

## Complaint

Miss W has complained about advice she received from Portal Financial Services LLP ('Portafina') to transfer a defined benefit occupational pension scheme ('OPS') she held with her former employer to a Self-Invested Personal Pension ('SIPP').

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

## Background

Miss W was introduced to Portafina in 2014 after she'd been in contact with another business, from here on referred to as 'Firm C'. At the time, Firm C was an appointed representative ('AR') of a regulated business, 'Firm S'. Firm S was authorised by the Financial Conduct Authority ('FCA') to provide investment advice, but neither it, nor Firm C were permitted to provide pension transfer advice. Miss W was introduced by Firm C to Portafina, who were authorised to provide pension transfer advice. Portafina had an established business arrangement with Firm C, whereby Portafina would provide the pension transfer advice before referring the client back to Firm C for investment advice on the transferred funds, and this arrangement was followed for Miss W.

Portafina gathered information about Miss W's needs and objectives through telephone reviews, the last of which took place on 5 August 2014. At the time Miss W was aged 56 and employed. In addition to her employment, she was in the early stages of starting her own business. No details were provided as to what this business was. She had recorded debts of £2,000, although she has since confirmed this was actually £20,000, including credit card debt. She had no investments or savings. Miss W had a preserved final salary local government pension. Prior to transfer it was valued at £56,326.55 and was projected to provide an income of £4,292 per year from age 65. Miss W has confirmed that this was her only pension provision and that she wanted to retire at 65.

In September 2014 Portafina recommended Miss W transfer her OPS to a SIPP. It was recorded that she had a 'balanced' attitude to risk ('ATR') and transferring would meet her objectives of accessing the tax-free cash ('TFC') in order to repay debts and start a new business. Portafina recommended the pension benefits should be invested in a portfolio of assets which it believed were appropriate for her balanced ATR, but said that the funds would be held in cash and Firm C would provide advice on how the funds would be invested post-transfer.

Following the transfer in December 2014, TFC was withdrawn from the pension and approximately £19,000 was invested in low risk funds. The remainder of the SIPP, £26,000, was left as cash by Firm C.

In 2018, with the assistance of a CMC, Miss W complained to Portafina about the advice she received to transfer. She said the advice was negligent and the comparison figures used were misleading. She also said Portafina had failed to provide any investment advice after transfer, so the funds left as cash had earned little to no interest over the intervening period.

Portafina didn't agree. It said Firm C was responsible for any investment advice and had forwarded the complaint to them. It noted that Miss W needed the TFC to pay off debt and free up some cash to potentially set up a new business. It said she did not want to take income until age 65 at the earliest. So, the flexibility and the fact she could alter the level of income and TFC she could take was very appealing to her.

Following this, Miss W referred her complaint to our service.

An adjudicator reviewed the complaint and recommended it should be upheld. She said the critical yield required to match the benefits being given up was 13.6% and Portafina should have realised this meant that there was a significant risk that the benefits after transfer would be significantly lower than those being given up. She thought it should have explained and made clear that the level of growth required to match Miss W's OPS benefits was unlikely to have been consistently achievable with a risk profile that was appropriate to her situation. The adjudicator said that even if Firm C had invested Miss W's funds according to her risk profile, she still considered the advice would be unsuitable based on the critical yield required to match the benefits being given up.

The adjudicator recommended that Miss W should be put back into the position she would've been in but for the unsuitable advice and that Portafina should pay her £300 for the distress and inconvenience caused.

Portafina disagreed, it said it was Firm C's responsibility to ensure the SIPP was invested in line with Miss W's objectives – the fact that funds were left as cash was Firm C's fault and not Portafina's. It added that it had carried out extensive due diligence on Firm C and it was satisfied it could provide investment advice. Portafina said the FCA allowed for two advisory firms to work together and provide separate advice on the pension transfer and the subsequent investments. However, in Miss W's case, it said it had set out what it considered would be a suitable portfolio for Miss W and it couldn't be held responsible if Firm C hadn't followed this.

