Complaint

Mr S is complaining about Falcon International Financial Services Ltd (FIFS). In his complaint form, he says he believes he received unsuitable advice to transfer his pension benefits to a self-invested personal pension (SIPP) to fund high-risk, unregulated investments. In previous correspondence with one of the firms involved in the sale, he expressed the view that he'd been the victim of a *"scam"*.

Background

Following events that Mr S says started with an unsolicited call from a Mr B, he transferred benefits held in two defined benefit occupational pension schemes and a personal pension with Scottish Widows to a SIPP with Stadia Trustees (Stadia). A Stadia application was completed on 9 March 2012 and the SIPP was established a week later. The benefits from Mr S's three pensions (totalling around £118,000) were then transferred into the SIPP. This process was completed on 8 August 2012.

On the same day the final transfer was completed, £105,000 of the money in the SIPP was used to purchase an investment in FR Land, an unregulated scheme investing in land. The original application for the investment was dated 9 March 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 transfers and received a fee from Stadia for its services.

In making his complaint, Mr S told us he received a cold call from Mr B from Falcon. I understand Mr B worked for Falcon International Estates Limited (FIE) and, according to the description of the sales process provided by FIFS's representative, that's who he was representing at the time. Mr S says he normally wouldn't have spoken to someone approaching him in this way, but that he listened to what Mr B had to say because at the time there was a potential scandal in the news about his occupational pension and how it had invested scheme funds.

Mr S says he was told Mr T of HTA would be involved, but that he never met or spoke to him. He says there was no discussion about whether the pension transfer and investment that were being proposed were suitable for his needs and he wasn't offered the opportunity to have such a conversation. Instead he says everything was done through Mr B. He says there was lots of paperwork to complete and that he went to Mr B's office to do this, where the documents were left marked with post-it notes where he needed to sign. He says Mr B was *"pushy"* about getting the documentation signed but didn't explain what any of it was or what it meant.

Mr S has since realised the investment might not have been suitable for his needs and made a complaint about both FIFS and HTA. His complaint about HTA was upheld by one of my colleagues. He felt Mr S shouldn't have been classified as an elective professional client and that HTA had a responsibility to give suitable advice to him as a retail client. If suitable advice had been given, he felt HTA should have advised Mr S against transferring his pension benefits and the associated investment. I understand Mr S eventually received compensation totalling £102,000 from HTA. But this is significantly less than the amount he believes he's lost as a result of the pension transfers and unregulated investment.

Our adjudicator recommended this complaint be upheld. She didn't believe FIFS should have promoted the investment to Mr S 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 Mr S and referred him to HTA for a suitability assessment on his 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.

- FIE was a separate company in The Falcon Group that 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 contacted Mr S, 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 Mr S in relation to his 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.

- Mr S, having been speculatively approached by Mr B, expressed an interest in investing and Mr B, having completed HTA's fact find document, referred him to HTA. The purpose of this was so that HTA, an IFA, could undertake a suitability assessment to determine whether Mr S was suited to an investment. The responsibility for assessing the risks of an investment for Mr S by reference to his 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 Mr S) 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 Mr S wouldn't have put his pension funds at risk if he'd understood the risks associated with the investments is at odds with the fact find he signed that said he was willing to accept a high level of risk with his 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 suggestion that HTA carried out its role at arm's length isn't correct. Having received the fact find information from FIE, HTA prepared a letter of authority for Mr S to sign, which it then sent to his pension providers to obtain information about his pensions. Once this process had been completed, HTA would directly contact the SIPP provider to set up the new SIPP. FIE wouldn't be involved in the SIPP process as that would be undertaken by HTA and it had the information needed about his pension arrangements to do that.

- The adjudicator referred to false information being included in the fact find, but the document on FIFS's records doesn't refer to many of the assets she mentioned. A copy of this was provided.

- FIFS can't comment on whether Mr S 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 Mr S's identity, including that photographs on his passport and driving licence were a true likeness, indicates there was a meeting of some kind.

- In any event, even if Mr S 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.

