Financial Ombudsman Service

complaint

Mr H has complained about advice he received from Portafina LLP to transfer a Stakeholder pension plan to a Self-Invested Personal Pension ('SIPP'). The funds within the SIPP were then used to invest in several unregulated collective investment schemes ("UCIS").

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

background

Mr H says he was approached by an advisory firm ("Firm C") in 2013, who offered him pension advice. Firm C advised Mr H to transfer three personal pension plans ("PPP") from a single pension provider to a SIPP with Firm T.

Mr H had a further stakeholder pension plan, established by his then current employer and to which both Mr H and his employer were making monthly contributions. Firm C mistakenly believed that the stakeholder plan was an Occupational Pension Scheme ("OPS") which would require the advising firm to have the relevant permissions from the Financial Conduct Authority ("FCA") before advice could be provided.

At that time Firm C was an appointed representative (AR) of a regulated business, Firm S. Firm S was authorised by the FCA to provide investment advice, but neither Firm S or Firm C had the required permissions to provide advice on OPS transfers. Therefore, Mr H was introduced by Firm C to Portafina LLP for advice about transferring this plan.

After obtaining details of the stakeholder plan, Portafina explained to Firm C that it wasn't an OPS and there were no safeguarded benefits. Therefore, Firm C could advise on the transfer, as it had with the PPPs. However, as Portafina had already spent time on Mr H's case, it was agreed that it would continue with the pension switch advice but it wouldn't provide advice on the subsequent investments in the new pension plan; this would be provided by Firm C.

Portafina completed a fact find by telephone with Mr H. It was also provided with a copy of Firm C's fact find and attitude to risk questionnaire, which Firm C had completed some months before. These documents recorded the following information about Mr H:

- He was approaching age 54, married with four children.
- His intention was to retire at age 66 but he was also considering taking his tax-free cash at age 55.
- He worked full time earning £27,000 per annum and had been employed by the same firm for 17 years.
- His wife was employed as a teacher.
- He owned a house with his wife. The property was worth approximately £165,000 and the outstanding mortgage was £152,000 i.e. 92% of the estimated property value. It was part repayment and part interest-only with a monthly repayment of £832. The remaining term was unclear but it was documented that the mortgage went beyond Mr H's intended retirement age of 66.
- He had a joint life insurance plan with a sum assured of £200,000.
- He had a joint net disposable income of £500 per month, total cash savings of £1,000 and Mr H also had lease agreements on two cars.

- the PPP's that had previously been transferred to the SIPP by Firm C were worth approximately £100,000.
- The stakeholder plan was worth approximately £33,000, to which Mr H was also contributing £27.80 gross per month and his employer was contributing £99.98 per month.
- the stakeholder plan was invested in a single fund, a mixed investment (40%-85%) managed fund.
- He felt that he would need £20,000 per annum before any adjustment for inflation to retire on, and he felt this was achievable.

According to the risk profiling questionnaire completed by Portafina, Mr H's attitude to investment risk was moderate to adventurous. Firm C's own risk profiling questionnaire recorded that Mr H had very little understanding or knowledge of investing.

A few weeks later, in March 2015, Portafina issued its suitability report. It stated that with regard to Mr H's stakeholder plan his objectives were to consolidate his pension plans, to have more control and flexibility, to move to a cheaper scheme and to be able to pass death benefits to his family.

Portafina recommended that to meet his stated objectives, Mr H should transfer his stakeholder to a SIPP with Firm N and both Mr H and his employer would continue to make regular contributions at the existing level.

The stakeholder plan was recorded to have an annual management charge of 1% per and the existing fund investment performance was on average 11.83% per annum over the previous five years. Mr H's attitude to risk was confirmed as moderately adventurous, which was described as:

"*Moderately Adventurous investors typically have moderate to high levels of financial knowledge and will usually keep up to date on financial issues. They will usually be fairly experienced investors, who have used a range of investment products in the past.*

In general. Moderately Adventurous investors are willing to take on investment risk and understand that this is crucial in terms of generating long-term return. They are willing to take risk with a substantial proportion of their available assets.

Moderately Adventurous investors will usually take gambles where they see the potential rewards as being attractive. They will usually be able to make up their minds on financial matters quite quickly. While they can suffer from regret when their decisions turn out badly, they are usually able to accept that occasional poor outcomes are a necessary part of long term investment."

With regard to the proposed investment strategy for the new SIPP the suitability report stated, "*We do not provide any advice in relation to the funds and investments within your new plan as this recommendation will be made by [Firm C*]."