Portafina also believed that wanting the TFC to pay off debt and set up a new business were valid reasons to access the benefits early. It said it had considered other retirement provisions available when determining her capacity for loss. This included another final salary scheme that she still had in place. It said commutation was available to Miss W at age 60, but this was still a few years away at the time of the advice. Portafina provided a copy of the call recording from August 2014. It said that this call demonstrated that death benefits were important, as Miss W was single and so would not benefit from the OPS's spouse's pension and she was prepared to accept lower income to secure these benefits. Portafina asked for the case to be referred to an ombudsman.

Before making my final decision I asked a case reviewer to expand on the arguments made by the adjudicator. Specifically, the case reviewer said that the regulator had issued alerts in 2013 and 2014 which explained that a firm providing pension transfer advice had to take into account the suitability of the intended investments. So, he didn't think Portafina could reasonably recommend the pension transfer without understanding where Miss W's funds were to be invested. The case reviewer also added that Miss W had told us that she only used £5,000 of the TFC to repay debt, so she still would've had debt of around £15,000 remaining. He said this shed considerable doubt on her ability to redirect the money she was using to repay her debt to her SIPP. Furthermore, he added that he didn't think Portafina had adequately explored any alternatives Miss W had to meet her objectives.

Portafina was given an opportunity to respond, but no response to these points was provided by the deadline set. So, I'm now providing my final decision.

## My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I'm upholding it.

Portafina advised Miss W to transfer her OPS benefits to a SIPP but says it didn't provide any recommendation regarding the investments held within the SIPP as Firm C was meant to provide this. Although the intention was for another regulated firm to advise on and arrange Miss W's underlying SIPP investments, I don't think that meant Portafina's responsibilities ended once the SIPP was set up, the funds transferred, and the money was made available for investment. I believe that as Miss W's financial adviser, Portafina still had a duty to ensure the overall transaction was suitable, even though another regulated firm was involved.

Suitable advice couldn't, in my view, be given without thinking about the intended investment. Portafina appeared to recognise this in its suitability report when, despite saying Firm C would provide specific investment advice, it set out recommendations for the fund asset classes Miss W should invest in and to what extent. The recommendation gave a model portfolio for an balanced investor, which Portafina satisfied itself Miss W was. And it's partly on the basis that Miss W invested in line with a suitable model portfolio and achieved the relevant targeted returns that Portafina concluded transferring could increase her overall pension benefits and was therefore worthwhile.

### *The regulator's position*

Having thought carefully about what happened here, I don't think Portafina's advice to transfer was suitable. And I don't think it was right to try to limit its advice in the way it sought to. At the time of the advice the regulator had made its view clear that it considered in order to suitably advise on pension transfers, a firm needed to consider the suitability of the underlying investments to be held in it.

The regulator's position was evident in its 2013 alert where it said:

*"Financial advisers (...) are under the mistaken impression (...) they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*

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

I acknowledge that the regulators' statement makes specific reference to unregulated investments but Miss W doesn't appear to have invested in unregulated investments. Nonetheless, I think it's clear that the statement applies to investments as a whole and isn't simply limited to unregulated investments.

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

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

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

As I've said above, it's clear to me that the alert isn't limited to just unregulated investments. And I can see it makes it clear that suitable investment advice 'generally' requires consideration of the other investments held by the customer, as well as the suitability of the overall proposition when advice is given on a product that is a vehicle for investment in other products (such as the SIPP in Miss W's case). It further refers to the broadly applicable rules and guidance that ensure that in all instances of advice, a firm must first take time to familiarise itself with the wider investment and financial circumstances. In saying that, I don't think the FCA intended that in pension transfer cases, regard to the overall proposition was only required where the introducing firm was unregulated, or where the assets contemplated included unregulated investments.

In my view, the regulator was indicating that these are standards that have broad application to pension switch and transfer advice, but pointing out that it had particular concern about cases in which unregulated firms and unregulated products put the consumer at risk. So, I think the alert is relevant to firms in the position of Portafina in this case. This is further demonstrated by an alert from the regulator in 2014 which stated:

*"Where a financial adviser recommends a SIPP knowing that the customer will (...) transfer (...) 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 (...), 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 (...) at all as it will not be able to assess suitability of the transaction as a whole. "*

Both alerts specifically referred to the regulator's overarching Principles for Businesses (PRIN) and 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 rules 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 Miss W under the regulatory system. So, saying it was operating under a limited retainer 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 Miss W's funds would be invested.

