Complaint

Ms J is complaining about Falcon International Financial Services Ltd (FIFS) because of losses she's incurred as a result of transferring her pension benefits to a self-invested personal pension (SIPP) to fund high-risk, unregulated investments. She says she was an unsophisticated retail investor and the investments shouldn't have been promoted to her in the first place.

Background

Following events that Ms J says started with an unsolicited call from a Mr B of Falcon International Estates (FIE). Following this call, on 6 February 2012, he sent her an email that said:

> *Further to our telephone conversation, attached is a company brochure containing further information about Falcon International Estates. Please take the opportunity' to peruse this at your earliest convenience.*
>
> *I will call you over the next couple of days to discuss how we have helped a number of private investors to consolidate and utilise old or existing pensions for fresh investments away from the stock market. Should you have any questions concerning the information enclosed or our investments in general, please do not hesitate to get in contact*

Ms J subsequently transferred benefits held in a defined benefit occupational pension scheme to a SIPP with Stadia Trustees (Stadia). A Stadia application was completed on 29 May 2012 and the SIPP was established on 12 June 2012. The benefits from Ms J's occupational pension (totalling around £187,000) were then transferred into the SIPP on 24 July 2012. The following day, £150,000 of the money in the SIPP was used to fund an investment in FR Land, an unregulated scheme investing in land. The original application for the investment was dated 29 May 2012, the same date as the SIPP application.

An independent financial adviser (IFA), Howard Taylor Associates (HTA), was also involved in arranging the SIPP and pension transfer and received a fee from Stadia for its services.

Prior to receiving Mr B's call, Ms J says she had no intention of transferring her pension benefits.

Ms J has since realised the investment might not have been suitable for her needs and made a complaint about both FIFS and HTA. Her complaint about HTA was upheld by one of my colleagues, who said it should have been evident to HTA that the pension transfer and investment were unsuitable. He didn't feel the evidence showed that Ms J was an investor with sufficient experience to understand the risks of what was being proposed; or that she fell within the investor categories set out by the regulator to whom this type of investment could lawfully be marketed; or that investing the majority of her funds in a single, high risk, unregulated investment could be suitable. I understand Ms J eventually received compensation totalling £120,000 from HTA. But this is significantly less than the amount she believes she's lost as a result of the pensions transfer and unregulated investment.

Our adjudicator recommended this complaint be upheld. She didn't believe FIFS should have promoted the investment to Ms J in the first place.

FIFS didn't accept the adjudicator's assessment. Its legal representative said responsibility for giving investment advice rested with HTA. FIFS relied on information provided by Ms J and referred her to HTA for a suitability assessment on her instruction. It said FIFS can't and shouldn't be held liable for the acts or omissions of HTA and made the following key points:

- FIFS is part of The Falcon Group of companies. Among its other financial services activities, The Falcon Group manages unregulated collective investment schemes in relation to strategic land investments.

- Falcon International Estates Limited (FIE) was a separate company in The Falcon Group and approached potential investors by telephone to discuss the benefits of investing in land generally and the possible investment structures that could be used to do this. FIE didn't discuss or promote specific investment opportunities.

- If a potential investor was interested in receiving more information about investing in land, FIE referred them to IFAs, such as HTA. FIFS had no involvement in this process. It was necessary because neither the FIE representative who approached Ms J, Mr B, nor FIE itself were authorised to provide investment advice to potential investors.

- In FIE's initial discussions with potential investors, it asked a series of questions for the purpose of collecting the relevant information and HTA provided FIE with a template form called a *"fact find"*. All completed fact find forms were then passed by FIE to HTA in respect of any potential investors who confirmed to FIE they were willing to be referred to HTA. This was the end of FIE's involvement.

- Upon receipt of any completed fact find, HTA considered it with any potential investor and completed a suitability test in accordance with the rules of the Financial Conduct Authority (FCA). Once HTA had completed this suitability assessment, it provided the potential investor with independent financial advice on whether he/she should invest.

- If HTA determined an investment would be suitable for the potential investor, it then referred him/her to Falcon Group. Falcon Group would then provide the potential investor with documentation relating to an investment scheme.

- Mr B was not authorised (or able) to give, and did not give, investment advice to Ms J in relation to her investments. As a representative of FIE, Mr B simply approached potential investors to discuss the potential benefits of investing in land and the possible investment structures that could be used to do so.

- Ms J says Mr B was insistent after first making contact and called her at least once each week for several weeks. But this can't be right as only one week and a day passed between the initial call and Mr B sending a fact find and letter of authority to Ms J for her to complete.

- Ms J, having been speculatively approached by Mr B, expressed an interest in investing and Mr B, having completed HTA's fact find document, referred her to HTA. The purpose of this was so that HTA, an IFA, could undertake a suitability assessment to determine whether Ms J was suited to an investment. The responsibility for assessing the risks of an investment for Ms J by reference to her risk appetite and investment sophistication rested solely with HTA. This is confirmed

in the *"Independent Financial Advisers' Declaration"* (which formed part of the investment application signed by Ms J) signed by HTA, which said:

> *I/We have reviewed this application for a land purchase and confirm that the investment is suitable for the applicant's circumstances and attitude to risk. The Memorandum has been disclosed to the applicant and any queries have been dealt with. We will notify FRFS of any variation to this application form or anything we believe to be incorrect.*

- The view Ms J wouldn't have put her pension funds at risk if she'd understood the risks associated with the investments is at odds with the fact find she signed that said she was willing to accept a high level of risk with her investment portfolio. Furthermore, the fact find clearly said:

> *In the event of land purchases, I/we understand that certain risk investments, especially investments in land, may not be readily realisable as there may not be a ready market for the sale of such investments and that access to reliable data for valuing such investments may be restricted.*

- The adjudicator referred to false information being included in the fact find, but all of the information it contained was confirmed verbally to Mr B by Ms J. Indeed, she signed the fact find and Mr B recalls that she read it through before doing so. By accepting Ms J's account of events on such a firm basis, the adjudicator is essentially determining that Mr B fraudulently produced Ms J's application documents and he denies this.

- FIFS can't comment on whether Ms J actually met with HTA, but it would expect HTA to meet with investors it advised to proceed with an investment, or at least speak with them over the telephone, in order to comply with regulatory requirements. The fact HTA certified various documents confirming Ms J's identity, including that the photograph on her driving licence was a true likeness, indicates there was a meeting of some kind.

- In any event, even if Ms J didn't meet with HTA in person, that doesn't mean FIFS or FIE should be held responsible for unsuitable investment advice given, or failure to give investment advice, by HTA.

In another complaint in which the circumstances are very similar, FIFS's representative provided further submissions relating to the promotion of the land investments. It provided a letter and flow chart obtained from FIFS' compliance consultants about the marketing process, which was described as follows:

- *Falcon identifies individuals who might have an interest in purchasing land, and for whom a purchase of land might be appropriate. These are general conversations and do not amount to financial promotion;*
- *An IFA then classifies such individuals, using the categorisation in COBS 3.5.3, either as elective professional clients or as retail clients;*
- *Elective professional clients (but not retail clients) can then be sent an Information Memorandum as permitted under COBS 4.12.4;*
- *Subsequently, the IFA assesses the suitability of an investment in land for the client on the basis of the full fact find.*

I am satisfied that no investor would be provided with an Information Memorandum unless and until the investor had been categorised as an elective professional client.

When the compliance consultant referred to Falcon identifying individuals who might have an interest in purchasing land, it appears to be referring to FIE as this is consistent with what FIFS's representative has said elsewhere. FIFS's representative then made the following points in its covering email dated 12 May 2017:

- FCA rules set out certain circumstances where an authorised firm (and its appointed representatives) may communicate a financial promotion relating to an unregulated collective investment scheme UCIS without breaching Section 238 of the Financial Services and Markets Act 2000 (FSMA), summarised in paragraph 8.20.4 of the Perimeter Guidance Manual (PERG). These circumstances are set out in section 4.12.4 of the Conduct of Business Sourcebook (COBS).

- COBS 4.12.4(7) provided that UCIS can be marketed to professional clients without breaching the Section 238 of FSMA. The third bullet point of the above letter confirms that this is the approach taken by Falcon. On this basis. Falcon marketed unregulated collective investment schemes in accordance with the FCA rules in COBS 4.12.4(7) and did not breach Section 238 of FSMA.

- FIE followed the marketing process outlined above, which means it was HTA that assessed the consumer as a professional client and informed FIFS of this. Responsibility for determining the type of client the consumer was rested with HTA and FIFS was entitled to rely on its assessment.

I issued a provisional decision setting out my reasons why I felt the complaint should be upheld. A copy of my reasoning is attached and forms part of this decision. FIFS didn't accept my findings and its legal representative made the following key points:

- A significant part of my provisional decision relates to whether or not FIFS itself was required to carry out the elective professional client assessment under COBS 3.5.3. This isn't relevant. I've taken it that FIFS is relying on the category 7 exemption set out in 4.12.4 to justify its promotion of the investment to Ms J but that's not correct. FIFS is instead relying on the category 2 exemption, which says it needed to take reasonable steps to ensure the investment was suitable for her before promoting it.

- The reasonable steps FIFS took to ensure the investment was suitable for Ms J included:
  - referring her to an experienced IFA for a suitability assessment;
  - obtaining written information from HTA in respect of the suitability assessment it conducted; and
  - considering the information provided to it in respect of Ms J's suitability to ensure it was able to rely on the category 2 exemption before promoting the investment.

- I should reconsider my view that FIFS shouldn't have placed reliance on the information it received from HTA because it's contrary to the FCA's rules and guidance and inconsistent with previous decisions made by other ombudsmen.

- It agrees that COBS 2.4.6 covering reliance on information provided by others is relevant as FIFS placed reliance on the suitability assessment performed by HTA.

But it's provided further information that it believes will change my interpretation and application of COBS 2.4.8.

