Complaint

Mr C is complaining about Falcon International Financial Services Ltd (FIFS) because he says he was mis-sold a high-risk, unregulated investment. This was funded by switching his pension benefits to a self-invested personal pension (SIPP).

Background

Following events that Mr C says started with an unsolicited telephone call, which according to FIFS was from Falcon International Estates Limited (FIE), he switched benefits held in a personal pension with AXA into a SIPP with Avalon. A total amount of around £120,000 was switched in August 2013. £88,000 of this was used to fund an investment in an unregulated scheme involving land at Cadnam in the New Forest.

An independent financial adviser (IFA), Sovereign Financial Services (Sovereign, a trading name of J Richfield Ltd), was also involved in arranging the SIPP and pension switch.

FIFS didn't uphold the complaint. It said it didn't advise Mr C on his investment or anything else. Instead, it said any advice was given by Sovereign. FIFS's legal representative told us the following about the process by which Mr C's investment was made:

- FIFS is a company in the Falcon Group. The Falcon Group, amongst its other financial services activities, manages unregulated collective investment schemes (UCIS) in relation to strategic land investments.

- FIE is a separate company in The Falcon Group that approached potential investors by telephone, a marketing method common in the industry, to discuss the benefits of investing in land generally and the possible investment structures that could be used. 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 independent financial advisers (IFAs), such as Sovereign. FIFS had no involvement in this process.

- This process was necessary because FIE wasn't authorised to provide investment advice to potential investors. For the avoidance of doubt, FIE didn't provide investment advice and didn't communicate any financial promotions within Section 21 of the Financial Services and Markets Act 2000 (FSMA).

- In relation to FIE's initial discussions with potential investors, Sovereign had provided it with a template form called a *"Client Financial Information"* form (or fact find), which FIE completed based on information provided by the investor. All completed fact finds were then passed by FIE to Sovereign in respect of any potential investors who confirmed they were willing to be referred to the IFA. This was the end of FIE's involvement.

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

- If Sovereign's independent advice determined an investment was suitable, it then referred the potential investor to FIFS. FIFS would then provide him/her with documentation relating to its investments. This is the first involvement FIFS had with any potential investors.

Our adjudicator contacted Mr C for his recollection of how his investment was arranged. He said he received an unsolicited call and was told his existing pension was lying dormant and being reduced by inflation. He said he was told he could invest it into a scheme to buy land without planning permission, which would then obtain planning permission before being sold for a large profit. He also said the caller spoke about a particular scheme in Hampshire only, involving land near the New Forest. Mr C told the adjudicator he doesn't know who called him, but that he knew a company called Falcon was involved. He said he was also aware of a company called Sovereign, although he never met anybody from that firm and thought it administered the land investment.

Our adjudicator recommended the complaint be upheld. As its appointed representative (AR), he thought FIFS was responsible for FIE's actions in relation to Mr C's investment. And because he didn't believe the investment was suitable for Mr C, he recommended FIFS pay compensation.

FIFS didn't accept the adjudicator's assessment and made the following key points in addition to those raised previously:

- The complaint, as set out in Mr C's complaint form, relates to investment advice received in relation to strategic land investments and it's his contention that this was unsuitable. This is the regulated activity being complained about, not those of arranging deals in investments or making arrangements with a view to transactions in investments as discussed by the adjudicator.

- The issue that determines if this complaint falls within our jurisdiction to consider is whether FIFS provided Mr C with investment advice as defined in article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO).

- FIE didn't provide investment advice as an AR of FIFS. The assessment referred to the AR agreement between FIFS and FIE in place between 2012 and 2017. But it's important to be aware that FIFS wasn't authorised to provide investment advice and consequently FIE couldn't either.

- As explained in previous correspondence, FIE simply approached potential investors to discuss the potential benefits of investing in land and the possible investment structures that could be used to do this. The entire purpose of referring Mr C to Sovereign, an IFA, was so that it could undertake a suitability assessment and determine whether Mr C was suited to this type of investment. This is the same process that was followed in a case we considered previously where an adjudicator concluded FIFS wasn't responsible for providing advice.