COBS 9.2 required Portafina to take reasonable steps to make sure its recommendation was suitable for Miss W. To achieve this, COBS 9.2.2R said Portafina had to obtain enough information from Miss W to ensure its recommendation met her objectives, that she could bear the related investment risks consistent with these objectives and that she 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 Miss W's objectives – two of which were ownership and control and a willingness to accept investment risk – and the related risks. It wasn't free to ignore how Miss W'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 Miss W would invest in within the wrapper, doesn't in my mind seem reasonably possible.

So, I think it's clear that in order to give suitable advice, Portafina had to have a good understanding of the investments Miss W intended to make. This is because it couldn't provide any assurance that the transfer out of the OPS would be in Miss W's best interest if it didn't know how her funds would be invested and the likely estimated return.

Like COBS, PRIN formed part of the regulatory framework that existed at the time of Portafina's advice and had to be complied with. Principles 1 (conducting business with integrity); 2 (exercising due skill, care and diligence); 6 (having regard for customers' interests and treating them fairly); 7 (communicating information in a clear, fair and not misleading way) and 9 (ensuring the suitability of advice for a customer entitled to rely on the firm's judgement) are of particular relevance to this case. In addition to what I've outlined above, I've considered Portafina's advice with these in mind.

As Portafina didn't consider itself responsible for any advice regarding the underlying assets of the SIPP it recommended, it says it was unaware of where, further to Firm C's involvement, Miss W's transferred funds would ultimately be invested. As Firm C was regulated and able to provide investment advice with a duty to ensure this was suitable, it says it saw no issue with this.

I recognise that the FCA allows for two advisers to work together to provide suitable advice to their mutual client. However, the alerts make it clear that a firm that is asked to advise on a pension transfer needs to be aware of the intended investments before it advises on the transfer, in order to provide suitable advice. So, it should've requested this information from Firm C before providing advice. And, as confirmed in the 2014 alert, if it didn't *'fully understand the underlying investment proposition'* intended to be held within the SIPP, it shouldn't have offered advice on the pension transfer at all. So, in the absence of Portafina knowing the investments Firm C intended for Miss W, it couldn't in my view provide her with suitable advice to transfer her OPS.

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 Miss W's appointed financial adviser, it had a significant responsibility to provide suitable advice and act in Miss W's best interests. And as I've said, this had to include an awareness of where Miss W's funds would be invested.

Portafina said that it carried out extensive due diligence on Firm C, which included background checks on the company directors, accounts and information about previous complaints. In other cases it has also told us that as part of its due diligence it carried out on Firm C, it requested details of the investment strategy it was likely to deploy for clients with the relevant ATR. For Miss W it set out in the suitability report what spread of investments it thought would be suitable for her, as follows:

Cash	10%
Equities	60%
Other Fixed Interest	12%
Secured Structured Bonds	18%

But I don't think that satisfies the regulator's expectations as set out in the alerts. I haven't seen any evidence to persuade me that Portafina carried out checks with Firm C that were specific to the investments envisaged for Miss W. So, I still think Portafina needed to do more to satisfy itself that its recommendation was based on the expected investment proposition that Firm C intended for Miss W. It needed, at the very least, to ask Firm C for an outline of that proposition. Portafina couldn't reasonably assess the suitability of the transfer it was recommending without doing so.

Portafina says that it can't be held responsible if Firm C failed to follow the model portfolio it suggested. But I don't think it was sufficient for Portafina simply to recommend a broad spread of investments in its suitability report for Miss W in the expectation that that would bring about the necessary alignment with Firm C's investment recommendations. Further, I do not agree that broad references to investment classes, such as 'equities' and 'secured structured bonds', would give consumers in the position of Miss W sufficient information to enable them to spot discrepancies.

