what the regulator says, my starting point is that a transfer won't usually be suitable. There'll need to be good reasons why a transfer will be in the consumer's best interests. And 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.

At the time of Portafina's advice Mr S was 58 years old and unemployed. He was a standard retail investor with seven years until his desired retirement age and two years until his OPS became payable. Aside from his state pension entitlement, his OPS represented his sole retirement provision. There was no record of Mr S having any other savings or investments. He had outstanding debts and lived in rented accommodation. It seems to me Mr S's OPS was his most valuable asset. It provided a guaranteed income at retirement with increases throughout his retirement. Based on this, I think Portafina should've recognised the significance of Mr S's OPS and proceeded with caution.

Transferring his OPS meant that Mr S would be losing his guarantees and instead relying on investment performance from a new scheme. But I don't think his situation lent itself to taking such risks. I think it should've been clear that while Mr S may have been open to taking some risk, he really wasn't in any position to expose his only source of private income to any level of potential loss.

Before continuing, I feel it is necessary to highlight a disparity in the income figures provided by Mr S's ceding scheme and those used by Portafina in their suitability report.

The retirement information provided by his OPS on 5 November 2013 stated that Mr S would receive a pension of £3,741 from age 60, along with a lump sum payment of £11,224. However, the suitability report shows he was giving up a lower guaranteed income of £2,477 from age 60 and no figure was given for any level of tax free cash. This difference in the level of guaranteed income Mr S was giving up would've had a significant impact on the growth figures needed to match the benefits being given up.

As he was only two years away from retirement, I would be inclined to accept his OPS figures above the ones quoted with Portafina's report. It is unclear from the information on file whether the pension transfer value analysis report (TVAS) used this higher level of income when calculating the critical yield, or if the lower pension amount of £2,477 was the target. For ease of understanding by all parties I have used the same income and growth figures Portafina relied upon in their suitability report for the rest of my decision.

The TVAS completed at time showed that a critical yield of 26.6% per year was required to match benefits from the OPS. But 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 S was too high to make the transfer viable.

An important part of assessing the viability of an OPS transfer, is a careful analysis of the investment returns required from any investments in the receiving scheme, to match (let alone exceed) the benefits that are being given up by transferring out of the OPS. And that needs to be done in conjunction with other important considerations, including the investor's ATR, financial circumstances and objectives.

Under COBS 19.1.2, the regulator required a business arranging a pension transfer to:

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 retail client to be able to make an informed decision;
3. give the retail client a copy of the comparison, drawing the retail 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.

COBS 19.1.3 goes on to say that in particular 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.

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 growth at that time, it was unlikely Mr S would receive a materially higher pension at retirement as a result of transferring. This is supported in the suitability report where Portafina estimated that, based on Mr S's moderately cautious attitude to risk, his personal pension would grow at a rate of 4.8%.

Portafina said that it did not base its recommendation on the critical yield in isolation and also considered the lifetime hurdle rate, which assumed he would take regular withdrawals throughout the duration of his life expectancy. They believed that the hurdle rate of 3.23%

was achievable, based on their model portfolio. As Portafina were not advising on how the funds were to be invested, their projections of performance based on their own model portfolios were not relevant in evaluating how likely it was he would be able to achieve the hurdle rate.

That said, the discount rate which we would use to assess what rates are reasonably achievable is 4.2% for a term to age 60 and 4.5% for a term to age 65, so was similar to Portafina's rate of 4.8%. Therefore a moderately cautious investor might expect to be able to achieve the required rate of 3.23%.

However, no explanation was given by Portafina, either in their report from 2014 or as part of their response to the complaint to demonstrate why Mr S did not want the security of a guaranteed income in retirement, or why he preferred to take his income via drawdown instead. For instance, as his only income in retirement would be state pension, it is doubtful Mr S would be in a position to take advantage of flexi-access drawdown and reduce or stop income payments in any one year.

At no time during the call recording from 2014 which Portafina have provided did Mr S ever volunteer a reason why he did not want an annuity, or say why he wanted to take his income via drawdown. For instance, when he was asked if he would prefer to have more flexibility with the plan, the customer did not understand the question and asked if it could be put in writing "… so that I can understand that a little bit more." The representative spoke about flexibility, without confirming that Mr S understood any of what he was telling him. He then moved on without pausing or checking if he had any questions and Mr S did not contribute at all to this topic. In short, the representative did not even check to see why, let alone how, Mr S would want to take benefits flexibly.

Page two of the suitability report lists the first of Mr S's objectives as 'Would like to take later retirement age to scheme normal retirement age'. No reason was provided why Mr S wanted to delay taking his pension. The scheme retirement age was 65, but he could take his benefits from age 60, although this would reduce the income received, along with the lump sum. The consumer was 58 and unemployed and I do not believe that he would realistically want to prolong the period which he was completely reliant upon state benefits and not able to take his pension.

His projected pension from age 60 was £3,741.42 p/a, with a lump sum of £11,224.27, according to the CETV provided by the scheme. Mr S could easily clear his debts and secure a guaranteed income by taking his benefits at age 60, rather than transferring and deferring income until age 65 or beyond. This would have the added benefit of guaranteed income for an extra five years, with no risk of loss. As his recorded debts amounted to £2,500, I do not believe that the lower tax free cash would have a significant impact on his circumstances, especially when the regular income from his pension would exceed the difference within three years.