- My provisional decision doesn't include any analysis of how COBS 2.4.8 applies to the facts of the case. It's inconsistent with the generally accepted application of the FCA rules to revert to the regulatory Principles without first analysing the requirement in COBS itself. DISP 3.6.4 requires me to take account of the regulator's guidance and standards when considering what's fair and reasonable.

- With regard to the requirements in COBS 2.4.8, information relating to Ms J's suitability was provided to FIFS in writing. For example, the investment application included the IFA declaration, signed by HTA, confirming the investment is suitable for the applicant's circumstances and attitude to risk. Also, this information was provided by an unconnected authorised person, HTA. Finally, there was no reason for FIFS to doubt the accuracy of this information for the following reasons:

    - FIFS carried out extensive due diligence on the systems and controls operated by HTA, including in relation to its suitability assessment, at the start of their commercial relationship that began in 2011.

    - FIFS had an ongoing relationship with HTA and carried out due diligence on an ongoing basis. This involved HTA attending weekly meetings at FIFS's office to discuss each individual potential investor in detail, reviewing and discussing the information provided by each potential investor, their risk profile and the assessment that had been undertaken by HTA. These discussions also took account of the meetings that took place between HTA and potential investors, including that with Ms J. FIFS and HTA also had regular telephone conversations, sometimes on a daily basis, to discuss the suitability assessments that were being undertaken by HTA. HTA would also have ongoing discussions with the potential investor and provided FIFS with regular updates on these discussions.

    - HTA had been authorised and regulated by the FCA and its predecessors since 1995. During that time, the regulators hadn't taken any enforcement action against HTA for breaching regulatory requirements.

- My provisional decision contradicts the guidance and commentary that's been published by the regulator. For example, when the Markets in Financial Instruments Directive ("MiFID") was implemented, the regulator commented on the rules which allow a firm to place reliance on other firms who may be in the *'chain'* for the provision of investment services. It said their effect was '*to minimise unnecessary regulatory burdens by permitting one firm to rely on another's efforts*". In respect of the reliance provisions more generally, the regulator also said their effect was '*proportionate regulation – it avoids more than one firm having to comply with the same requirement in respect of the one client/transaction*'. Whereas, in my provisional decision, I'm in effect suggesting FIFS needed to conduct its own suitability assessment for Ms J despite the fact HTA had already done it.

- I've effectively said that in promoting the investment to Ms J, FIFS breached the regulator's Principles. The FCA's rules state there's an enforcement procedure if there are allegations of a breach and this hasn't been followed. I don't have the jurisdiction or the information at my disposal to make such a determination. It's

inappropriate for me to comment on the rules and regulatory provisions, including the Principles, which are not the subject of this Complaint, haven't been considered by the FCA, and are beyond my remit to consider.

- There were inaccuracies in my provisional decision, including:
  - on page 3, I said HTA didn't operate on an arm's length basis. It did in fact operate on an arm's length basis from FIFS, which isn't clear from my statement;
  - in the section entitled "Putting Things Right", I said HTA's role was restricted to arranging the pension and classifying Ms J as a professional client, which isn't correct as it also provided investment advice to her; and
  - I also said that I didn't think Ms J would have otherwise transferred her pension benefits to the SIPP as the only reason for doing so was to facilitate the use of UCIS. This isn't correct as HTA advised her to do this.

- Ms J's recollection is unreliable. For example, she says that after his initial contact, Mr B called her at least once each week for several weeks. As I said in my provisional decision this can't be right as only one week and a day passed between the initial call and him sending a fact find and letter of authority for completion. Given I've acknowledged her recollection is incorrect, it questions the basis on which I've said I find her submissions *'compelling'*.

I then reconsidered the complaint in light of his response. Having done so, I still felt the complaint should be upheld and I issued a second provisional decision addressing the points raised by FIFS's representative. A copy of my reasoning is attached and forms part of this decision. FIFS still didn't accept my findings and its representative made the following key points that it says are intended to address the issues raised in four separate complaints I'm currently considering, including this one:

- The sales process changed from 1 January 2014, when the rules in COBS 4.12 were amended and the category 2 exemption covering the promotion of UCIS was removed. Prior to this date, FIFS relied on the category 2 exemption to promote its products. After this date, it relied on the category 7 exemption. It provided flowcharts outlining how each of these processes worked.

- FIFS was entitled to rely on a suitability assessment completed by the IFAs. On the issue of whether information about the suitability assessment was completed in writing, I said the application was presumably completed after the investment had been promoted and therefore any suitability assessment may have taken place after promotion. But I've provided no evidence for this.

- Further, FIFS and the IFAs weren't *"connected"*. While the term isn't described in the Handbook Glossary, my interpretation is irrational and inconsistent with the definition of *"connected"* that applies in a different context elsewhere in the Handbook.

  Guidance from the regulator issued during the implementation of the Markets in Financial Instruments Directive (MiFID) allowed a firm to place reliance on another that was in the *"chain"* for the provision of investment services. The stated aim of this was *"to minimise unnecessary regulatory burdens by permitting one firm to rely on another's efforts"*. In respect of the reliance provisions, more generally the FSA has also said their effect is *"proportionate regulation – it avoids more than one firm having to comply with the same requirement in respect of one client transaction"*. I should

have regard to this when interpreting the term *"unconnected"* in the context of placing reliance on another firm.

The definition of *"connected"* that should apply is that in COBS 4.12, which is linked to the UCIS marketing exemptions. Note 2 in COBS 4.12(4) says:

A company is 'connected' with another company if:

- *they are both in the same group; or*
- *one company is entitled, either alone or with another company in the same group, to exercise or control the exercise of a majority of the voting rights attributable to the share capital, which are exercisable in all circumstances at any general meeting of the other company or of its holding company.*

Using this definition, FIFS could not be said to be connected with the IFAs.

- Finally, FIFS had no reasonable grounds to doubt the accuracy of the suitability assessments completed by the IFAs. I may not agree with the outcome of a suitability assessment based on the consumer's circumstances, but this isn't the issue to be considered. The issue to be determined is whether FIFS was entitled to rely on the information it was given by the IFAs.

  I've referred to supporting documents provided by the consumers but FIFS didn't have, and wasn't required to have, this information. It relied on the information provided by the IFAs and had no reason to doubt this because of the extensive due diligence measures it had in place and that have been described previously.

  I've also said that the information on which the IFA's suitability assessment was based should have given it reasonable grounds to doubt the accuracy of that assessment. But as stated by the regulator and outlined above, the whole purpose of the reliance rules was to minimise unnecessary regulatory burdens and prevent duplication of effort. So FIFS wasn't required to receive or review all of the information on which the IFA's suitability assessment was based.

  I've said the due diligence measures FIFS put in place suggest the relationship between it and the IFAs was close, indicating a connection in respect of the investment schemes being promoted. But actually the measures were entirely reasonable to ensure FIFS complied with its regulatory obligations. Otherwise, it seems any step taken to ensure the accuracy of the information it received from the IFAs would lead me to consider there was a connection and no reliance could be placed on their suitability assessments. Applying my comments would lead to a situation where COBS 2.4.6(2) would never allow an authorised firm to place reliance on another authorised firm to comply with any rule requiring it to obtain information.

  In summary, my analysis in respect of COBS 2.4.8 and its application to these complaints is inconsistent with the generally accepted application of the FCA rules.

- FIFS has operated the sales process discussed in these complaints for more than 10 years. Neither FIFS nor any other company within the Falcon Group has ever been sanctioned by the regulator in respect of any regulatory rule breaches. While I'm

entitled to consider and comment on regulatory rules and principles, it questions whether I have the power to decide whether a rule breach has taken place or whether it's necessary for me to do so. In fulfilling my role outlined in DISP 3.6.1, it's sufficient only for me to form a view on what's fair and reasonable in the circumstances of the case. I don't need to conclude a regulatory breach has occurred to find in a consumer's favour.

It also questions how I was able to reach such a conclusion where limited information has been provided and I've also commented on various inconsistencies between the consumer's statements during the complaints process and the documentation that was provided/signed/reviewed by them at the time of their investment.

- It provided copies of correspondence between the regulator – at that time the Financial Services Authority (FSA) - and the Falcon Group from 2012 following its review of the sales process that applied to the complaints I'm considering. This didn't identify any rule breaches and no action was taken. FIFS's process hasn't changed since this date.

  In explaining the process to the regulator, it was expressly stated that:

  - it relied on the category 2 exemption to market its products to potential investors; and

  - its relationship with the IFA, including the fact that the IFA completed the suitability assessment and FIFS then relied on this.

  The regulator confirmed that it accepted this explanation in its letter of 2 May 2012. It would be irrational for me to take a view that's not consistent with the regulator's investigation and analysis.

My Findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having reconsidered the case, including the responses to my second provisional decision, my conclusions haven't changed.

As with my provisional decisions, I haven't tried to address every single point raised here. I've instead concentrated on the key issues that I think are central to the outcome. I also note FIFS's representative has referred to previous decisions issued by our service, but I hope it will appreciate that I must consider and decide each case based on its own individual facts and circumstances.

After reviewing the case carefully, I'm satisfied it's now appropriate for me to issue my final decision and I don't think it's necessary or appropriate to issue a further provisional decision. I addressed the key issues, including the application of the exemptions in COBS 4.12, in detail in my previous provisional decisions. FIFS has had adequate opportunity to make its submissions and I don't think the responses received raise any substantive new issues or lines of argument that justify delaying the settlement of this complaint further.

The sales process

I thank FIFS's representative for its recent clarification of the sales process that led to Ms J's investment, although even this explanation appears to include contradictions. Most notably, it begins by saying the exemption FIFS relied on was different after the rules were changed at the start of 2014, yet it later says the same process has operated for over ten years. Either way, according to the latest submissions, including the flowcharts outlining how sales should have been conducted at different times, FIFS seems to be saying the three-stage process was intended to work as follows:

- The first stage was the initial contact by FIE, who it's said gave no advice and discussed the benefits of investing in land generally with Ms J without promoting a particular investment. As part of this process, FIE also completed a fact find document that was passed to an IFA.