I should also add that even if I was satisfied Portafina could adequately assess the suitability of the transfer by merely recommending potential investments into broad asset classes, with no further steps taken to align its advice with Firm C's recommendations, I don't think the asset allocation set out in the table would in any event have been suitable for Miss W. I say this because the model portfolio suggested that 18% of the pension fund should be invested in 'secure structured bonds'. These are described in the suitability report as asset backed debt securities that are issued for a fix term. The report goes on to explain that these are not covered by the FSCS. And that there are credit risks – due to the possibility of the company borrowing the money going into default – and liquidity risks.

In my view, this puts the secure structured bonds at the higher end of the risk spectrum and would generally mean that they're unsuitable for an inexperienced investor, with a fairly modest pension fund. So, I'm not satisfied that a portfolio that would've invested 18% of Miss W's pension fund in unregulated and potentially illiquid funds – and a further 60% in equities – would've been suitable for a client in her position in any event.

### *The advice to transfer*

Notwithstanding what I've said above, I don't think the suitability of Portafina's advice turns solely on where Miss W's funds were ultimately invested. Portafina's recommendation that she transfer to a SIPP in the first place is an important consideration. And were it not for the transfer and Portafina's incomplete and, in my view, flawed advice regarding this, I'm not persuaded Miss W would've become vulnerable to unsuitable investment advice.

OPSs typically have significant benefits and guarantees. Giving up the benefits and guarantees available under an OPS and subjecting future pension income to the risks associated with unpredictable investment returns should only be done where it can be shown that it was clearly in the best interests of the consumer. The COBS guidance (COBS19.1.6G) at the time of the advice, stated:

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

Given what the regulator says, my starting point is that a transfer won't usually be suitable. There'll need to be good reasons why a transfer will be in the consumer's best interests. And generally, a transfer will only be in the consumer's best interests if there's a reasonable prospect that the new arrangement will provide better retirement benefits. The transfer will also need to be suitable, taking into account the individual's particular circumstances.

At the time of Portafina's advice Miss W was 56 years old, employed and in good health. She was a standard retail investor with nine years until she expected to retire and until her OPS benefits became payable. Aside from her state pension entitlement, this OPS represented her sole retirement provision. In addition to her employment, she was in the early stages of starting her own business. She had recorded debts of £2,000, although as I will go on to explain later in this decision, I'm satisfied this was actually £20,000. She had no investments or savings. So, it seems to me Miss W's OPS was her most valuable asset. It provided a guaranteed income at retirement with increases, along with a spouse's pension. Based on this I think Portafina should have recognised the significance of Miss W's OPS and proceeded with caution.

Based on a risk profile Miss W completed, Portafina said it believed she had a balanced ATR and this has not been challenged by the consumer. Although Miss W had no investment experience, she was aged 56 at the time the advice was given, so she had around nine years before she thought she wanted to retire. So, I think she had probably had enough time to expose her funds to a medium or balanced level of risk and recoup any losses. As Miss W appears to accept the classification, I see no reason to disagree with the balanced ATR recorded.

Portafina recommended Miss W transfer out of her OPS into a SIPP mainly so that she could access the TFC from her pension. These funds would then be used to pay down debt and fund a new business. Miss W has confirmed that the funds were used for this purpose. While Miss W had a desire to access her pension, this is only one factor in assessing the suitability of the transfer. There is usually a price to pay for transferring from a guaranteed pension in the form of a loss of benefits and a customer should only proceed if they are fully aware of the value of what they are giving up.

When a firm considers recommending a client transfers out of a defined benefit scheme, the regulator requires it to carry out a calculation to establish the investment performance required by the new pension in order to match the benefits available from the transferring scheme. This is known as the 'critical yield'.

Portafina commissioned a pension transfer value analysis report which showed that a critical yield of 13.6% per year was required to match benefits from the OPS if Miss W retired at 65. This reduced to 12.6% if Miss W took the maximum TFC at retirement. While it appears to take account of the initial and ongoing adviser charges, it does not make any allowance for the plan, fund or any other ongoing charges. This meant the growth needed just to match the benefits being given up was most likely understated. Like the adjudicator, I think the growth required just to match her existing benefits was too high to make the transfer viable for Miss W.