- That Sovereign was responsible for any advice is also confirmed in the Independent Financial Advisers Declaration that formed part of the investment application, which was signed by Sovereign to confirm:

> *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 application form also includes a declaration signed by Mr C that said:

> *I/We accept that I/we must rely on our own professional advice (including legal, financial and tax advice) and I have sought and obtained such advice before making this application as I/we believe is appropriate considering my/our circumstances.*

- Mr C signed a letter of authority that gave Sovereign permission to access information about his pension arrangements. He did this so it could ascertain his financial circumstances and consider the suitability of an investment. Neither FIFS or FIE had access to this information

- There are discrepancies in the information provided by the parties about Mr C's circumstances when he invested. In preferring Mr C's version, the adjudicator didn't place sufficient weight on the documentation from the time, including the fact find and the above signed declarations in the application. If we continue to favour Mr C's version, we should provide copies of the documentation he's given us to confirm his circumstances, for example bank statements and tax returns.

- The Falcon Group structured its operations to ensure not only that it didn't provide investment advice, but also that it didn't communicate financial promotions within section 21 of FSMA. FIE approached potential investors by telephone to discuss the benefits of investing in land generally and the possible investment structures that could be used to invest in land. It didn't discuss or promote specific investment opportunities. This exemption is covered under article 13 of FSMA (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (the CIS Exemptions Order).

- In any event, the ombudsman service doesn't have jurisdiction to consider a breach of the financial promotion regime under section 21 of FSMA.

I issued a provisional decision setting out my reasons why I felt the complaint should be upheld. Mr C's representative told us Mr C accepts the provisional decision, but also made the following comments:

- The fact find recorded that Mr C's annual income was £100,000. This isn't true, it was closer to £30,000. Also the statement that he had a portfolio of shares is false.

- Once compensation is resolved, Mr C intends to transfer away from the SIPP into a more suitable retirement vehicle. Is it possible to ensure the SIPP provider won't charge fees for this?

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 C, 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 C included:
  - referring him to an experienced IFA for a suitability assessment;
  - obtaining written information from Sovereign in respect of the suitability assessment it conducted; and
  - considering the information provided to it in respect of Mr C's suitability to ensure it was able to rely on the category 2 exemption before promoting the investment.

- The initial contact by FIE, which occurred before referral to Sovereign, didn't constitute a financial promotion. FIE discussed the benefits of investing in land generally and the possible investment structures that could be used to do this, but it didn't promote specific investment schemes. This business model and regulatory analysis has previously been discussed and agreed with the FCA and the ombudsman service on many occasions. So it's inconsistent and irrelevant that I failed to identify a suitability assessment prior to FIE making the initial call to Mr C.

- I should reconsider my view that FIFS shouldn't have placed reliance on the information it received from Sovereign 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 Sovereign. But 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 C's suitability was provided to FIFS in writing. For example, the investment application included the IFA declaration, signed by Sovereign, confirming the investment is suitable for the applicant's circumstances and attitude to risk. Also, this information was provided by an unconnected authorised person, Sovereign. 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 Sovereign, including in relation to its suitability assessment, at the start of their commercial relationship that began in 2013.

  - FIFS had an ongoing relationship with Sovereign and carried out due diligence on an ongoing basis. This involved Sovereign 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 it had undertaken. These discussions also took account of the meetings that took place between Sovereign and potential investors, including that with Mr C. FIFS and Sovereign also had regular telephone conversations, sometimes on a daily basis, to discuss the suitability assessments that were being undertaken by Sovereign. Sovereign would also have ongoing discussions with the potential investor and provided FIFS with regular updates on these discussions.

  - Sovereign had been authorised and regulated by the FCA and its predecessors since 2011. During that time, the regulators hadn't taken any enforcement action against it 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 C despite the fact Sovereign had already done it.

- My provisional decision contradicts decisions reached by our service on other complaints. It provided examples of cases that it believes illustrate this point.

- I've effectively said that in promoting the investment to Mr C, 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.

Following my provisional decisions on other complaints involving similar circumstances, FIFS's representative made further submissions that it said related to all four cases I'm considering. It raised the following key points:

- 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 provisional decision, my conclusions haven't changed.

As with my provisional decision, 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.

I note FIFS's representative thinks I should issue a further provisional decision in light of its recent submissions, but I don't think that's necessary or appropriate in the circumstances. I addressed the key issues, including the application of the exemptions in COBS 4.12, in detail in my provisional decision and I don't think the responses raise any substantive new issues or lines of argument that justify delaying the settlement of this complaint further. I'm satisfied FIFS has had adequate opportunity to make submissions and that it's now appropriate for me to issue my final decision.