- The investment scheme hasn't failed and Mr S hasn't been left with *"a worthless parcel of land"*. The land has at least maintained its value and remains a viable investment. Indeed, it's understood planning permission has been granted in relation to a separate land investment offered, which increases its potential value. Further, Mr S's investment hasn't become illiquid, it was always illiquid. This was stated in the fact find and should have been explained to Mr S by HTA as part of its suitability assessment and independent financial advice.

FIFS's representative then provided further submissions relating to the promotion of the land investments. It provided a letter and flow chart obtained from FIFS's compliance consultant 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 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 unregulated collective investment schemes (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, with the typographical errors pointed out by FIFS's representative corected, 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 Mr S, 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 him before promoting it.

- The reasonable steps FIFS took to ensure the investment was suitable for Mr S included:
    - referring him 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 Mr S'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 Mr S'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 Mr S. 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 Mr S despite the fact HTA had already done it.

- I've effectively said that in promoting the investment to Mr S, 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 Mr S as a professional client*, which isn't correct as it also provided investment advice to him; and
  - I also said that I didn't think Mr S would have otherwise transferred his 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 him to do this.

- In terms of Mr S's conduct, there are clear references to him providing incorrect information to the adjudicator. I should also be aware that Mr S has lied to us on several occasions and behaved in a rude and unacceptable way towards the employees of FIFS during this process. I don't seem to have taken this into account.

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:

FIFS didn't accept my conclusions 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.*

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

- 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 Mr S'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 Mr S 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 him. HTA also arranged the SIPP and the transfer of Mr S'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.

This is broadly consistent with what HTA said took place in its letter to Mr S dated 13 August 2013:

> *Although we did not meet we spoke on the phone on several occasions regarding your purchase of land through a SIPP. My function was initially to qualify you as someone for whom the investment was suitable and then once that was established you were sent an Investment Memorandum and at that time after receiving letters of authority from you, we obtained information regarding your pension schemes with* [names of three pension scheme providers].

Although in another letter to our adjudicator dated 20 April 2015, in connection with Mr S'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 [Mr S]'s case, however, the deferred benefit that [Mr S] 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 [Mr S] about whether to effect the transfer, and he decided to proceed with the transfer on an execution only basis.

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 Mr S's investment was established.

Jurisdiction

Mr S believes he's been the victim of a scam and I think that shows he has concerns about all aspects of the sales process by which his money was moved from his original pensions to an unregulated investment via a SIPP. So in addition to any advice he received from HTA, I think his complain incorporates a number of other issues, including FIE's initial contact and also the promotion of his investment.

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 Mr S'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 Mr S. 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 Mr S invested and that's the issue I must address here. So I don't accept that it would be irrational for me to conclude Mr S'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 Mr S 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 Mr S. I think it's relevant to note at this point that by relying on this exemption alone, FIFS would effectively be accepting Mr S 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 Mr S 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 Mr S. 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 Mr S.

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 Mr S 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 him. 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 Mr S before promoting it to him. 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 Mr S 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 Mr S were suitable for him, 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 Mr S 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.

FIFS has only provided an extract from an application form with the above declaration signed by HTA on 9 March 2012, although the extract provided doesn't identify this particular application as being that for Mr S's investment. But even if this is Mr S's application, under the sales process described, it's not reasonable to think the application and declaration were completed before FIFS had promoted the investment as part of the third stage of the sales

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 Mr S before it promoted them to him.

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 Mr S to inform it that HTA had completed an appropriate suitability assessment that concluded the products to be promoted were suitable for him. 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 Mr S were suitable for him, 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 expectation 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 representative, 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 Mr S, FIFS wouldn't have been able to promote its investments to him and wouldn't have made any money. And if FIFS didn't promote its investments to Mr S, there wouldn't have been any reason for him to transfer his 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. 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 Mr S 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 Mr S?