The advice was given at a time when there were no industry standard projection rates to assess the likelihood of the critical yield being achieved. But at the time, the regulator's assumed future growth rates for personal pensions illustrations were 2% (lower); 5% (intermediate); and 8% (higher). So even if the personal pension had achieved the highest maximum projected growth at that time, it was unlikely Miss W would receive a higher pension at retirement as a result of transferring. This also seems to meet with Portafina's own estimates of the growth Miss W could likely expect. In the suitability report dated 16 September 2014, it estimated that based on Miss W's balanced attitude to risk, her personal pension would grow at a rate of 6.13%, which didn't take account of advice fees or plan charges.

Nevertheless, Portafina based its recommendation on the 'lifetime hurdle rate', which it said was 6.11%, rather than the critical yield. It did this because it assumed Miss W wouldn't purchase an annuity with her fund and would instead take her benefits via income drawdown. This rate would appear to be the 'average' of the hurdle rates listed in the TVAS, which were 7.2% to match the OPS full pension and 6.8% to match the income provided after the reduction for TFC.

The guidance under COBS 19.1.3 states that the comparison undertaken by Portafina should:

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

Having considered this carefully, I'm not satisfied that using the hurdle rate was appropriate in Miss W's case. Firstly, the hurdle rate is used to determine the growth required to match the starting pension of the OPS, without increases and without a spouse's pension being included. Miss W's OPS provided a 50% spouse's pension and it escalated in retirement. So the hurdle rate doesn't replicate the benefits Miss W was giving up, which, as can be seen from the above guidance, was what the regulator wanted businesses to do when comparing schemes. Furthermore, the hurdle rate was also based on the full pension fund being invested and was therefore not an accurate reflection of the true level of growth that would be needed just to match the pension income in the first year of retirement. So, it seems unreasonable to use the hurdle rate when comparing the OPS benefits with the SIPP.

In addition, Miss W had around nine years before she thought she wanted to retire, which according to the suitability report was age 65. I don't think Portafina, or Miss W, could say with any certainty nine years before she planned to retire that she was definitely going to take her benefits via income drawdown. Miss W had debts and was embarking on a new business venture. So, I think in those circumstances a secure guaranteed income in retirement would've been more attractive to her than placing her entire retirement funds at risk. And I don't think Miss W's point of view on taking an annuity in retirement was explored in any meaningful sense. I'm therefore satisfied that the appropriate growth rate to use was the critical yield figure of 12.6%, as I think it's clear Miss W wanted to take tax-free cash rather than the full pension.

In the suitability report, Portafina stated Firm C would provide their investment recommendations. But without having an understanding of Firm C's proposed investment strategy, I don't think Portafina were in a position to know whether the transfer advice was suitable. Even without knowing Firm C's proposed investments, the critical yield was far above the growth Portafina said Miss W could expect if she invested in line with the suggested model portfolio in its suitability report. And as explained above, it was also greater than the highest of the regulator's assumed future growth rates. For this reason, I think Miss W was likely to receive benefits of a substantially lower overall value than the OPS at retirement, as a result of transferring her OPS. And I don't think that was at all made clear to Miss W in the suitability report, which gave her the impression that the expected level of growth from her transferred funds would be sufficient to provide the same level of income her employer's scheme would pay.

I believe that the level of pension funding Miss W could expect after transferring was significantly overstated by Portafina and she was not given an accurate picture of her likely position in retirement. I have, however, gone on to consider whether there were other legitimate reasons for recommending the transfer of Miss W's OPS benefits despite her likely being worse off in retirement as a result.

Portafina argues that Miss W required access to her TFC to repay debt and help start a business. The fact find completed by Portafina on 5 August 2014 noted that Miss W was making loan repayments of £500 a month. Her debts were recorded as £2,000, but this was most likely a mistake and Miss W has since confirmed that the actual figure was £20,000. I am inclined to accept that this higher figure is correct for several reasons; firstly it is in keeping with repayments of £500 a month. Secondly, an individual would be unlikely to want to cash in a pension to pay off a £2,000 loan which (based on £500 repayments) only had four months to run. Finally, Portafina's own projections of the cost of paying the outstanding debt via monthly repayments totalled £21,066 and I cannot see any way that £2,000 could ever cost that much to repay.