- The second stage involving an IFA, HTA in this case, that completed a suitability assessment and provided advice on whether an investment was suitable for her. HTA also arranged the SIPP and the transfer of Ms J's pension benefits.

- The final stage was the promotion of particular land investments by FIFS. In making this promotion, FIFS relied on the suitability assessment completed by HTA, which it believed meant the category 2 exemption in COBS 4.12.4 applied.

But in a letter to our adjudicator dated 20 April 2015, in connection with Ms J's complaint about that firm, HTA offered a different explanation of the sales process when it said:

> *It might be helpful for me to explain how the various companies operate. The sales team at Falcon International Estates purchases lists of investors, whose characteristics indicate they that they might be interested in purchasing plots of land, and builds a relationship with those investors by telephone. The majority of individuals telephoned prove not to be interested in, or not appropriate for, investing in this type of scheme. Those who are qualified as potential candidates for the scheme are referred to an independent financial adviser (this was my role in 2012). The IFA obtains a full fact find, qualifies the investor as an elective professional client following the procedures set out in COBS 3.5.3 and those investors who qualify as elective professionals are sent an Information Memorandum. Investors who do not qualify as elective professionals are politely turned away.*
>
> *The normal procedure thereafter would be for the IFA to consider the suitability of a land investment for the individual, having regard to their circumstances, as recorded in the fact find. Many individuals who are interested in land investment choose to purchase the land through a SIPP, which is often established at the suggestion of the IFA by means of a transfer from a deferred personal pension. The attraction of the SIPP route is the substantial tax relief available for the investment. In Ms J's case, however, the deferred benefit that Ms J wished to use to purchase land was in an occupational pension scheme. Howard Taylor Associates does not have permission to advise on pension transfers. I, therefore, declined to advise Ms J about whether to effect the transfer, and she decided to proceed with the transfer on an execution only basis.*
>
> *. . . .*

> *. . . as mentioned above, Ms J was an elective professional client. This means, under DISP 2.7.9(2) (a), that her complaint is outside the jurisdiction of the Financial Ombudsman Service.*

As I've outlined, accounts of the sales process that should have been followed have been inconsistent and seem to vary depending on who you're speaking to and when you're speaking to them. But whatever the truth of the situation, I'm looking at what's fair and reasonable in the circumstances of this complaint. So the nature of the process that should have been followed is much less relevant and I'm far more concerned with what actually did happen when Ms J's investment was established.

Jurisdiction

In making her complaint, Ms J has said her investment shouldn't have been promoted to her as she was an unsophisticated retail investor. As FIFS was responsible for promoting the investment, I'm satisfied the complaint has been set up against the correct firm.

In terms of FIFS's role in what took place, to summarise what I've said previously, it carried out various regulated activities in connection with Ms J's investment. These included establishing and operating a collective investment scheme, arranging deals in investments, and agreeing to arrange deals in investments. It was also involved in promoting its UCIS to Ms J. While promoting investments isn't a regulated activity in its own right, I'm satisfied it was essentially part of or ancillary to the other activities I've identified. For these reasons, I still believe this is a complaint we can consider and FIFS's representative doesn't seem to be disputing this.

Merits

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having reconsidered the case, including the responses to my provisional decisions from FIFS's representative, my conclusions and the key reasons for them haven't changed.

For the reasons I set out I my second provisional decision, it remains my view that I have a duty to consider whether a breach of specific rules or high-level principles has occurred in considering what's fair and reasonable. And, if it's material to the outcome, to identify this in setting out the reasons for my decision as I'm required to do under section 228 of FSMA.

correspondence with the FSA in 2012

With its most recent submissions, FIFS's representative has provided copies of correspondence between FIE and the FSA in 2012. This shows the FSA asked for details about FIE's introduction of potential clients to an IFA and it's apparently being argued that because no action was taken this represents an endorsement of the overall sales process.

Unfortunately, we haven't been provided with a copy of the FSA's response to the explanation provided by FIE in June 2012 so I can't say with certainty that this was accepted. But even if it was demonstrated that the FSA was satisfied with the explanation it received about the sales process, this wouldn't demonstrate that process was followed correctly when Ms J invested and that's the issue I must address here. So I don't accept that it would be irrational for me to conclude Ms J's complaint should be upheld on the grounds

I've previously outlined simply because of the correspondence between FIE and the FSA in 2012.

Incidentally, I note FIFS's representative has also said its business model has been discussed and agreed with our service. But it's not provided any evidence to demonstrate this and I find it unlikely that any such agreement was obtained. The role of the ombudsman service is to consider individual disputes on their own merits and it's never been our remit or practice to carry out reviews of a firm's business model or enter into discussions about such issues.

the rules on promoting UCIS

As I've previously set out, there were rules covering the promotion of UCIS investments at the time Ms J invested. The starting point in section 238 of FSMA was that:

> *An authorised person must not communicate an invitation or inducement to participate in a collective investment scheme.*

But there were exceptions to this. COBS 4.12.1 said:

> *A firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the restriction on promotion in section 238 of the Act if the promotion falls within an exemption in the table in (4), as explained further in the Notes.*

The table referred to in COBS 4.12.4 set out various types of promotion to which this exemption could apply.

which exemption is being relied on?

The most recent submissions from FIFS's representative seem to confirm that it relied on the category 2 exemption to promote its products to Ms J. I think it's relevant to note at this point that by relying on this exemption alone, FIFS would effectively be accepting Ms J was a retail client and not a professional client. But I remain conscious that the submissions from FIFS's representative have been inconsistent throughout. It's previously told us that HTA assessed Ms J as an elective professional client, indicating it relied instead on the category 7 exemption, and that's also what HTA told our adjudicator.

The fact the parties are so inconsistent on how sales were made doesn't inspire confidence that the intended process was followed correctly. But either way, the most important consideration in deciding this particular case is whether FIFS was entitled to promote its investments to Ms J. As far as I can see, there were only two possible grounds on which it could do that and these are covered by the category 2 and category 7 exemptions in COBS 4.12.4. So I've considered the evidence carefully to assess whether either of these provided a justification for FIFS's actions in promoting its investment to Ms J.

category 2 exemption

Under a category 2 exemption, COBS 4.12.4 essentially permits the promotion of UCIS to

> *A person:*
>
> *(a) for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable;*

To legitimately promote its products to Ms J under this exemption, FIFS would have first needed (before sending an information memorandum or making any other form of promotion) to take *reasonable steps* to satisfy itself that those investments were suitable for her. Under the sales process as most recently described by FIFS's representative, HTA carried out a suitability assessment and FIFS relied on that to promote its products.

I don't think the wording of the exemption indicates FIFS was required to carry out a suitability assessment itself. And I take the point that the regulator allowed a firm to rely on information from another in certain circumstances. So in principle, it might be reasonable for a firm promoting investments to rely on a suitability assessment completed by another. But the key question I need to address is whether FIFS took reasonable steps to ensure its investment scheme was suitable for Ms J before promoting it to her. The reasonable step it says it took was to rely on a suitability assessment made by HTA.

was FIFS entitled to rely on HTA's suitability assessment?

The circumstances in which it's appropriate for one firm to rely on information provided by another is addressed in COBS 2.4. In my view, the relevant sections are COBS 2.4.6 to 2.4.8. At the time Ms J invested, these sections said:

> ***Reliance on others: other situations***
>
> ***COBS 2.4.6***
>
> *(1) This rule applies if the rule on reliance on other investment firms (COBS 2.4.4 R) does not apply.*
>
> *(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 2.4.7***
>
> *(1) In relying on COBS 2.4.6 R, a firm should take reasonable steps to establish that the other person providing written information is not connected with the firm and is competent to provide the information.*
>
> *(2) Compliance with (1) may be relied upon as tending to establish compliance with COBS 2.4.6 R.*
>
> *(3) Contravention of (1) may be relied upon as tending to establish contravention of COBS 2.4.6 R.*

COBS 2.4.8

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.

The guidance provided in COBS isn't exhaustive. But for FIFS to rely on information provided by HTA that the investment products it was promoting to Ms J were suitable for her, the expectation was that it was *reasonable* for it to do so. The examples of situations where this would be reasonable, as set out in COBS 2.4.8, include those where the information being relied upon was in writing, from an *unconnected* authorised firm, and where it had no reason to doubt its accuracy.

After reviewing the evidence carefully, I don't think the circumstances of this case are consistent with any of those described in COBS where it would have been reasonable for FIFS to rely on information from HTA that an appropriate suitability assessment had been completed. In summary, I believe:

- there's insufficient evidence to show information was provided in writing before the promotion took place;
- FIFS was working collaboratively with HTA, so it wasn't an unconnected firm; and
- there's insufficient evidence to show FIFS could reasonably conclude a proper assessment of suitability had taken place.

I'll now explain my reasons for reaching these conclusions in detail.

did HTA confirm its suitability assessment to FIFS in writing?

FIFS's representative says it obtained written confirmation from HTA that its investment products were suitable for Ms J and it referred to a declaration on the investment application, which was signed by HTA, and said:

I/We have reviewed this application for a land purchase and confirm that the investment is suitable for the applicant's circumstances and attitude to risk.

In connection with her complaint about HTA, we obtained a copy of Ms J's investment application. As FIFS's representative has said, this included a declaration signed by the IFA to confirm he'd reviewed the application and that the investment was suitable for her circumstances and attitude to risk. But under the sales process described, it's not reasonable to think the application and declaration were completed before FIFS promoted the investment as part of the third stage of the sale process I've outlined above. So this declaration can't have been the written confirmation of the suitability assessment FIFS relied upon.

In response to comments from FIFS's representative, I'm not saying this means the suitability assessment took place after promotion had begun. What I am saying is that this document doesn't demonstrate FIFS had written confirmation from HTA that it had completed a suitability assessment and concluded the products it was promoting were suitable for Ms J before it promoted them to her.