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 Mr S based on information provided by HTA that it had completed a suitability assessment and concluded its products were suitable for him. 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 FIE completing a fact find for HTA, so it seems that everybody understood the adviser needed to know about Mr S's 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 Mr S, 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 completing a fact find, I think the evidence indicates no appropriate suitability assessment took place. Both Mr S and HTA are consistent in their recollection that they didn't even meet and HTA's comments to our adjudicator in its letter of 20 April 2015 appear to suggest that suitability may not have been considered on this occasion because HTA wasn't authorised to advise on pension transfers.

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 Mr S and should have concluded that it couldn't promote to him.

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 Mr S. 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 Mr S. So it follows that it shouldn't have promoted to him.

The overall transaction involved Mr S moving his pension fund, almost all of which was held in defined benefit schemes with the associated protections and guarantees, to an alternative unregulated, high-risk, investment that presented the possibility he could lose most or all of his money. This put him at significant risk of detriment. He'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 Mr S 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 he'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 Mr S 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 Mr S 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 Mr S as a professional client or to promote its investments to him on that basis.

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

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

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

conclusions

As I've said above, the key consideration in this case is whether FIFS was entitled to promote the investment to Mr S. 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 Mr S. 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 Mr S fairly. This is the reason I'm upholding his complaint.

Putting Things Right

The principal aim of any award I make is to return Mr S to the position he'd be in if FIFS hadn't promoted its UCIS to him when it shouldn't have. I don't think it's likely that Mr S would have made this investment off his own back and if FIFS hadn't promoted it to him, I'm satisfied it wouldn't have taken place. Further, I don't think he would have transferred his pension benefits to the SIPP if he 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 Mr S transferring his pension benefits and investing in UCIS. But I think any loss he'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 remaining loss. I'm conscious Mr S 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.

Further to my first provisional decision, Mr S has 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 him closing it if he wants.

for the benefits Mr S transferred out of occupational schemes

I currently believe a fair and reasonable outcome would be for FIFS to put Mr S, as far as possible, into the position he'd now be in if it hadn't promoted investments to him when it shouldn't have. I consider he would have remained in his occupational schemes. 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 Mr S'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 Mr S. 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 Mr S.

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

for the benefits Mr S switched from a personal pension

To compensate him fairly for this part of the money he transferred to his SIPP, FIFS should obtain the notional transfer value of Mr S's personal pension plan if he'd remained invested and not transferred to the SIPP from the former provider. That should be the value at the date of my final decision.

If there are any difficulties in obtaining a notional valuation, then the FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market

Income total return index) should be used instead. This is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

fair compensation and payment

To calculate Mr S's loss, FIFS should compare the value of all benefits lost as a result of transferring his occupational schemes and personal pension with the value of the SIPP at the date of my final decision. If this calculation demonstrates a loss, the compensation (less the amount of compensation already received from HTA in respect of his complaint about its actions) should if possible be paid into Mr S's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

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

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

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

additional compensation

I think the problems Mr S has experienced with his pension arrangements as a result of FIFS's actions have caused him considerable unnecessary trouble and upset over a prolonged period and that he should be compensated for that. The precise impact of this situation on Mr S, 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 Mr S (not into his 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 Mr S 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 Mr S 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 Mr S 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 Mr S the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr S.

If Mr S accepts my decision, the money award would be binding on FIFS. My recommendation would not be binding on FIFS. Further, it's unlikely Mr S would be able to accept my decision and go to court to ask for the balance. Mr S may want to consider getting independent legal advice before deciding whether to accept my final decision.

My Final Decision

My final decision is that I uphold this complaint.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S 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 Mr S 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 him or not. HTA also arranged the SIPP and the transfer of Mr S'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 Mr S's pension benefits were transferred and his 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

Mr S believes he's been the victim of a scam and I think that shows he has concerns about all aspects of the sales process by which his money was moved from his original pensions to an unregulated investment via a SIPP. So in addition to any advice he received from HTA, I think his complain incorporates a number of other issues, including FIE's initial contact and also the promotion of his investment.