Page eight of the suitability report 'Ways to Generate Cash', states if Miss W continued to pay her loan monthly, she would have paid £21,066 in total and have a pension fund of £84,661 at retirement. By comparison, if she used her TFC to pay down her debt and redirected these payments into her pension, these would be grossed up to £25,280 and would result in a higher total pension fund of £90,237. I believe that these figures are incorrect and misleading when it is clear that Miss W only intended to use part of her TFC to pay off some of her debt, not the whole amount. As only a share of her repayments could be redirected back to her pension, the total of £25,280 was, in my view, a very large over-estimation. Given that the level of growth needed to match her benefits in retirement was significantly understated and the possible value of her fund at age 65 was over-estimated, I don't think Miss W had an accurate picture of the value of what she was giving up and how much it would realistically cost to replace it.

In addition, there doesn't appear to have been any discussion about how much of her debt Miss W intended to pay off. So Portafina should not have been making projections without having this information. As it is, Miss W has confirmed she used £5,000 of her pension for debt repayment, so only a quarter of her repayments could be redirected back to her SIPP. This means that her pension fund would be lower at retirement than if she had not made any withdrawals and not higher, as the report stated.

Furthermore, page nine of the same report stated that Miss W did "*not have enough disposable income to service [her] needs*", so it is doubtful that she would be able or willing to give up any disposable income which became available from paying down debt. This would be especially true when she was about to start a new business. In my view, it was far more likely that she would use any spare cash to support her business in its early years, rather than lock it away in her pension.

In my view, Portafina did not try to find out the necessary facts to demonstrate that transferring Miss W's OPS benefits to access TFC was suitable for her. It did not ask Miss W how much of the cash would be used to pay down debt and how this would affect her outgoings. It didn't ask what share of the funds would be used for the business, or even what the business was. It didn't ask how the funds would be used. For instance, I think it ought to have established whether the funds were needed to purchase equipment or some other asset which may have a re-sale value if the business failed. Or whether it was to be used to support Miss W in the early stages and was therefore just expenditure unlikely to be recouped.

Having listened to the phone call of 5 August 2014, there was no attempt by Portafina's representative to gather this information and I have no reason to doubt that, had Miss W been asked, she would have answered whatever questions he had. During the call Miss W said that she would use part of the money for her business and part to repay debt to make her outgoings more manageable. Although she did not mention any figures herself, Miss W was clearly willing to discuss this topic, but the adviser made no attempt to gather more information. And although the suitability report noted that Miss W did not want to take on any further lending, I haven't seen any evidence to demonstrate that this was explored in any meaningful sense. Miss W owned her home outright and whilst she may have not wanted to take a loan, I still think this should've been explored to see how she might be able to restructure her debt and/or take out further lending to support her new business. This option ought to have been presented in the context of the lower pension she could expect to receive in retirement as a result of transferring and using her TFC to do this instead. Had it been explored and presented in this way, Miss W may have been more amenable to this alternative.

I think these were all important considerations which should have been discussed with Miss W before making a recommendation. If a customer has large or unmanageable debts, an argument can be made for using retirement funds to avoid a situation becoming worse which would impact her standard of living post retirement. This would be very different to sacrificing stability in retirement to fund a risky venture which may fail, taking a substantial part of the pension funds with it and providing no benefit to the customer.

During the call Miss W was asked how much of a reduction in her pension she would be willing to take to get control of her pension, take the TFC and increase her death benefits. She replied that she would like it to be *'none at all'*, but would accept a reduction of 10%. This indicates that Miss W did not have an overwhelming desire to transfer and certainly was not prepared to do so at any price. It may be that the decision to start a business was only taken because of the availability of the funds and, had the risks been fully explained, this may have been less appealing to her if she knew she was going to lose income in retirement. I am not saying that this definitely was the case, simply that Portafina did not know either and should not have proceeded without being sure that transferring and taking the TFC was in Miss W's best interest.

Finally, Portafina has stated that one of the reasons Miss W was willing to accept a lower income in retirement was to secure better death benefits, as she had no need for the spouse's pension her OPS provided. I do not agree with this argument when Miss W did not express any strong desire to provide additional cover for her family during the call recording. In fact, she actually said that she did not plan on leaving any money to her family, as they would inherit her property after her death. As such, I do not think that increasing death benefits by transferring was a genuine objective for her.