I previously said I've reviewed the other evidence provided but haven't found anything else in writing from the time before FIFS started promoting its products to Ms J to inform it that HTA had completed an appropriate suitability assessment that concluded the products to be promoted were suitable for her. I note what FIFS's representative has said about how the sales process was intended to work. But that doesn't prove it was followed correctly in this case. If FIFS had received written confirmation from HTA that it was satisfied the products to be promoted to Ms J were suitable for her, I don't think it's unreasonable to expect it to be able to provide this. And in the absence of this information, I think it's open to me to conclude this requirement in COBS 2.4.8 wasn't satisfied.

were HTA and FIFS unconnected?

I've previously explained why, in accordance with GEN 2.2.1 to 2.2.2, the provisions in COBS 2.4.8 need to be interpreted in light of their purpose. The term *unconnected* isn't defined in COBS 2.4.8, but I remain satisfied it's appropriate to apply the natural meaning of the word as outlined in GEN 2.2.6 to 2.2.12.

Legally, HTA and FIFS were different companies. But in practice and in terms of this sales process at least, it's clear that they weren't acting independently. Instead, there was a high degree of interdependence and collaboration. Both firms were an integral part of a process that was agreed between them. And according to the submissions from FIFS's representatives, the nature of its ongoing relationship with HTA was very close. It's said to have involved detailed discussions in weekly meetings and regular telephone conversations, that sometimes took place on a daily basis.

Further, the nature of the relationship was such that the actions of HTA had a direct impact on the fortunes of FIFS and vice-versa. If HTA didn't conclude the products FIFS offered were suitable for Ms J, FIFS wouldn't have been able to promote its investments to her and wouldn't have made any money. And if FIFS didn't promote its investments to Ms J, there wouldn't have been any reason for her to transfer her pension to a SIPP and HTA wouldn't have made any money either.

The main purpose of the rules in COBS was to ensure protection for consumers. The rules on reliance in COBS 2.4 also provide for a situation where one firm can rely on information from another. But this is subject to conditions and the purpose of those conditions was to prevent consumers from the harm that could result from one firm relying on information from another when it's not appropriate for it to do so. In my view, a good example of where it wouldn't be appropriate for one firm to rely on information from another is when those two firms have a relationship that's based on mutual self-interest and there's an incentive for one party to provide certain information to the other even if that isn't correct. So if the natural meaning of the term *unconnected* and the purposive interpretation of the rule requiring firms to be unconnected are applied, I don't think FIFS was entitled to rely on a suitability assessment completed by HTA because it wasn't an unconnected firm.

In its most recent submissions, FIFS's representative has referred to the notes at the foot of COBS 4.12.4 (version as updated on 1 January 2014). In particular, it says my interpretation of the term unconnected should be based on Note 2, which says:

> *A company is 'connected' with another company if:*
>
> - *they are both in the same group; or*

- *one company is entitled, either alone or with another company in the same group, to exercise or control the exercise of a majority of the voting rights attributable to the share capital, which are exercisable in all circumstances at any general meeting of the other company or of its holding company.*

FIFS's representative has quoted from COBS 4.12.4 as updated on 1 January 2014, so that clearly doesn't apply to this case. But the same note does appear in the version of COBS that applied when Ms J invested, although it was listed as Note 4 at that time.

I've considered the content of this note carefully, but it refers specifically to a different exemption (category 4) and relates to a company promoting its shares or debentures to employees. These are entirely different circumstances to those in this complaint and I don't think it follows that this definition should be applied to all circumstances where it's necessary to determine the extent of a connection between two firms.

In terms of addressing the issues raised by this particular complaint, it's not helpful that the term *unconnected* isn't specifically defined in COBS 2.4.8. But in the circumstances, I still believe it's appropriate to apply the natural meaning of the word and to interpret COBS 2.4.8 in light of its purpose as set out in GEN 2.2, which after all is intended to describe how the Handbook should be interpreted. For this reason, it remains my view that FIFS wasn't entitled to rely on a suitability assessment completed by HTA because it wasn't an unconnected firm.

was FIFS aware, or should it have been aware, of reason to doubt the accuracy of information from HTA saying the product it was promoting was suitable for Ms J?

While it's not been able to demonstrate this was provided in writing as I've already discussed, FIFS's representative says it promoted to Ms J based on information provided by HTA that it had completed a suitability assessment and concluded its products were suitable for her. And it's correct to say the issue I need to decide here is whether FIFS should have had reason to doubt the accuracy of this information.

I'm not suggesting FIFS should have carried out its own suitability assessment. But it should have understood what the advice process looked like. The sales process involved completing a fact find and its letter of 8 February 2012 shows FIE sent this document to Ms J. So it seems that everybody understood the adviser needed to know about her circumstances and requirements. FIFS should also have known that an adviser would normally be expected to provide a suitability letter and appropriate risk warnings about any investment being considered.

FIFS knew its products were covered by the general prohibition on promoting UCIS in FSMA and that the regulator had taken the view they weren't generally suitable for retail investors. In the circumstances, and before it could reasonably be satisfied it was appropriate to promote to Ms J, I think it's reasonable to expect that FIFS should have satisfied itself HTA had followed the correct process to assess suitability. I don't think it would have been enough to simply accept HTA's word that this was the case. Its representative has made much of the ongoing due diligence it carried out, which it says involved frequent meetings and detailed discussions of individual investors, and that suggests to me that FIFS understood this point.

If the advice process had been followed correctly, HTA should have been able to demonstrate this to FIFS, by providing copies of a suitability letter and appropriate risk warnings for example. But in this particular case, beyond sending a fact find, I think the evidence indicates no appropriate suitability assessment took place. This is consistent with HTA's comments to our adjudicator in its letter of 20 April 2015 that appear to suggest suitability may not have been considered on this occasion because HTA wasn't authorised to advise on the pension transfer.

If FIFS had checked that an adequate suitability assessment had been completed and HTA had provided evidence to satisfy this enquiry, I think it's reasonable to believe it would have a record of this. But as it stands, neither FIFS nor HTA have been able to provide any documentary evidence to show the correct advice process was followed in respect of the suitability of the investment. So I think it's more likely than not that this never existed. Without sight of evidence that an appropriate suitability assessment had been completed, I think FIFS had reasonable grounds to doubt whether its investments were in fact suitable for Ms J and should have concluded that it couldn't promote to her.

In respect of my discussion in my provisional decisions of the relevance of the Principles for Businesses (PRIN), I note FIFS's representative appears concerned that I may be using the Principles to supplant the rules. But I think it's clear from what I've said above that, by reference to COBS alone, there are compelling reasons to conclude that FIFS shouldn't have promoted its products to Ms J. A consideration of the Principles only supports that view for the reasons I've explained before.

Taking everything into account, I think the evidence shows that it wasn't reasonable for FIFS to believe an appropriate assessment had been completed and that its products were suitable for Ms J. So it follows that it shouldn't have promoted to her.

The overall transaction involved Mr J moving her pension fund, which was held in a defined benefit scheme with the associated protections and guarantees, to an alternative unregulated, high-risk, investment that presented the possibility she could lose most or all of her money. This put her at significant risk of detriment. She'd also be without the protection offered by the Financial Services Compensation Scheme (FSCS).

I've explained in detail in my provisional decisions why I don't think this proposition was suitable for Ms J and FIFS's representative doesn't appear to be disputing my conclusions on this point. So I think it follows that if HTA had completed an appropriate suitability assessment, it should have reached the same conclusion. I believe this shows that by failing to take reasonable steps to ensure an adequate suitability assessment had been carried out, FIFS directly contributed to the loss she's suffered.

category 7 exemption

Under a category 7 exemption, COBS 4.12.4 permits the promotion of UCIS to:

> *An eligible counterparty or a professional client.*

For Ms J to have been appropriately considered and treated as an elective professional client, all three of the criteria set out in COBS 3.5.3 would have needed to be satisfied. This said:

Elective professional clients

A firm may treat a client other than a local public authority or municipality as an elective professional client if it complies with (1) and (3) and, where applicable, (2):

(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");

(2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:

(a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;

(b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;

(c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;

(the "quantitative test"); and

(3) the following procedure is followed:

(a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

(b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

(c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

was FIFS entitled to rely on the category 7 exemption?

The category 7 exemption specifically says a firm could treat an investor as an elective professional client if *'it'* complied with the relevant requirements. My interpretation of this is that the firm involved in promoting UCIS needed to follow the appropriate steps itself. I don't think the rules allowed FIFS to delegate its regulatory responsibilities to another party, HTA for example. I believe this interpretation is illustrated in the context of the third point in COBS 3.5.3. This says a client must state in writing to *the firm* – which, when read in the context of the rest of the rule, I think can only reasonably be interpreted as referring to the firm promoting UCIS – that he/she wants to be treated as a professional client. I think the same could be said of the requirements for *the firm* – again, the firm promoting the UCIS – to

provide a clear written warning of the protections being given up and to obtain confirmation of the client's understanding of this.

In this particular case, if an assessment of Ms J as an elective professional client was completed, the relevant submissions are consistent that this would have been completed by HTA. There's been no suggestion from anyone involved in this complaint (and there's no evidence to support any such suggestion either) that FIFS itself took the steps required in COBS 3.5.3. As a result, I don't think FIFS would have been entitled to treat Ms J as a professional client or to promote its investments to her on that basis.

Further, I think the available evidence indicates Ms J wouldn't have met the criteria to be considered an elective professional client if FIFS had completed a valid assessment as it should have.

Ms J disputes the accuracy of most of what was recorded about his circumstances at the time in the sales documentation. While this records she had an investment portfolio and some experience in this area, she says she didn't have any assets aside from her home and pension. I find Ms J's recollection of her circumstances compelling. But even if the contents of the documentation are accepted as showing she satisfied part (b) of the quantitative test, she doesn't appear to have satisfied either of the other criteria. I've seen no suggestion that she'd carried out relevant transactions at the required frequency or that she worked or had worked in a relevant professional position.