While there is no doubt that Mr S would have wanted to clear his debt as early as possible, by October 2014 he was only 18 months away from being able to take his OPS benefits and lump sum. This would provide a high enough lump sum to repay his loan and still leave several thousand pounds for home improvements. As Mr S lived in rented accommodation, it's likely any improvements would only be of a cosmetic nature and relatively inexpensive. And in all likelihood could be delayed until such a time as he had the funds to complete the work. There was no discussion around this alternative and there was no need for Mr S to expose his pension assets to any risk in order to meet his main objective of paying off debt.

Portafina set out in their report that, if Mr S used his tax free cash to repay his loan, he could redirect his repayments into his pension fund. I don't believe that this was a realistic prospect, when the payments of £61 a month make up almost 15% of his monthly income of £411. Furthermore, the figures used do not appear to be accurate, when the report states that if he continued to pay his debt from income, he will have made total repayments of £26,671.

His debt was £2,500. The monthly repayment of £61 equates to £732 a year. A "market average" APR of 10.55% on £2,500 is £263.75, so the loan would be reduced by approximately £468 after one year (£732-£263.75). A net payment of £468 each year would clear the debt within five and a half years and that is without allowing for any reduction in the interest accruing on the lower capital amount. £61 a month over five and a half years would result in total payments of £4,026. The benefits in repaying the debt early were massively overstated by the adviser.

Mr S liked the idea of leaving as much as possible to his family on death, but this has to be weighed against the likelihood of this happening early enough to be a significant benefit, along with the actual benefits being given up. He had no dependents and was giving up a lifetime of guaranteed income to provide a notional benefit to his siblings and father, when there was no evidence that they would have any need for the cash (or in the case of his father even outlive him). The longer he lived, the more of his pension he would spend, thereby reducing the fund which could be passed on. In order for his beneficiaries to receive a large lump sum, Mr S would have to die in the early years of his retirement and there is no reason to believe this was likely, despite the heart condition Portafina have referenced.

Portafina have argued that his health condition meant that he could take an annuity later if he wanted and benefit from enhanced rates which could match or even exceed his OPS pension. This ignores the fact that the critical yield was already high at 26% and once the lump sum withdrawal had been accounted for, there is little chance that an equivalent income could be purchased from the remaining funds. Furthermore, as far as I can tell, Portafina did not attempt to get any quotes for annuities with enhanced rates to see how much it would cost to purchase the same benefits, so this argument is purely speculative.

Overall, I'm not persuaded the advice to transfer was suitable. The business should have advised against transferring and risking a lower standard of living just to provide a larger inheritance for his family and pay off his loan 18 months earlier.

Would Mr S have gone ahead with the transfer anyway?

I've thought about whether, if he'd been correctly advised by Portafina not to transfer, Mr S would have gone ahead anyway. Having carefully considered all the circumstances in this case, I don't believe he would. While there is no doubt that the availability of tax free cash would have been appealing to him, especially when he was out of work, had it been explained that he would receive far more in the long term by waiting another 18 months, I believe Mr S would have accepted the advice of the Portafina.

As a professional adviser, which unlike Firm C was authorised to provide transfer advice, Portafina's recommendation would've carried significant weight and could, I believe, have dissuaded Mr S from proceeding with the transfer and subsequent investments. I accept it's possible Mr S may still have wanted to go ahead anyway. But I think, at the very least, if Portafina had advised against this, that would have made him think about things.

Alternatively, had Mr S proceeded against such advice, Portafina could've discharged its professional responsibility to him appropriately. For example, it could've treated him as an insistent client. However, there's nothing to indicate Mr S was acting against the advice he'd been given.

Overall, I consider that the losses suffered by Mr S are as a result of the inappropriate advice provided by Portafina. And had it not been for this unsuitable advice, I don't believe he would have gone ahead with the transfer of his OPS or invested more than half of his fund in UCIS.

Is Portafina wholly responsible for Mr S's loss?

I'm satisfied that the advice Portafina provided was unsuitable and the losses suffered by Mr S are as a result of its inappropriate advice to him to transfer his OPS to a SIPP. And had it not been for this unsuitable advice, Mr S 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 S'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 S'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.

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 S to Portafina. Portafina advised Mr S to transfer to a SIPP, it set up the SIPP and arranged for the OPS. I acknowledge that Firm C advised Mr S 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 S on the investments. It was only as a result of Portafina's involvement that Mr S 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 S hadn't transferred, he couldn't have invested as he did. And, 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 S, 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 S. So, while I accept that Firm C might also bear some responsibility for Mr S's losses, I'm satisfied that had it not been for Portafina's failings, Mr S wouldn't have suffered a loss at all.

I appreciate that Firm C is in liquidation but I'm 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 C is now in liquidation. My starting point as to causation is that Portafina gave unsuitable advice and it is responsible for the losses Mr S 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 S that he should transfer. Mr S hasn't complained about Firm C and in light of its 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'm satisfied that Portafina is responsible for Mr S's losses.

Putting things right

A fair and reasonable outcome would be for the business to put Mr S, 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 S'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 S. 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 S in this case.

Portafina may wish to contact the Department for Work and Pensions (DWP) to obtain Mr S'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 S's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr S'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 S 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 S 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 S.

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 S 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 S 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 S to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

In addition, Portafina should pay Mr S £300 for the distress and inconvenience caused as a result of the disruption to his retirement planning.

my final decision

I uphold the complaint and direct Portafina LLP to pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 4 November 2021.

Lorna Goulding
ombudsman