The sales process

I thank FIFS's representative for its recent clarification of the sales process that led to Mr C'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. According to FIFS's representative, FIE gave no advice and discussed the benefits of investing in land generally and the structures that could be used to facilitate this without promoting a particular investment – I'll return to this point later. FIE also referred Mr C to an IFA, Sovereign, for advice and FIFS's representative has referred to FIE completing a fact find with consumers to assist with that. FIE was a separate company to FIFS, but had been its AR since August 2012.

- The second stage involved Sovereign. Its role was to provide advice on whether an investment was suitable for Mr C. Sovereign also arranged the SIPP and the switch of Mr C's pension benefits. Sovereign was a regulated business in its own right and it's not appropriate for me to comment on its actions here, except where this is relevant to the outcome of the complaint about FIFS.

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

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 C's investment was established.

Jurisdiction

I've reviewed my findings on the issues concerning our jurisdiction to consider this complaint in light of the submissions received since my provisional decision. To be clear and as required, my conclusions on our jurisdiction are based on a strict interpretation of the rules rather than what I think is fair and reasonable.

Mr C says his investment was mis-sold. The overall process of selling the investment incorporated a number of different activities, including promoting the investment, advising on it, and arranging it. Some of these activities were carried out by FIE and FIFS.

jurisdiction - in respect of the activities of FIFS

Regulated activities are specified in the RAO. Along with other investors, Mr C invested in plots of land with a view to planning permission being obtained in the future when the land could be sold at a profit. It seems to be accepted the scheme is a UCIS. Units in a collective investment scheme (CIS), which includes UCIS, are specified as investments (article 82).

I've set out previously that I think FIFS was involved in various regulated activities in connection with Mr C's investment. These included establishing and operating a CIS (article 51), arranging deals in investments (article 25), and agreeing to arrange deals in investments (article 64). While promoting investments wasn't a regulated activity in its own right, a complaint about promotional activity would fall within our jurisdiction if it was ancillary to one of the other regulated activities I've identified.

FIFS's representative hasn't disputed my findings on these issues and my conclusions haven't changed. Promoting its investments was a key part of the sales process described by FIFS's representative and there doesn't seem to be any dispute that it carried out this activity and that it was ancillary to the regulated activities identified.

jurisdiction - in respect of the activities of FIE

In my view, the evidence also indicates FIE was involved in regulated activity, particularly that of arranging deals in investments. This activity is defined as:

> *(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> > *(a) a security,*
> > *(b) a contractually based investment, or*
> > *(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,*
>
> *is a specified kind of activity.*
>
> *(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.*

As I said in my provisional decision, I think the fact FIE was involved in this activity is demonstrated by the letters from FIE to Mr C dated 11 December 2013 and 8 January 2014, in which it enclosed share certificates for his land purchase and confirmed the relevant funds had been transferred to the management company's bank account.

I note FIFS's representative has also referred to FIE providing, and possibly completing, a fact find with clients prior to them being referred to the IFA. I think that would also be part of the process of arranging Mr C's investment.

As I also said in my provisional decision, I think FIE was involved in promoting investments to Mr C. 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*

Further, section 8.23.2 of the Perimeter Guidance Manual (PERG), the regulator 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.*

FIFS's representative maintains the actions of FIE didn't amount to a financial promotion and says it only discussed the benefits of investing in land generally and the possible investment structures that could be used without promoting specific investments. This directly contradicts Mr C's recollection that the person who called him spoke about a particular investment scheme involving land near the New Forest, which is what he ended up investing in.

Without access to a recording or other records of the conversation, it's difficult to be absolutely certain about what FIE discussed with Mr C. But in my view, his recollection that specific investments, including that at Cadnam, were discussed is compelling. I certainly don't think it's likely he deliberately misrepresented this point as I don't believe he had a detailed understanding of the rules covering the promotion of UCIS and the potential significance of this issue when he made his complaint.

Further, based on the description of the sales process provided by FIFS's representative, I'm conscious that FIE's aim when contacting Mr C was to arrange for him to speak to Sovereign, which was the next stage in a sales process ultimately designed to result in him investing in a scheme offered by FIFS and no other scheme operators. Mr C says the call from FIE was unsolicited and he doesn't appear to have been looking to switch his pension benefits to a new arrangement to fund unregulated investments in land. In the circumstances, I think it's unlikely he'd have considered speaking to anyone else about such a proposition further if FIE hadn't given him some information about the proposed investment. Further, for FIE to achieve its aim, I think any comments it did make would have been positive and ultimately intended to induce him to agree to invest.