So I think it's clear that any assessment of Ms J's status should have led FIFS to conclude it couldn't promote its UCIS products to her.

conclusions

As I've said above, the key consideration in this case is whether FIFS was entitled to promote the investment to Ms J. There were only two grounds on which promotion could possibly be justified, the category 2 and category 7 exemptions in COBS 4.12.4. For the reasons I've explained, it remains my view that the requirements for reliance on these exemptions weren't met and FIFS therefore wasn't entitled to promote to Ms J. By failing to act in accordance with the rules covering the promotion of UCIS, and designed for the protection of consumers, I think I can only reasonably conclude FIFS didn't treat Ms J fairly. This is the reason I'm upholding her complaint.

Putting Things Right

The principal aim of any award I make is to return Ms J to the position she'd be in if FIFS hadn't promoted its UCIS to her when it shouldn't have. I don't think it's likely that Ms J would have made this investment off her own back and if FIFS hadn't promoted it to her, I'm satisfied it wouldn't have taken place. Further, I don't think she would have transferred her pension benefits to the SIPP if she hadn't been subject to this sales process as the only reason for doing so was to facilitate the use of the investment.

As I've said, I'm aware FIFS wasn't the only regulated firm involved in the events that led to Ms J transferring her pension benefits and investing in UCIS. But I think any loss she's suffered as a result wouldn't have happened if FIFS had acted as it should and that it's therefore appropriate to hold it responsible for any loss. Although I'm conscious Ms J has received some compensation following a separate complaint about HTA and this needs to be taken account in any award I make here. I've explained below how this can be done.

Ms J has also told us that HTA took ownership of the land investment and it's been removed from the SIPP. Consequently, it appears there are no illiquid investments in the SIPP and there's nothing preventing her closing it if she wants.

A fair and reasonable outcome would be for FIFS to put Ms J, as far as possible, into the position she would now be in if it hadn't promoted investments to her when it shouldn't have. I consider she would have remained in the occupational scheme. FIFS 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. FIFS must therefore take into account any amendments to the regulator's Finalised Guidance FG 17/9.

The calculation should be carried out as at the date of my final decision, 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 Ms J's acceptance of the decision. If this is completed before publication of the *FCA's intended amendments to the guidance*, FIFS 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 Ms J. FIFS need only re-run the calculation once, to take account of amendments currently planned by the FCA. FIFS does not subsequently need to recalculate following any further amendments the regulator might later make).

Alternatively, FIFS may wait until publication of the FCA's amended Finalised Guidance (expected in March 2021) before calculating and paying the compensation due to Ms J.

FIFS must contact the Department for Work and Pensions (DWP) to obtain Ms J'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 Ms J's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation (less the amount of compensation already received from HTA in respect of her complaint about its actions) should if possible be paid into Ms J'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 Ms J 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 her 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 Ms J within 90-days of the date FIFS receives notification of her 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 FIFS to pay Ms J.

It's possible that data gathering for a SERPS adjustment may mean 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.

additional compensation

I think the problems Ms J has experienced with her pension arrangements as a result of FIFS' actions have caused her considerable unnecessary trouble and upset over a prolonged period and that she should be compensated for that. The precise impact of this situation on Ms J, and therefore the amount to award, is difficult to assess. But in the circumstances, I think a substantial payment of £500 is fair and reasonable. FIFS would need to pay this amount direct to Ms J (not into her pension) in addition to any compensation calculated using the method outlined above.

compensation limits

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 FIFS to pay Ms J 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 FIFS to pay Ms J any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £150,000, I only require FIFS to pay Ms J any interest as set out above on the sum of £150,000.

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

If Ms J accepts my decision, the money award would be binding on FIFS. My recommendation wouldn't be binding on FIFS. Further, it's unlikely that Ms J could accept my decision and go to court to ask for the balance. Ms J may want to consider getting independent legal advice before deciding whether to accept this decision.

My Final Decision

My final decision is that I uphold this complaint.

If Ms J accepts my decision, Falcon International Financial Services Ltd must pay her compensation using the method set out above. It should provide her with details of its calculations in a clear and understandable format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms J to accept or reject my decision before 12 April 2021.

Jim Biles
Ombudsman

Extract from second provisional decision:

My Provisional Findings

I've carefully read all submissions provided in connection with this complaint. But as with my first provisional decision, I haven't tried to address every single point raised here. I've instead concentrated on what I think are the key issues that are central to the outcome. I also note FIFS's representative has referred to previous decision issued by our service, but I hope it will appreciate that I must decide each case based on its own individual facts and circumstances.

It remains my understanding that the transaction that led to the unregulated investment was a three-stage process involving three different businesses.

- The first stage was the initial contact by FIE, who gave no advice and discussed the benefits of investing in land generally without promoting a particular investment. As part of this process, FIE also completed a fact find document that was passed to HTA.

- The second stage involving an IFA, HTA, although the explanation of its role hasn't been consistent. At times, it's been suggested HTA's role was to determine whether Ms J was a retail or professional client. At other times, it's been suggested HTA's role was to provide advice on whether an investment was suitable for her or not. HTA also arranged the SIPP and the transfer of Ms J's pension benefits.

- The final stage was the promotion of particular land investments by FIFS.

In respect of each of these stages:

- Stage 1 – FIE was a separate company to FIFS. Although it later became an appointed representative of FIFS, this wasn't until 24 August 2012 – after Ms J's pension benefits were transferred and her investment finalised. Prior to this date, FIE appears to have been an unregulated business and that means any complaint about its actions falls outside our jurisdiction and I have no power to investigate or make an award.

- Stage 2 – HTA was a regulated business in its own right and its actions have already been considered in a separate complaint. It's not appropriate for me to comment on HTA's actions in this decision, except where this is relevant to the outcome of the complaint about FIFS.

- Stage 3 – FIFS was a regulated business and it's the actions of this business after HTA had carried out its part of the overall transaction that I'm considering in this decision.

Jurisdiction

In making her complaint, Ms J has said her investment shouldn't have been promoted to her as she was an unsophisticated retail investor. As FIFS was responsible for promoting the investment, I'm satisfied the complaint has been set up against the correct firm.

In terms of FIFS's role in what took place, to summarise what I've said previously, it carried out various regulated activities in connection with Ms J's investment. These included establishing and operating a collective investment scheme, arranging deals in investments, and agreeing to arrange deals in investments. It was also involved in promoting its UCIS to Ms J. While promoting investments isn't a regulated activity in its own right, I'm satisfied it was essentially part of or ancillary to the other activities I've identified. For these reasons, I still believe this is a complaint we can consider and FIFS doesn't seem to be disputing this.

Merits

the rules on promoting UCIS

As I've previously set out, there were rules covering the promotion of UCIS investments at the time Ms J invested. The starting point in section 238 of FSMA was that:

> *An authorised person must not communicate an invitation or inducement to participate in a collective investment scheme.*

But there were exceptions to this. COBS 4.12.1 said:

> *A firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the restriction on promotion in section 238 of the Act if the promotion falls within an exemption in the table in (4), as explained further in the Notes.*

The table referred to in COBS 4.12.4 set out various types of promotion to which this exemption could apply.

which exemption is being relied on?

A category 7 exemption relates to elective professional clients. I based my previous findings on whether this particular exemption applied because FIFS provided a letter from its compliance consultant dated 7 May 2017, which I've quoted above in full. This said the process was for FIE to identify potential investors and then:

- *An IFA then classifies such individuals, using the categorisation in COBS 3.5.3, either as elective professional clients or as retail clients;*
- *Elective professional clients (but not retail clients) can then be sent an Information Memorandum as permitted under COBS 4.12.4;*
- *Subsequently, the IFA assesses the suitability of an investment in land for the client on the basis of the full fact find.*

> *I am satisfied that no investor would be provided with an Information Memorandum unless and until the investor had been categorised as an elective professional client.*

I thought it was reasonable to assume that FIFS's compliance consultant understood how its process worked. The covering email from FIFS's representative dated 12 May 2017 also referred to the category 7 exemption to justify promoting UCIS to Ms J. While earlier correspondence did mention a suitability assessment, it seemed clear from that received in May 2017 that FIFS was relying on the category 7 exemption only.

FIFS's compliance consultant did mention a suitability assessment but I think its use of the word *'subsequently'* is potentially relevant. This could be interpreted to mean the only assessment carried out before the investor information memorandum was sent was that of whether Ms J was a professional or retail client. The suitability assessment was said to have been carried out *subsequently*, which appears to suggest it was done after the information memorandum had been sent.

I think it's clear that sending Ms J a copy of the information memorandum was a financial promotion, which the FCA defines simply as "*an invitation or inducement to engage in investment activity . . . that is communicated in the course of business"*. My interpretation of the rules is that no promotion should have been made until FIFS had established one of the exemptions set out in COBS 4.12 applied. So, any suitability assessment after promotion had begun was too late and FIFS wouldn't be able to rely on the category 2 exemption in any event.

From the response to my provisional decision, it now appears FIFS's representative is saying the description of the process provided in May 2017 isn't correct and a suitability assessment was completed before any promotion took place. So FIFS is now relying on the category 2 exemption and I've reconsidered the evidence to see if this affects the outcome. I think it's relevant to note at this point that by relying on this exemption alone, FIFS would effectively be accepting Ms J was a retail client and not a professional client.

category 2 exemption

Under a category 2 exemption, COBS 4.12.4 essentially permits the promotion of UCIS to

> *A person:*
>
> *(b) for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable; and*
>
> *(c) who is an 'established' or 'newly accepted' client of the firm or of a person in the same group as the firm (see Notes 2 & 3).*

To legitimately promote its products to Ms J under this exemption, FIFS would have first needed (before sending an information memorandum or making any other form of promotion) to take *reasonable steps* to satisfy itself that those investments were suitable for her. Under the process as most recently described by FIFS's representative, HTA carried out a suitability assessment and FIFS relied on that to promote its products.