Overall, Portafina had a significant and overriding responsibility to challenge Miss W's objectives and not accept them at face value. Miss W wasn't a financial expert and was heavily reliant on Portafina for its advice and expertise. So, I think it needed to do more than just note Miss W's objectives and agree to facilitate what she thought was the best way of achieving them, especially when there might be viable alternatives to meeting those goals. If Miss W was unwilling to accept advice from Portafina on this basis, this should have been clearly documented and, if necessary, the consumer treated as an insistent client. I have no reason to believe that this would have been the case.

I've thought about whether, if she'd been correctly advised by Portafina, Miss W would have gone ahead with the transfer anyway. Having carefully considered all the circumstances in this case, I don't believe she would. While she did have a purpose for the TFC, she was withdrawing the funds on the understanding that she would not be any worse off in retirement by doing so. It was even implied that by taking her TFC at that point and redirecting her debt repayment funds, she would have a larger pension fund in retirement. Had Miss W been appropriately advised and made aware of how much she stood to lose by transferring, I think it's more likely that she would have chosen to stay with her OPS.

As a professional adviser which, unlike Firm C, was authorised to provide transfer advice, Portafina's recommendation would've carried significant weight and could, I believe, have dissuaded Miss W from proceeding with the transfer and withdrawing TFC. I accept it's possible Miss W may still have wanted to go ahead anyway. But I think, at the very least, if Portafina had advised against this, that would have made her think about things. Alternatively, had Miss W proceeded against such advice, Portafina could've discharged its professional responsibility to her appropriately. For example, it could've treated her as an insistent client. However, I'm not persuaded Miss W would've acted against the advice she'd been given.

I've thought about the fact that Firm C provided Miss W with investment advice. Although she didn't invest in UCIS, I agree with the adjudicator's view that it is fair to hold Portafina fully responsible for Miss W's loss. I think it's important to emphasise that Firm C and Portafina were in a business relationship in which each firm agreed to provide services that were designed to bring about a single outcome for clients – pension-release advice and investment. Because Firm C wasn't authorised to provide pension transfer advice, it referred Miss W to Portafina. Portafina advised Miss W to transfer to a SIPP, it set up the SIPP and arranged for her existing pension benefits to be transferred. Portafina's understanding that it could reasonably limit its advice to just the transfer and the SIPP was wrong; it needed to consider the proposed investments too, even if Firm C was advising Miss W on them. It was only as a result of Portafina's involvement that Miss W transferred the funds held in her OPS to the SIPP. Portafina's role was pivotal, since the eventual investments were fully reliant on the funds being transferred first; if that hadn't happened, Miss W couldn't have invested as she did. So, in my view, the entirety of her loss stems from Portafina's unsuitable advice to transfer away from her OPS.

Portafina argues that any redress awarded to Miss W should take account of the compensation Miss W could obtain from the FSCS by complaining about Firm C's investment recommendations. It doesn't appear Miss W has approached the FSCS. But I am aware that, as a fund of last resort, the FSCS won't pay out on claims where it is aware that another firm was involved in the transaction, and it considers that firm might also be responsible for a consumer's losses. This means that apportionment of only part of the loss to Portafina could risk leaving Miss W out of pocket. But I think it's important to point out that I'm not saying Portafina is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portafina gave unsuitable advice and it is responsible for the losses Miss W suffered in transferring her existing benefits to the SIPP and investing as she did. That isn't, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position. So, overall, I think apportioning responsibility to Portafina for the whole of the loss represents fair compensation in this case.

### **Putting things right**

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

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

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

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Miss W'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 Miss W 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 Miss W within 90 days of the date Portafina receives notification of her acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Portafina to pay Miss W.

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.

A copy of Portafina's calculations should be provided to Miss W's representative.

In addition, Portafina should pay Miss W £300 for disruption to her retirement planning.

### **My final decision**

I uphold the complaint and direct Portal Financial Services LLP to pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 10 October 2021.

Hannah Wise  
**Ombudsman**