On balance, I'm satisfied FIE was involved in the regulated activity of arranging investments and the unregulated (but ancillary) activity of promoting FIFS's investments to Mr C. Further, I think the evidence shows it was carrying out these activities before Mr C had been referred to Sovereign. As an ancillary activity to that of arranging his investment, I'm satisfied a complaint about promotion by FIE falls within our jurisdiction and is something we can consider.

jurisdiction - is FIFS responsible for the activities of FIE?

The fact FIFS effectively outsourced part of the promotional activity doesn't mean it somehow isn't responsible for the regulated and ancillary activities carried out by FIE. FIE acted as an AR of FIFS at all times. My provisional decision analysed the AR agreement between FIFS and its AR and I concluded that this authorised FIE to engage in promotional activity. As FIFS permitted FIE to carry out this activity on its behalf, it follows that it's responsible if it wasn't done correctly. FIFS's representative hasn't disputed this point and my conclusions remain unchanged.

overall conclusions on jurisdiction

For the reasons I've set out here, I remain satisfied that both FIE and FIFS were involved in regulated and ancillary promotional activities involving Mr C's investment and that FIE was promoting the particular investment offered to him before he was referred to Sovereign. As a result, I'm satisfied we can consider a complaint about the actions of both FIE and FIFS.

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 decision from FIFS's representative, my conclusions and the key reasons for them haven't changed.

From comments in its most recent submissions, 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 that requires me to consider whether the rules and regulatory Principles the firm is expected to adhere to have been followed. 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 I have a duty to consider whether a breach of specific rules or high-level principles 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.

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 C 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 C's complaint should be upheld on the grounds I've previously outlined simply because of the correspondence between FIE and the FSA in 2012, more than a year before he invested.

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 at the time Mr C 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.*

The CIS Exemptions Order sets out circumstances where this restriction doesn't apply and FIFS's representative has previously referred to article 13, which says:

> *The scheme promotion restriction does not apply to any communication which:*
>
> *(a) does not relate to units of a particular unregulated scheme identified (directly or indirectly) in the communication; and*
>
> *(b) does not identify (directly or indirectly) any person who operates a collective investment scheme or sells units.*

For this exemption to apply, it must be the case that any communication (which would include telephone calls as well as written correspondence) doesn't relate to a particular investment scheme and doesn't identify a particular scheme operator.

I think it's clear a particular scheme operator had been identified from the outset as the sales process followed by FIE and FIFS meant all resultant investments would only be through FIFS and no other scheme operators. Further, there's no dispute FIFS identified its own investments when promoting to Mr C and, for the reasons set out earlier in this decision, I'm satisfied FIE did the same. For these reasons, I don't think FIFS was entitled to believe either its actions or those of FIE were covered by article 13 in the CIS Exemptions Order.

the exemptions in COBS

As I set out in my provisional decision, there were other exceptions to the general prohibition covering the promotion of UCIS. At the time Mr C was contacted by FIE and promotion began, section 4.12.1 of The Conduct of Business Sourcebook (COBS) 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 set out various categories of client to whom it was acceptable to promote UCIS.

which exemption is being relied on?

The most recent submissions from FIFS's representative seem to confirm that the category 2 exemption was relied on to promote its products to Mr C. I think it's relevant to note at this point that by relying on this exemption alone, FIFS would effectively be accepting Mr C 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 Sovereign assessed Mr C as an elective professional client, indicating it relied instead on the category 7 exemption.

The fact FIFS's representative have been 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 C. 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 C.

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 FIFS's products to Mr C under this exemption, FIE and 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, Sovereign carried out a suitability assessment and FIFS relied on that to promote its products.

FIE – was it entitled to rely on the category 2 exemption?

Under the sales process described by FIFS's representative, the assessment of whether the investment was suitable for Mr C – which was required before UCIS could be promoted to him - was completed at the second stage when he spoke to Sovereign. As I've explained earlier in this decision, I believe the evidence shows FIE promoted a particular investment to him before he was referred to Sovereign and, crucially, before there was any consideration of whether it was suitable for him. Further, I'm satisfied this promotional activity was ancillary to the part FIE played in the regulated activity of arranging Mr C's investment.

I believe it's clear from the description of what took place by both parties that no attempt was made to ensure it was appropriate to promote to Mr C before FIE began its promotional activity. That means FIE wasn't entitled to rely on the exemption in COBS and should have identified that it wasn't appropriate to promote to Mr C. That it went on to do so represents a breach of the regulator's rules that were designed for the protection of consumers.

FIFS – was it entitled to rely on the category 2 exemption?