The capacity loss section of the suitability report stated "*upon review of your answers to these question (investment time horizon, income relative to spending needs, value of assets, ease of reducing the amount spent, how flexible was the retirement date, would there be financial support from a spouse) I believe you have a suitable level of Capacity for Loss for the recommendation we have made for you*."

The investment recommendations section stated "*Due to your risk rating of Moderately Adventurous, your stated age of retirement and your needs and objectives we would recommend that you invest in the following fund asset classes, however, [Firm C] will contact you in due course to discuss the actual fund investment portfolio. Please note until this time, your funds will be initially invested in 100% Cash Deposit with [Firm N] upon transfer*."

The Alternatives section of the suitability report stated, "*I have not recommended a stakeholder Pension because you wish to make contributions of £22.24 net per month to a new plan with [Firm N*]."

The Fees and Charges section stated that Portafina would charge an initial advice fee of 5% of the transfer value, of which 2% would be paid to Firm C as part of the introducer's agreement it had with it. Firm C would discuss its ongoing review service and the cost of its ongoing advice with Mr H in the very near future. The ongoing charge of Firm N's SIPP would be 0.5% of the fund value per annum plus an initial set up fee of £180.

Mr H accepted Portafina's advice and signed the necessary paperwork for the transfer to proceed. On the same day Mr H also signed a transfer of agency form to appoint Firm C as the new servicing agent for the Firm N SIPP. Three weeks later, at the end March 2015, the transfer from the stakeholder to the SIPP was completed. The transfer value was £34,634.25 and the initial fee was 5% of the transfer value was paid.

A week later on 8 April 2015 Firm C wrote a Risk Tolerance Report for Mr H. The Report recommended that Mr H invest in the Governed Portfolio, which would comprise of the following investments:

Fund name	**% invested**	**Notes**	**Firm C risk rating**
Cash	5%	Regulated	Low
Marlborough ETF Global Growth P Fund Acc (iFunds Red)	5%	Regulated	High
Spectrum Thesis iFunds Orange A Acc	25%	Regulated	Medium
Spectrum Thesis iFunds Green A Acc	20%	Regulated	Low
Spectrum Thesis iFunds Indigo A Acc	10%	Regulated	Low
Lakeview Holdings	6%	Unregulated	High
Real Estate Investments USA Plc	6%	Unregulated	High
Motion Pictures	6%	Unregulated	High
Strategic Residential	6%	Unregulated	High
Timbaba	2.5%	Unregulated	High
Brisa	2.5%	Unregulated	High
Biomass Investments Plc	6%	Unregulated	High

A few weeks later the funds in the Firm N SIPP were invested in line with Firm C's recommendation.

In February 2018, Mr H complained to Portafina that he'd been given unsuitable advice to transfer his pension. In summary he complained that:

- The transfer recommendation was unsuitable because it did not fully explain how the transfer met his needs and demands, did not explain the possible disadvantages and failed to adequately compare the benefits to be paid between the existing and recommended pension plans.

- Portafina failed to consider the subsequent investments and the FCA thematic review of September 2009 confirms that Portafina are not entitled to excuse themselves from providing full investment advice.
- The investments would not have taken place were it not for Portafina's recommendation to transfer.
- He wasn't a moderately adventurous investor. He was medium risk.
- He was not high net-worth or a sophisticated investor.
- Many of the resulting investments were unsuitable because they were high risk and illiquid and did not match his attitude to risk.
- The risks of the investments were not fully explained.
- He was not fully informed in respect of the fees charged for the advice.
- Contingent charging by Portafina created a conflict of interest as Portafina would only receive its fee if it recommended the transfer.

Portafina reviewed the complaint but it didn't think it was at fault. It said that:

- It was only responsible for the transfer advice. The Suitability Report explained that Firm C would provide the investment advice.
- Mr H's attitude to risk was assessed using third party software. Furthermore, the assessment was discussed with Mr H who could have objected to it at any time.
- The transfer met Mr H's objectives of a cheaper plan and to pass the whole of the funds to his spouse upon death.
- Firm C was provided with all the information needed to provide the recommended investment portfolio.
- Risks were disclosed and sufficient information was provided for Mr H to make an informed decision.
- Portafina ensured Mr H had sufficient capacity for loss.

Mr H didn't accept Portafina's explanation so the matter was referred to our service for review.