In my view, the wording of the category 2 exemption is less clear than category 7 in saying the firm promoting the investment must make the necessary assessment itself. And, in principle, it might be reasonable to rely on a qualified IFA to assess suitability. So the question then becomes whether it was reasonable for FIFS to rely on HTA's suitability assessment in this case.

was FIFS entitled to rely on HTA's suitability assessment?

The circumstances in which it's appropriate for one firm to rely on information provided by another is addressed in COBS 2.4. In my view, the relevant sections are COBS 2.4.6 to 2.4.8. I don't think COBS 2.4.4 applies as that specifically refers to a firm receiving *"an instruction"* from another, which wasn't the situation here. At the time Ms J invested, the rules said:

> ***Reliance on others: other situations***
>
> ***COBS 2.4.6***
>
> *(1) This rule applies if the rule on reliance on other investment firms (COBS 2.4.4 R) does not apply.*
>
> *(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 2.4.7***
>
> *(1) In relying on COBS 2.4.6 R, a firm should take reasonable steps to establish that the other person providing written information is not connected with the firm and is competent to provide the information.*
>
> *(2) Compliance with (1) may be relied upon as tending to establish compliance with COBS 2.4.6 R.*

(3) Contravention of (1) may be relied upon as tending to establish contravention of COBS 2.4.6 R.

COBS 2.4.8

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.

So, for FIFS to rely on information provided by HTA that the investment products it was promoting to Ms J were suitable for her, the rules required it was *reasonable* for it to do so. Under COBS 2.4.8, it was reasonable for FIFS to rely on information provided that was:

- in writing;
- from by an *unconnected* authorised firm; and
- unless it was aware, or should have been aware, of something that cast doubt on its accuracy.

did HTA confirm its suitability assessment to FIFS in writing?

FIFS's representative says it obtained written confirmation from HTA that its investment products were suitable for Ms J and it referred to a declaration on the investment application, which was signed by HTA, and said:

I/We have reviewed this application for a land purchase and confirm that the investment is suitable for the applicant's circumstances and attitude to risk.

In connection with her complaint about HTA, we obtained a copy of Ms J's investment application. As FIFS's representative has said, this included a declaration signed by the IFA to confirm he'd reviewed the application and that the investment was suitable for her circumstances and attitude to risk. But I think it's relevant to note that the application was presumably completed after the investment had been promoted so it doesn't necessarily demonstrate a suitability assessment was completed before promotion took place as required under the rules.

I've reviewed the other evidence provided, but I haven't found anything else in writing from HTA to inform FIFS that it had completed an appropriate assessment that concluded the products to be promoted were suitable for Ms J before any promotion took place. So as things currently stand, it's not clear this requirement was met.

were HTA and FIFS unconnected?

In the General Provisions (GEN) section of the FCA Handbook, Gen 2.2 *"Interpreting the Handbook"* said:

Purposive interpretation

GEN 2.2.1
Every provision in the Handbook must be interpreted in the light of its purpose.

GEN 2.2.2
The purpose of any provision in the Handbook is to be gathered first and foremost from the text of the provision in question and its context among other relevant provisions.
The guidance given on the purpose of a provision is intended as an explanation to assist readers of the Handbook. As such, guidance may assist the reader in assessing the purpose of the provision, but it should not be taken as a complete or definitive explanation of a provision's purpose.

. . . .

Use of defined expressions

GEN 2.2.6
Expressions with defined meanings appear in italics in the Handbook.

. . . .

GEN 2.2.9
Unless the context otherwise requires, where italics have not been used, an expression bears its natural meaning (subject to the Interpretation Act 1978; see GEN 2.2.11 R to GEN 2.2.12 G).

. . . .

GEN 2.2.11
The Interpretation Act 1978 applies to the Handbook.

GEN 2.2.12
The application of the Interpretation Act 1978 to the Handbook has the effect, in particular, that:

> *(1) expressions in the Handbook used in the Act have the meanings which they bear in the Act, unless the contrary intention appears;*

In COBS 2.4.8, the term *unconnected* doesn't appear in italics so isn't defined. In accordance with GEN 2.2.9, the natural meaning of the word needs to be applied and I can't see anything in the Interpretation Act that would inform otherwise on this point.

Legally, HTA and FIFS were different companies. But in practice, it seems clear to me they were connected at least in terms of this venture. Both firms were an integral part of a sales process that was agreed between them. And according to the most recent submissions from FIFS's representatives, the nature of its ongoing relationship with HTA appears to have been very close. It's said to have involved detailed discussions in weekly meetings and regular telephone conversations, that sometimes took place on a daily basis.

Further, the nature of the relationship was such that the actions of HTA had a direct impact on the fortunes of FIFS and vice-versa. If HTA didn't conclude the products FIFS offered were suitable for Ms J, FIFS wouldn't have been able to promote its investments to her and wouldn't have made any money. And if FIFS didn't promote its investments to Ms J, there wouldn't have been any reason for her to transfer her pension to a SIPP and HTA wouldn't have made any money either.

The overarching purpose of the rules on reliance in COBS 2.4 was to protect consumers from detriment caused by a business relying on inaccurate information from a third party. When the regulator set out that it was only reasonable for a firm to rely on information from another *unconnected* firm, it seems to me that it was trying to prevent the harm that could result from a relationship based on mutual self-interest for the two firms involved where there was an incentive for one party to provide certain information to the other even if that wasn't correct. So if the natural meaning of the term *unconnected* and the purposive interpretation of the rule requiring firms to be unconnected are applied, I don't think FIFS was entitled to rely on a suitability assessment completed by HTA because it wasn't an unconnected firm.

was FIFS aware, or should it have been aware, of reason to doubt the accuracy of information from HTA saying UCIS were suitable for Ms J?

FIFS's representative also says there was no reason for FIFS to doubt the accuracy of the information it received from HTA. This is because it carried out ongoing due diligence and had a process that meant there was regular contact with HTA where each potential investor and the suitability assessments it was carrying out were discussed in detail.

But I think it can also reasonably be argued that the nature of the sales process, which created a situation where it knew HTA stood to benefit by concluding UCIS were suitable for Ms J whether that was true or not, should have given FIFS reason to doubt whether any written confirmation it received was accurate. Given the general prohibition in FSMA and the stance of the regulator that UCIS weren't generally suitable for retail investors, and in view of the fact it now seems to accept Ms J wasn't a professional investor, FIFS should have known it was more likely an IFA making a fully independent assessment, and with nothing to gain from the outcome, would conclude its products weren't suitable.

This notwithstanding, it's not clear at this stage what documentation FIFS saw as part of the detailed discussions its representative says would have taken place about Ms J's situation before it promoted its products to her. But I've reviewed the other evidence that could relate to HTA's suitability assessment to see whether this should have reassured FIFS about the accuracy of any written confirmation it may have received to confirm their suitability or whether it should have given it reason to doubt this.

In connection with her complaint about that firm, HTA provided a copy of a fact find that appears to have been signed by Ms J in March 2012. This records she was in her fifties, single with no dependants and wasn't working at the time. Her only income is recorded as investment income of £10,000. It was also recorded that she owned three properties, only one of which had a small mortgage, a share in a family property, savings, including money on deposit, ISAS and various shares worth between £275,000 and £345,000, and investments in gold and antiques worth between £15,000 and £30,000. No details of any pensions other than her occupational scheme that was transferred to her SIPP were recorded.

Ms J disputes the accuracy of the information recorded in the fact find, particularly the property and investments she was recorded as owning. She says she only signed the last page of the fact find and didn't see the rest of the contents, which she says were inaccurately recorded by HTA. She says she didn't own the various properties and investments that were attributed to her and that she had no assets aside from her home, which was mortgaged, and her pension that was transferred to the SIPP. She also says her only income was Employment and Support Allowance (ESA) benefit.

To support what she's said about her income, Ms J has provided a copy of a certificate of pay and taxable benefit for the year to April 2014 that appears to show she received ESA benefit of £5,542 and nothing else. I've asked the investigator to forward a copy of this document to FIFS in case it hasn't seen it before. Given the inherent difficulty in proving a negative, it's unrealistic to expect Ms J to demonstrate she didn't own the properties and investments listed. But on balance, and in view of the information she has provided in connection with her income, I find it unlikely that she also owned the array of assets recorded in the fact find and I think her recollections on this point are compelling.

The fact find also recorded Ms J's attitude to investment risk as *"high"* on the following scale:

Low	*Below average*	*Average*	*Above average*	*High risk*	*Very high risk*

High risk was defined as:

> *I am willing to accept a high level of risk in relation to my portfolio. I realise that such of achieving an approach may include investments in specialist funds and products whose performance may be highly volatile.*

Above where Ms J signed the fact find, the following statement also appeared:

In the event of land purchases, I/we understand that certain risk investments, especially investments in land, may not be readily realisable as there may not be a ready market for the sale of such investments and that access to reliable data for valuing such investments may be restricted.

The investment FIFS promoted to Ms J wasn't held in a well-diversified selection of equities and other assets. It invested solely in plots of land at a single site. Further, it was an unregulated investment that meant she couldn't fall back on the protection offered by the Financial Services Compensation Scheme (FSCS) if things went wrong. This was a high-risk, specialised investment of the type the industry regulator had said shouldn't be promoted to unsophisticated retail investors.

If FIFS saw the information contained in the fact find about Ms J's circumstances, I think it should have given it reason to doubt any assurance from HTA that its products were likely to be suitable for her. Even if it's accepted that FIFS was entitled to believe she owned the assets attributed to her, it was clear from the fact find that her income was very low and depended on the performance of the assets she was said to own. It's also not clear how she expected to be able to survive on that level of income without cashing in her assets.

The money Ms J invested represented all of her pension and a significant portion of the total assets she was said to own. Without further clarification of her situation, I think the fact she appeared to have no other source of income than that from the investments should have led to questions about her capacity for capital loss and whether she was really willing to accept a high degree of risk with the money she was investing.