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 Mr S'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 Mr S. 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 Mr S 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 Mr S. While earlier correspondence did mention a suitability assessment, it seemed clear from that received in May 2007 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 Mr S 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 Mr S 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 Mr S 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 Mr S 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 him. 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 Mr S 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 Mr S were suitable for him, 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 Mr S 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.*

FIFS has only provided an extract from an application form with the above declaration signed by HTA on 9 March 2012. But the extract provided doesn't identify this particular application as being that for Mr S's investment. I think it's also relevant to note that the application was presumably completed after the investment had been promoted so it doesn't necessarily demonstrate this assessment was completed before promotion took place as required under the rules.

FIFS hasn't provided anything else in writing from HTA to confirm it had completed an appropriate assessment that concluded the products to be promoted were suitable for him 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 Mr S, FIFS wouldn't have been able to promote its investments to him and wouldn't have made any money. And if FIFS didn't promote its investments to Mr S, there wouldn't have been any reason for him to transfer his pensions 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 Mr S?

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 Mr S 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 Mr S wasn't assessed as 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, I think there were also other reasons why FIFS should have doubted HTA's assessment if it had indeed received written confirmation that the product it was proposing to promote was suitable for Mr S.

Mr S has disputed some of the information contained in the fact find, particularly relating to investments attributed to him that he says he didn't own, provided by HTA in connection with his complaint about that firm. In response to the adjudicator's original assessment, FIFS provided a copy of the fact find document it says was sent to HTA and this is noticeably different.

The fact find FIFS says was sent to HTA recorded that Mr S worked for a local authority in a job that doesn't appear to have been connected to financial services, earned £30,000 per year, had a buy-to-let property and investments worth £100,000. It also records that he had benefits in three pension schemes, all of which were transferred to his SIPP to fund his investment with FIFS. The fact FIFS has been able to supply this information indicates it had access to it at the time.

The investment FIFS promoted to Mr S 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 he 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.

Based on the information contained in the fact find it says was presented to HTA, I think it's difficult to conceive how anyone at FIFS could reasonably have thought it would have been suitable for Mr S to invest in its products.

The fact find does include an assessment of Mr S's attitude to risk, which was recorded 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.*

But I note this assessment had already been completed on the version of the document FIFS says it sent to HTA. According to the process as described by its representative, that means the assessment on the fact find was carried out by an unregulated introducer rather than 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 made it clear to Mr S that he'd end up investing in products where he could lose all of his capital and he'd have no FSCS protection because the investment FIFS planned to promote to him was unregulated..

Above where Mr S 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.*

But as with the attitude to risk assessment, I don't think this clearly explained all the risks he'd be exposed to either. It simply said his investment may not be readily realisable and that access to reliable data for valuations may be restricted. Again, it didn't tell Mr S there was a chance he could lose all of his money and that he'd have no FSCS protection.

Our adjudicator asked Mr S why he signed various documents, including the fact find and he told her there were lots of papers he needed to sign. He says all dealings with HTA were carried out via Mr B. And that Mr B would email him when paperwork needed signing and he'd go to the office, where it would be have been left waiting and marked with a post-it note where he needed to sign. He says nobody explained to him what he was signing or what it meant.

It's difficult for me to know exactly what happened. But I note HTA wrote to Mr S on 13 August 2013 and said:

> *Although we did not meet we spoke on the phone on several occasions regarding your purchase of land through a SIPP.*

Presumably Mr S had to sign paperwork somewhere and if he didn't meet with HTA, I think this adds weight to his recollection that it was signed at Mr B's offices. Wherever the documentation was signed, I'm persuaded that Mr S probably wouldn't have understood from the fact find – even if he had read it before signing it – the implications of the risk assessment carried out by the introducer or the risk warning it contained. As I've said, neither of these sections of the fact find, or anything else in the document, explained some of the key risks he was about to be exposed to. If this had been explained to him, I think it's likely he would have thought differently about signing the document.

After considering the contents of the original fact find sent to HTA, it doesn't paint the picture of an experienced or sophisticated investor with the capacity to lose a significant amount of money or the inclination to put a sum that accounted for all of his pension benefits and a high proportion of his overall capital in an unregulated investment where he could lose everything without recourse to the FSCS.