One of our investigators reviewed matters and thought Portafina had acted unfairly. In summary the investigator thought:

- The transfer value was too small to justify a transfer to a SIPP.
- The existing investments were performing adequately.
- The new SIPP was not cheaper when accounting for all fees and charges.
- An FCA alert from January 2013 made it clear that transfer / transfer advice must also cover the subsequent investments.
- Mr H was neither high net-worth or a sophisticated investor and so the UCIS investment he ended up in were unsuitable.
- The attitude to risk assessment was flawed.
- Suitable advice would have been to remain where he was and advise on alternative funds.
- Portafina is wholly liable as all events stemmed from its recommendation.
- Mr H should be compensated for any financial loss, using a benchmark comparison from transfer to settlement date. The comparison should assume Mr H was willing to accept some risk with his investments, in other words that he was a medium risk investor. Portafina should also cover 5 years of future SIPP fees because of the illiquid nature of some of the investments, and also pay £300 for the trouble and upset caused to Mr H.

Portafina didn't accept the investigator's findings and made the following additional arguments:

- As it was not recommending investments it did not look at alternate funds in the existing Stakeholder plan.
- Its advice model of delegating investment advice to a third party followed FCA guidance and so it viewed it unfair that its liable for investment losses caused by the actions of Firm C. It is not the fault of Portafina that Firm C did not follow Mr H's attitude to risk classification in respect of the investments recommended.
- At the time of advice Firm C was also regulated also and subject to the same complaint procedure as Portafina.

The complaint has been passed to me to decide.

my findings

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

Portafina recommended that Mr H transfer his stakeholder plan to a SIPP but it says that, although it assessed his attitude to risk, it didn't provide advice as to the investments within the SIPP because this was being provided by Firm C.

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

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

In 2013, the regulator at the time issued an alert about advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP. This alert was issued because it had come to the regulator's notice that some firms were adopting advice models which didn't comply with the existing obligations and so there was a potential for consumer detriment. The regulator made its position clear in the alert, where it said:

> *"The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating (…)*
>
> *If you give regulated advice and the recommendation will enable investment in unregulated items, you cannot separate out the unregulated elements from the regulated elements"*

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

The position on this is further supported by a subsequent alert issued by the regulator, on 28 April 2014, regarding pension transfers and switches. Again, this alert didn't follow the introduction of new regulations but restated the existing position.

The regulator said it was:

> '*alerting firms to our requirements when they give advice on self-invested personal pensions (SIPPS), giving our view and key messages*'. It included the following: '*Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable. If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole*.'

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

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

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

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

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

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

COBS 9.2.2R included the following wording:

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

So as part of the fact-finding process Portafina had to understand Mr H's objectives and the related risks. It wasn't free to ignore how Mr H's funds were going to be invested irrespective of Firm C's involvement. I consider the underlying investments in the SIPP to be inextricably linked to the risks relating to the SIPP, so assessing the risk and suitability of a transfer without knowing what Mr H would invest in within the wrapper, doesn't in my mind seem reasonably possible.

After Portafina gave advice the agency for Mr H's SIPP was transferred to Firm C and it was Firm C that recommended the high risk and Illiquid investments. However, the alerts make it clear that a firm that is asked to advise on a pension transfer or switch needs to be aware of the intended investments *before* it advises on the transfer, in order to provide suitable advice. So, Portafina should've requested this information from Firm C before providing advice. And, as confirmed in the alert, if it didn't '*fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all'.*

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

COBS 2.4.6R(2).

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

COBS 2.4.8G

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

These rules essentially mean that a firm can rely on information provided to it by another regulated firm, where it is reasonable to do so. The rule is stated to apply to situations where a firm is *required by a handbook rule* to obtain the information in question from another person.

However, in this case, Portafina failed to obtain any information from Firm C about the intended investment proposition for Mr H. This is despite Firm C completing the fact find and attitude to risk questionnaire for Mr H - and forwarding these to Portafina - before Portafina issued its suitability report. And having already invested Mr H's SIPP with Firm T, in the same funds that his Firm N SIPP went on to be invested in. So I think it's likely that Firm C had in mind a portfolio of intended investments before Portafina was involved, or at the very least at the same time as when Portafina were involved. Firm C advised Mr H to invest a significant proportion of his SIPP in unregulated investments. Portafina says it didn't know this was Firms C's intention - but it would have, had it found out about the intended investments as I consider it was required to do; they were part and parcel of the transfer. But it appears that in giving its advice to transfer, Portafina failed to check how Firm C broadly proposed to invest Mr H's money. At the very least, Portafina was required to research the investments of the Firm T SIPP as part of its responsibility to "know its client", which would have undoubtedly alerted Portafina to the investment strategy of Firm C. So, either Portafina were aware of the investments Firm C had already arranged, or it failed in its responsibility to "know its client."