It's also not clear that FIFS should have taken any reassurance from the attitude to risk statement on the fact find. According to the process as described by its representative, this document was completed before it was sent to HTA so it hadn't been completed by a qualified IFA and I don't think it was appropriate for FIFS to rely on it in those circumstances. Even if the assessment had been completed by HTA, I don't think the risk table and definition above told Ms J she'd end up investing in products where she could lose all of her capital and she'd have no FSCS protection because the investment FIFS planned to promote to her was unregulated.

Similarly, I think the statement at the foot of the fact find above where Ms J signed simply explained her investment may not be readily realisable and that access to reliable data for valuations may be restricted. Again, it didn't tell her there was a chance she could lose all of her money and that she'd have no FSCS protection.

HTA's file also contained an *"Investor Profile Questionnaire"*, which appears to record Ms J's answers to various questions about her attitude to investment risk and concluded this could be described as *"adventurous"* on the following scale:

Very cautious	*Cautious*	*Moderately cautious*	*Balanced*	*Moderately adventurous*	*Adventurous*	*Very adventurous*

Ms J says she didn't see this document and that she didn't give the answers that were recorded. While I can't comment with any certainty on whether she saw it, I think it's relevant to note that it isn't signed and there's no evidence to confirm she did. If FIFS saw this document as part of its detailed discussions with HTA about Ms J and its suitability assessment, I don't think it should have taken any particular reassurance from it. As I've already identified, I think there were genuine reasons for doubting it was suitable for Ms J to invest all of her pension assets in the investments FIFS offered based on a consideration of her circumstances at the time even if it is assumed they were recorded correctly.

Even if I'm wrong to say HTA and FIFS weren't unconnected as envisaged in COBS 2.4.8, and if FIFS could also show it received written confirmation from HTA that its products were suitable for Ms J, I think the information on which HTA's suitability assessment was based should have given it reasonable grounds to question the accuracy of that assessment.

the regulatory Principles

FIFS's representative has objected to my reference to the regulatory Principles, but I'm conscious the COBS rules aren't entirely prescriptive and their application to a given situation relies on a judgement about what was reasonable. It's here that I think the Principles are particularly relevant.

The Principles, which are set out in the FCA's handbook, were *"a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). Principles 2, 3 and 6 said:

> *Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*
>
> *Principle 6 – Clients' interests – A firm must pay due regard to the interests of its clients and treat them fairly.*

The Principles are an over-arching set of requirements that must be complied at all times and this makes them entirely relevant to the application of the rules in COBS. This view is supported by the relevant case law. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) Ouseley J said at paragraph 162:

> *The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules.*

And at paragraph 77:

> *Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules.*

Subsequently Jacobs J at paragraph 104 in *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* having set out some paragraphs of the British Banking Association judgment, including paragraph 162 set out above, said;

> *These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6.*

So, the Principles have a wide application, and I need to have regard to them when deciding what's fair and reasonable in the circumstances of this complaint.

The overall transaction promoted to Ms J involved investing her pension fund, which was held in a defined benefit scheme with the associated protections and guarantees, to an alternative unregulated, high-risk, investment that presented the possibility she could lose most or all of her money, thereby putting her at significant risk of detriment. She'd also be without the protection offered by the FSCS. In the circumstances, I don't think it was consistent with the Principles for FIFS to simply accept written confirmation from HTA (if it can in fact be demonstrated this was obtained) that the investments it was promoting were suitable for her. The description of the ongoing due diligence by FIFS's representative, that involved various meetings and detailed discussions of individual investors, indicates to me that it understood this point.

If FIFS had held detailed discussions with HTA about Ms J and its suitability assessment, I think a review of the documentation and her circumstances would have made it apparent that UCIS weren't likely to be suitable for her. In my view, the fact FIFS then went on to promote its investments anyway shows it either didn't discuss Ms J's situation with HTA in detail and simply relied on its word, or that it did discuss her situation with HTA - when it should have identified its products weren't suitable - and went on to promote to her anyway.

Whichever of these possibilities took place, I think it's clear FIFS acted inappropriately. Promoting investments to Ms J when it had reason to doubt they were suitable for her is a clear breach of the regulator's rules. On the other hand, failure to obtain sufficient evidence to confirm suitability before promoting its products was in my view contrary to the relevant rules and regulatory Principles requiring FIFS to act with appropriate care and diligence, to organise and control its affairs responsibly and to have due regard to her interests. Either way, I don't think it treated Ms J fairly.

other exemptions in COBS 4.12

I hope FIFS is now clear which of the exemptions in COBS 4.12 it was relying on when it decided to promote its products to Ms J. But in the event it has further thoughts on this, I'd like to clarify that I still don't think a category 7 exemption could have applied for the reasons set out in my first provisional decision. The latest submissions from FIFS's representative haven't given me any reason to question that view.

I've also reviewed the other exemptions listed in COBS 4.12.4 and the only other I can see that could conceivably apply here is category 8, which allowed promotion of UCIS to:

> *A person:*
>
> *(1) in relation to whom the firm has undertaken an adequate assessment of his expertise, experience and knowledge and that assessment gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the person is capable of making his own investment decisions and understanding the risks involved;*
>
> *(2) to whom the firm has given a clear written warning that this will enable the firm to promote unregulated collective investment schemes to the client; and*
>
> *(3) who has stated in writing, in a document separate from the contract, that he is aware of the fact the firm can promote certain unregulated collective investment schemes to him.*

In line with my comments on the category 7 exemption, I think the wording of the rule means the steps described had to be taken by the firm doing the promoting, so FIFS, before promoting UCIS. There's nothing in the description of the process by FIFS's representative or the other evidence provided that I believe shows FIFS carried out an assessment of Ms J's expertise, experience and knowledge, that it gave the necessary written warning, or that it obtained a separate statement from her. So again, that means FIFS couldn't rely on this exclusion to promote UCIS to her.

other issues:

In response to some of the other issues raised by FIFS's representative:

- It seems FIFS's representative may have misunderstood my role. The Financial Services and Markets Act 2000 (FSMA), under which the Financial Ombudsman Service was established, says in section 228:

  > *A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.*

  The same section of FSMA also says:

  > *When the ombudsman has determined a complaint he must give a written statement of his determination to the respondent and to the complainant.*
  >
  > *The statement must—*
  >
  > *(a) give the ombudsman's reasons for his determination;*

  To discharge these responsibilities effectively, a key consideration in assessing any case must be whether the respondent firm has treated the consumer making the complaint fairly. I think it would be very difficult to determine that without reference to the rules and regulatory Principles the firm is expected to adhere to. FIFS's representative seems to accept this when it refers to DISP 3.6.4, which says:

  > *In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:*
  >
  > *(1) relevant:*
  > *(a) law and regulations;*
  > *(b) regulators' rules, guidance and standards;*
  > *(c) codes of practice; and*
  >
  > *(2) (where appropriate) what he considers to have been good industry practice at the relevant time.*

  I have no power to fine or punish a firm for a breach of any of the above and maybe that's what FIFS's representative is thinking of when it says considering such issues are outside my remit. But it's absolutely appropriate for me to consider whether a breach has occurred and, if it's material to the outcome, to identify this in setting out the reasons for my decision as I'm required to do under section 228 of FSMA.

- I didn't question Ms J's recollections in the way that's been suggested. The comments quoted by FIFS's representative are from the background section of my provisional decision where I set out a summary of the arguments it had put forward. I didn't say I agreed with its comments.

  For the record, I don't particularly agree that it has been established Ms J's recollection of events is unreliable. But if there have been some areas of inconsistency in what she's said at times, that's not necessarily surprising given how long ago events occurred and how long the complaint has been going on.

  I have said that I find some Ms J's recollections *"compelling"*, but I was specifically referring to her comments about the assets recorded on the fact find that she says she didn't own. While I accept it may now be difficult for her to recall exactly when Mr B called her and how many

times, I think it's far less likely she would have forgotten that she owned an extensive portfolio of properties and investments.

I think it would also be unreasonable to think any inconsistency has only come from one of the parties involved in this complaint. As I've outlined above, FIFS hasn't been at all consistent about its sales process and the grounds on which it thinks its actions were justified. In May 2017, its representatives told us it relied on HTA having categorised Ms J as an elective professional client. But it now says that wasn't the case and it actually relied on a suitability assessment completed by HTA. There's a marked difference between these two positions.

In reaching my decision, I've been aware of any potential inconsistencies in the information provided by either party. But I don't believe any this has prevented me from conducting an appropriate analysis and reaching a fair and reasonable conclusion about what took place that's based squarely on the available evidence.

conclusions

In conclusion, I think the evidence shows FIFS failed to act in accordance with the rules covering the promotion of UCIS to Ms J and that it promoted its products to her when it should have identified it wasn't appropriate to do so. After a detailed consideration of the exemptions set out in COBS 4.12.4, I don't think the information that's been provided shows FIFS was able to rely on any of these to justify its actions. In connection with the category 2 exemption, FIFS hasn't provided evidence it received written confirmation from HTA that its products were suitable for Ms J, I don't think HTA was an unconnected firm in this context anyway, and I do think FIFS had reasonable grounds to doubt the accuracy of any suitability assessment it was informed of by HTA. It's for these reasons that I'm proposing to uphold this complaint.

Extract from first provisional decision:

My Provisional Findings

We've received extensive submissions in connection with this complaint, but I haven't tried to address every single point raised here. I've instead concentrated on what I think are the key issues that are central to the outcome.

My understanding of the submissions from FIFS' representative is that it's saying the transaction that led to the unregulated investment was a three-stage process involving three different businesses.

- The first stage was the initial contact by FIE, who gave no advice and discussed the benefits of investing in land generally without promoting a particular investment.