Even if I disregard what Mr S has said about the contents of the fact finds and accept the alternative version provided by HTA that records he owned a small amount of additional investments as being accurate, I don't think this could reasonably have given any reassurance that what was being proposed was suitable for him either. I still don't think it could reasonably have been seen that an investment in UCIS, particularly for such a large part of his pension assets that were previously been held in defined benefit schemes and benefitted from the various protections and guarantees that entailed, was suitable for him.

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 Mr S, I think the information it knew and had access to should have given it reasonable grounds to question the accuracy of the suitability 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 Mr S involved investing his pension funds, almost all of which were held in defined benefit schemes with the associated protections and guarantees, to an alternative unregulated, high-risk, investment that presented the possibility he could lose most or all of his money, thereby putting him at significant risk of detriment. 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 him. 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 Mr S and its suitability assessment, I think a review of the documentation and his circumstances, whichever version of the fact find was relied upon, would have made it apparent that UCIS weren't likely to be suitable for him. In my view, the fact FIFS then went on to promote its investments anyway shows it either didn't discuss Mr S's situation with HTA in detail and simply relied on its word, or that it did discuss his situation with HTA - when it should have identified its products weren't suitable - and went on to promote to him anyway.

Whichever of these possibilities took place, I think it's clear FIFS acted inappropriately. Promoting investments to Mr S when it had reason to doubt they were suitable for him 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 his interests. Either way, I don't think it treated Mr S 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 Mr S. 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 Mr S's expertise, experience and knowledge, that it gave the necessary written warning, or that it obtained a separate statement from him. So again, that means FIFS couldn't rely on this exclusion to promote UCIS to him.

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 don't agree that it's been established Mr S has *'lied'* in making his complaint. If there have been some areas of inconsistency in what he'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 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 Mr S 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 terms of Mr S's conduct, I have seen an email to Mr B in January 2017 when he spoke extremely bluntly and used colourful language to express his feelings. But I'm not sure why FIFS's representative has brought this up now as I don't think the language he used in an email several years later is at all relevant to my assessment of what happened when his investment was arranged. But in any event, the circumstances were that Mr S was concerned he'd lost his entire pension and for his future security as a result of Mr B's actions. In that situation, I think it's understandable that he felt anger towards Mr B and the business he represented. And I think his feeling that he'd been treated unfairly is vindicated by the conclusions I've set out here.

In reaching my decision, I've been aware of any potential inconsistencies in the information provided by either party and also of the emotion involved. But I don't believe any of 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 Mr S and that it promoted its products to him 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 Mr S, 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'S 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 Mr S 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 Mr S or not. HTA also arranged the SIPP and the transfer of Mr S'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 Mr S's pension benefits were transferred and his 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, Mr S 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 Mr S 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 Mr S, 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'S representative has identified, there were rules covering the promotion of UCIS investments at the time Mr S 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 Mr S 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 Mr S 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 Mr S satisfied the criteria for an exemption from the general prohibition covering the promotion of UCIS. So it shouldn't have promoted to him.

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

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

In view of the fact FIFS didn't carry out a valid assessment to determine Mr S satisfied the criteria for one of the exemptions that would have allowed it to promote UCIS to him. And given the available evidence appears to show he 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 him in any event.

Even if FIFS (wrongly in my view) felt it was entitled to rely on HTA having correctly assessed Mr S 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 his expertise, experience and knowledge, or anything to confirm he'd carried out the relevant types of transactions at the required frequency, or that he'd worked in a relevant professional position. I've also seen nothing to show FIFS obtained copies of a written warning given to Mr S about the protections and rights he was giving up or a signed statement confirming he 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 Mr S 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 Mr S involved investing his 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 he could lose most or all of his money, thereby putting him 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 Mr S 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 Mr S actually met the criteria for an elective professional client before promoting UCIS to him 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 his interests. In short, I don't think it treated him fairly.

In conclusion, and by its own admission, FIFS didn't comply with COBS 3.5.3 before promoting UCIS to Mr S because it didn't carry out its own assessment to determine whether he 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 him 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 Mr S 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 him and refrained from doing so.