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

Portafina may say it completed due diligence checks on Firm C before agreeing to accept client referrals from it. But it wasn't enough for it to rely on general information provided to it at the start of its relationship with Firm C; that wouldn't have been a reasonable basis for Portafina to have assessed the suitability of the pension switch for Mr H.

In my view, it should've done more to ensure it understood the types of investments Firm C would be recommending, and in particular in connection with Mr H's proposed transfer. As I've said, I would've expected Portafina to request details upfront from Firm C as to the intended portfolio for Mr H. Without this information, I'm not satisfied that Portafina could reasonably assess the suitability of the transfer.

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

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

What was Portafina required to do?

I think it's important to explain that regardless of anyone else's part in the matter Portafina had to follow the relevant rules set out by the regulator. These include the overarching Principles for Businesses. Principles 1 (*integrity*), 2 (*skill, care and diligence*), 6 (*customers' interests*) and 9 (*reasonable care)* are of particular relevance here.

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

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

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

The advice to transfer the stakeholder plan

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

It is clear from Mr H's background and circumstances that he satisfied the FCA definition of a Retail Client i.e. he was neither a professional client or an eligible counterparty. Therefore, he was entitled to rights and protections afforded to Retail Clients and was clearly reliant on the advice given to him. From the evidence I have seen there is no suggestion whatsoever that he was either high-net worth or a sophisticated investor. In fact, the two risk profiling assessments completed by Firm C prior to the transfer and prior to its investment advice both confirmed that he had little knowledge or understanding of investments.

I have thought about how the recommendation addressed Mr H's objectives, as stated in Portafina's suitability report.

Consolidation

Mr H started with three separate PPP's with one provider and a Stakeholder plan with a second provider. He ended up with two separate SIPP's with two different providers. Portafina ought to have been aware that he already had a Firm T SIPP by the time it gave advice. No justification has been provided for why he was recommended a new SIPP with Firm N rather than using the existing Firm T SIPP as the source of the transfer and so it is clear that the recommendation did not achieve this objective.

Flexibility & control

I have seen no evidence to suggest that Mr H wanted to have an active role in the management of his pension plan/s. In my view, his lack of investment experience points to completely the opposite. That he wanted simplicity and clarity, and I think that this would have been best met by his existing Stakeholder which was designed for this purpose. So, I do not believe Mr H was looking for additional control.

The Stakeholder did not appear to offer flexible income options such as flexi-access drawdown, where Mr H would be able to take tax-free cash and defer taking any income until required. Mr H was one year away from when he could access his tax-free cash at age 55. Although we know that Mr H did take his tax-free cash on his 55th birthday, Portafina did not establish this as one of his objectives. Therefore, there was no apparent pressing need for additional flexibility. If Portafina was aware of Mr H's possible intention to take tax-free cash at 55 - and if this was the reason for additional flexibility - it was also required to demonstrate why Mr H's needs could not be met by his existing stakeholder plan and how taking the tax-free cash would affected the suitability of the recommendation. It didn't do either of these.

A cheaper scheme

Although Portafina argue that the transfer resulted in lower costs, I disagree. The comparison was limited to the lower annual management charge of the SIPP compared to the total annual charge of the Stakeholder plan. Portafina's argument takes no account of the additional advice and investment fees of Firm C or the 5% initial advice fee. So, its suggestions that the new plan was cheaper was misleading. An advisor is clearly entitled to charge a fee for its advice, but when this advice fee defeats the objective that it is setting out to achieve, it by definition renders that objective as not met.

Death benefits

I can see no meaningful difference in the treatment or entitlement to death benefits between the stakeholder plan and the SIPP, but the additional overall fees incurred by transferring to the SIPP resulted in lower, rather than improved, death benefits.

So, I do not think that the transfer met any of Mr H's stated objectives. But I have also thought about if the transfer achieved any other benefit for Mr H.

Mr H argues that he has always had a medium, or balanced attitude to risk. I take this to be in the context of investment risk. Portafina used a third party risk profiling tool which assessed his attitude to risk as moderately adventurous, But the Fact Find confirmed that his capacity for loss was low. His pensions were in effect his only asset, which he would clearly be heavily reliant on in the future. An adviser's role in assessing attitude to risk is to go beyond using the responses to a risk profiling assessment tool and to consider the individual's circumstances and objectives overall. I think it is also important to note that the definition of a moderately adventurous attitude to risk as explained in the suitability report was clearly out of kilter with Mr H's knowledge and experience. For example, it said that such individuals typically have moderate to high levels of financial knowledge and are usually experienced investors, which was clearly not the case for Mr H.