- The second stage involving an IFA, HTA, although the explanation of its role hasn't necessarily been consistent. On the one hand, it's been suggested HTA's role was to determine whether Ms J was a retail or professional client. On the other, it's also been suggested HTA's role was to provide advice on whether an investment was suitable for Ms J or not. HTA also arranged the SIPP and the transfer of Ms J's pension benefits.

- The final stage was the promotion of particular land investments by FIFS.

In respect of each of these stages:

- Stage 1 – FIE was a separate company to FIFS. Although it later became an appointed representative of FIFS, this wasn't until 24 August 2012 – after Ms J's pension benefits were transferred and her investment finalised. Prior to this date, FIE appears to have been an unregulated business and that means any complaint about its actions falls outside our jurisdiction and I have no power to investigate or make an award.

- Stage 2 – HTA was a regulated business in its own right and its actions have already been considered in a separate complaint. It's not appropriate for me to comment on HTA's actions in this decision, except where this is relevant to the outcome of the complaint about FIFS.

- Stage 3 – FIFS was a regulated business and it's the actions of this business after HTA had carried out its part of the overall transaction that I'm considering in this decision.

Jurisdiction

The rules I must follow in assessing all aspects of this complaint are set out in the Dispute Resolution (DISP) rules, published as part of the FCA Handbook. Under DISP 2.3.1, I can only consider a complaint under our compulsory jurisdiction if it relates to:

- an act or omission by a firm in carrying on one or more of the listed activities, which includes regulated activities; or

- any ancillary activities carried on by a firm in connection with those activities.

Regulated activities are specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO). Along with other investors, Ms J invested in plots of land with a view to them gaining planning permission and being sold at a profit in the future. It seems to be accepted that the scheme is a UCIS. Units in a collective investment scheme are specified as investments (article 82).

Various regulated activities set out in the RAO were carried out by FIFS in connection with the UCIS Ms J invested in. These include establishing and operating a collective investment scheme (article 51), arranging deals in investments (article 25), and agreeing to arrange deals in investments (article

64). The submissions from its representative also indicate FIFS was involved in promoting its UCIS to Ms J, once HTA had completed its part of the process. The FCA defines a financial promotion simply as:

> *an invitation or inducement to engage in investment activity . . . that is communicated in the course of business*

While promoting investments isn't specifically listed in the RAO as a regulated activity, I'm satisfied it was essentially part of or ancillary to the other activities I've identified and that FIFS was involved in. I think this view is supported by section 8.23.2 of the Perimeter Guidance Manual (PERG), which says:

> *Anyone who is carrying on a regulated activity is likely to make financial promotions in the course of or for the purposes of carrying on that activity.*

With these points in mind, I'm satisfied the complaint is about an activity we can consider and that it falls within our jurisdiction.

Merits

As FIFS' representative has identified, there were rules covering the promotion of UCIS investments at the time Ms J invested. The starting point in section 238 of FSMA was that:

> *An authorised person must not communicate an invitation or inducement to participate in a collective investment scheme.*

But there were exceptions to this. COBS 4.12.1 set out that:

> *A firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the restriction on promotion in section 238 of the Act if the promotion falls within an exemption in the table in (4), as explained further in the Notes.*

The table referred to in COBS 4.12.4 set out various types of promotion to which this exemption could apply. FIFS appears to believe promotion to Ms J was covered by the category 7 exemption relating to elective professional clients.

Under a category 7 exemption, promotion of UCIS was allowed to:

> An eligible counterparty or a professional client.

The definition of a professional client included elective professional clients. To have been appropriately considered and treated as an elective professional client, all three of the criteria set out in COBS 3.5.3 would have needed to be satisfied. This says:

> **Elective professional clients**
>
> A firm may treat a client other than a local public authority or municipality as an elective professional client if it complies with (1) and (3) and, where applicable, (2):
>
> (1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");
>
> *(2)* in relation to MiFID or equivalent third country business in the course of that assessment, *at least two of the following criteria are satisfied:*

(a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;

(b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;

(c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;

(the "quantitative test"); and

(3) the following procedure is followed:

(a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

(b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

(c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

FIFS's representative seems to be saying the process was for HTA to determine whether Ms J was a professional or retail client and that it then relied on that assessment to promote the investment. But on reading the rules carefully, I don't think that was a valid approach. COBS 3.5.3 specifically says a firm could treat a client as an elective professional client if *'it'* complied with the relevant requirements. My interpretation of this is that the firm involved in promoting UCIS needs to follow the appropriate steps *itself*. So, a valid assessment by HTA might have permitted HTA to promote UCIS but not FIFS or anyone else.

I think this interpretation is illustrated in the context of the third point above. This says a client must state in writing to *the firm* – which, when read in the context of the rest of the rule, I think can only reasonably be interpreted as referring to the firm promoting UCIS, in this case FIFS – that he/she wants to be treated as a professional client. I think the same could be said of the requirements for *the firm* – in this context FIFS alone – to provide a clear written warning of the protections being given up and to obtain confirmation of the client's understanding of this.

The rules do not say that a firm can treat a consumer as a professional client because another regulated firm classified them as such. I don't think they allow a firm to delegate its regulatory obligations in this way. FIFS seems to accept it didn't carry out the required steps itself to identify that Ms J satisfied the criteria for an exemption from the general prohibition covering the promotion of UCIS. So it shouldn't have promoted to her.

Further, I think the available evidence indicates Ms J wouldn't have met the criteria to be considered an elective professional client if FIFS had completed a valid assessment as it should have.

Ms J disputes the accuracy of most of what was recorded about her circumstances at the time in the fact find and assessment of expertise, experience and knowledge documents. While these record she had an investment portfolio and some experience in this area, she says she didn't have any assets aside from her home and pension. I find Ms J's recollection of her circumstances compelling. But even if the contents of the documentation are accepted as showing she satisfied part (b) of the qualitative test, she doesn't appear to have satisfied either of the other criteria. I've seen no suggestion that she'd carried out relevant transactions at the required frequency or that she worked or had worked in a relevant professional position.

In view of the fact FIFS didn't carry out a valid assessment to determine Ms J satisfied the criteria for one of the exemptions that would have allowed it to promote UCIS to her. And given the available evidence appears to show she wouldn't have met the criteria if an assessment had been completed, I think it's clear that FIFS should have concluded it couldn't promote UCIS to her in any event.

Even if FIFS (wrongly in my view) felt it was entitled to rely on HTA having correctly assessed Ms J as a professional client, it doesn't appear to have obtained any documentation from HTA to confirm this had been done in accordance with the rules. For example, I've seen nothing to show it obtained copies of an assessment of her expertise, experience and knowledge, or anything to confirm she'd carried out the relevant types of transactions at the required frequency, or that she'd worked in a relevant professional position. I've also seen nothing to show FIFS obtained copies of a written warning given to Ms J about the protections and rights she was giving up or a signed statement confirming she was aware of the consequences of this.

The circumstances in which it's appropriate for one firm to rely on information provided by another is addressed in COBS 2.4. In my view, the relevant sections are COBS 2.4.6 to 2.4.8. I don't think COBS 2.4.4 applies as that specifically refers to a firm receiving *"an instruction"* from another, which wasn't the situation here. At the time Ms J invested, the rules said:

> ***Reliance on others: other situations***
>
> ***COBS 2.4.6***
>
> *(1) This rule applies if the rule on reliance on other investment firms (COBS 2.4.4 R) does not apply.*
>
> *(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 2.4.7***
>
> *(1) In relying on COBS 2.4.6 R, a firm should take reasonable steps to establish that the other person providing written information is not connected with the firm and is competent to provide the information.*
>
> *(2) Compliance with (1) may be relied upon as tending to establish compliance with COBS 2.4.6 R.*
>
> *(3) Contravention of (1) may be relied upon as tending to establish contravention of COBS 2.4.6 R.*
>
> ***COBS 2.4.8***
>
> *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.*

So, for FIFS to rely on information provided by HTA, the rules required it was *reasonable* for it to do so. In considering this point, I think it's appropriate to refer to the FCA's Principles for Businesses. The Principles, which are set out in the FCA's handbook, were *"a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). Principles 2, 3 and 6 said:

> *Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*

> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*
>
> *Principle 6 – Clients' interests – A firm must pay due regard to the interests of its clients and treat them fairly.*

In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) Ouseley J said at paragraph 162:

> *The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules.*

And at paragraph 77:

> *Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules.*

Subsequently Jacobs J at paragraph 104 in *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* having set out some paragraphs of the British Banking Association judgment, including paragraph 162 set out above, said;

> *These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6.*

So, the Principles have a wide application, and I need to have regard to them when deciding what's fair and reasonable in the circumstances of this complaint.

The transaction promoted to Ms J involved investing her pension funds, which were held in a defined benefit scheme with associated protections and guarantees, to an alternative unregulated, high-risk, investment that presented the possibility she could lose most or all of her money, thereby putting her at significant risk of detriment. In the circumstances, I don't think it was consistent with the Principles for FIFS to simply accept HTA's word that Ms J was an elective professional client and could reasonably be treated as such without at least seeing evidence to show all of the requirements set out in COBS 3.5.3 had been satisfied. Failure to obtain sufficient evidence to confirm Ms J actually met the criteria for an elective professional client before promoting UCIS to her was in my view contrary to the Principles requiring FIFS to act with appropriate care and diligence, to organise and control its affairs responsibly and to have due regard to her interests. In short, I don't think it treated her fairly.

In conclusion, and by its own admission, FIFS didn't comply with COBS 3.5.3 before promoting UCIS to Ms J because it didn't carry out its own assessment to determine whether she was a professional client. Even if it felt another firm had carried out that assessment and that it was entitled to rely on this – which I don't think it was for the reasons I've explained – I don't believe it treated her fairly by simply

accepting HTA's word without obtaining evidence to show the assessment had been conducted properly and all of the requirements had been met. Given the evidence appears to show Ms J didn't satisfy all of the criteria in COBS 3.5.3, I have to conclude that whatever happened, FIFS should have decided it couldn't promote its investments to her and refrained from doing so.