The Stakeholder was invested in a mixed investment (40%-85%) managed fund. This was simple, managed, relatively low cost, broadly consistent with a medium attitude to risk and Portafina's own research confirmed strong historic performance of 11.88% per annum. I think this type of fund was fit for purpose for Mr H, because I think he would have been suited to something that was relatively simple and low cost but provided a reasonable degree of diversification with a reasonable prospect for growth.

However, given Mr H's low capacity for loss and intention to possibly take his tax-free cash within a year I am not persuaded that the level of risk of this fund was suitable. I believe that had his capacity for loss been considered adequately, his attitude to risk should have been assessed as between cautious and medium. Therefore, I do feel that Mr H would have benefitted from advice in this regard. However, this in isolation did not necessitate a transfer as I think it is reasonable to conclude that the stakeholder plan would have offered a suitable alternative fund or combination of funds suitable to his attitude to risk. I acknowledge that it was not possible for Portafina to be appointed as agent for the stakeholder plan. However, I do believe that it would have been able to research the range of funds available to Mr H in the stakeholder plan and provide a suitable fund switch recommendation.

I can see no other potential benefit for Mr H being advised to transfer his stakeholder plan to a SIPP.

Mr H has argued that the fees and charges of the transfer were not disclosed. However, the fees and charges attributable to Portafina's advice and the SIPP were disclosed in the Suitability Report and given that Mr H signed and returned the accompanying Declaration it is clear that he received this Report and it was his responsibility to read and understand it. However, I agree that the fees and charges attributable to the advice and investments arranged by Firm C were undisclosed.

The suitability report discounted a transfer to an alternative Stakeholder plan because Mr H wanted to make regular contributions. This statement was false and misleading because he was already making regular contributions to his existing Stakeholder plan. In my view this serves to illustrate the point that Mr H's needs and objectives were broadly already being met by his existing plan.

In summary, the recommendation to transfer was unsuitable. Mr H's needs and objectives would have been better met remaining in the stakeholder plan, with a recommendation of an internal fund switch to a lower risk investment fund or funds that would be more conducive to his weak capacity for loss and possible intention to access his tax-free cash within a year.

would Mr H have gone ahead with the transfer in any event?

Mr H was clearly reliant on the advice given to him. His desire to access his tax-free cash may have acted as a strong incentive to transfer, but this should have been balanced against the advantages and disadvantages of both the transfer itself and of taking the tax-free cash. We do not know why Mr H accessed his tax-free cash, because Portafina did not establish this. So, in the absence of any compelling argument for a need to access his tax-free cash I do not believe Mr H would have transferred had he been fully advised of the advantages and disadvantages of doing so.

Putting things right

My aim is that Mr H should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr H would have invested differently. It’s not possible to say *precisely* what he would have done differently. But I’m satisfied that what I’ve set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

What should Portafina do?

To compensate Mr H fairly, Portafina must:

Compare the performance of Mr H's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value* there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Portafina should add interest as set out below.

If there is a loss, Portafina should pay into Mr H's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief.

Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Portafina is unable to pay the total amount into Mr H's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr H's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr H is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr H would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

Pay to Mr H £250 for the trouble and upset caused by the advice received.

Income tax may be payable on any interest paid. If Portafina deducts income tax from the interest it should tell Mr H how much has been taken off. Portafina should give Mr H a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Firm N SIPP	mixed	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

My aim is to return Mr H to the position he would've been in but for the failings of Portafina. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here. So when determining the current value of the SIPP, the value of any illiquid investments should be assumed to be nil to arrive at fair compensation. Portafina should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above.

If Portafina is unable to purchase the investment, the value should be assumed to be nil for the purpose of calculation. Portafina may wish to require that Mr H provides an undertaking to pay it any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Portafina will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Portafina should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in. This includes any regular contributions paid into the SIPP.

Any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Portafina totals all those payments and deducts that figure at the end instead of deducting periodically.

Sipp fees

As the SIPP only exists because of the advice Portafina gave, in order for the SIPP to be closed and further SIPP fees prevented, the illiquid investment need to be removed. But if Portafina can't buy them, Mr H is faced with future SIPP fees. I think it is fair to assume five years' of future SIPP fees. So, if Portafina can't buy the investment, it should pay an amount equal to five years of SIPP fees based on the current full tariff. This is in addition to the compensation calculated using a nil value for the investment.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr H wanted capital growth with a small risk to his capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr H's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr H into that position. It does not mean that Mr H would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr H could have obtained from investments suited to his objective and risk attitude.

my final decision

For the reasons explained, I uphold this complaint and direct Portafina LLP to pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 30 April 2021.

Lorna Goulding
ombudsman