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 C before promoting it to him. The reasonable step it says it took was to rely on a suitability assessment made by Sovereign.

was FIFS entitled to rely on Sovereign'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 C 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 Sovereign that the investment product it was promoting to Mr C was 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 Sovereign 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 Sovereign, 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 Sovereign confirm its suitability assessment to FIFS in writing?

FIFS's representative says it obtained written confirmation from Sovereign that its investment products were suitable for Mr C and it referred to a declaration on the investment application, which was signed by Soveriegn, 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 a copy of Mr C's application form with the above declaration signed by Sovereign on 2 August 2013. But 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 Sovereign that it had completed a suitability assessment and concluded the products it was promoting were suitable for Mr C before it promoted them to him.

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 C to inform it that Sovereign 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 Sovereign that it was satisfied the products to be promoted to Mr C 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 Sovereign 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, Sovereign 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 Sovereign 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 Sovereign had a direct impact on the fortunes of FIFS and vice-versa. If Sovereign didn't conclude the products FIFS offered were suitable for Mr C, 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 C, there wouldn't have been any reason for him to transfer his pension to a SIPP and Sovereign 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 Sovereign 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 C 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 Sovereign 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 Sovereign saying the product it was promoting was suitable for Mr C?

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 C based on information provided by Sovereign 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 Sovereign, so it seems that everybody understood the adviser needed to know about Mr C'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 C, I think it's reasonable to expect that FIFS should have satisfied itself Sovereign had followed the correct process to assess suitability. I don't think it would have been enough to simply accept Sovereign'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, Sovereign 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 and risk profiler, I think the evidence indicates no appropriate suitability assessment took place and I note Mr C says he never even met anyone from Sovereign.

If FIFS had checked that an adequate suitability assessment had been completed and Sovereign 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, FIFS hasn't 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 C 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 C. 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 C. So it follows that it shouldn't have promoted to him.

what were the consequences of FIE and FIFS promoting to Mr C without first taking reasonable steps to ensure the investment was suitable for him?

The overall transaction involved Mr C moving his pension fund 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 decision why I don't think this proposition was suitable for Mr C and FIFS's representative doesn't appear to be disputing my conclusions on this point. So I think it follows that if Sovereign 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 before promoting to Mr C, the actions of FIE and 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 C 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.

FIE – was it entitled to rely on the category 7 exemption?

Under the sales process described by FIFS's representative, any assessment of whether Mr C was a professional client – which was required before UCIS could be promoted to him – would have been completed at the second stage when he spoke to Sovereign. As I've explained earlier in this decision, I believe the evidence shows FIE promoted a particular investment to him before he was referred to Sovereign and, crucially, before there was any consideration of whether he was a professional client. Further, I'm satisfied this promotional activity was ancillary to the part FIE played in the regulated activity of arranging Mr C's investment.

I believe it's clear from the description of what took place by both parties that no attempt was made to ensure it was appropriate to promote to Mr C before FIE began its promotional activity. That means FIE wasn't entitled to rely on the exemption in COBS and should have identified that it wasn't appropriate to promote to Mr C. That it went on to do so represents a breach of the regulator's rules that were designed for the protection of consumers.

FIFS – was it entitled to rely on the category 7 exemption?

I believe the actions of FIE alone would sufficient for this complaint to be upheld. But for the sake of completeness, I've also considered whether FIFS would have been entitled to promote its investments to Mr C by relying 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, Sovereign 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 C as an elective professional client was completed, the relevant submissions are consistent that this would have been completed by Sovereign. 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 C as a professional client or to promote its investments to him on that basis. That it went on to do so represents a breach of the regulator's rules that were designed for the protection of consumers.

what were the consequences of FIE and FIFS promoting to Mr C without first carrying out an appropriate assessment of his status?

If FIE of FIFS had carried out an appropriate assessment of whether Mr C was an elective professional client before promoting to him, I think the evidence shows that he couldn't reasonably have been considered to have met the quantitative test outlined above. Mr C disputes the accuracy of most of what was recorded about his circumstances at the time in the fact find and I find his 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 C's status should have led both FIE and FIFS to conclude they couldn't promote to him. Because rules designed for his protection weren't followed, I think I could only reasonably conclude FIE and FIFS didn't treat Mr C fairly. As the principal of FIE, and in line with the contents of the AR agreement, I'm satisfied FIFS would be responsible for FIE's failings in the respect. Further, I don't think Mr C would have invested but for the promotional activities of FIE and FIFS. So it follows that the actions of these firms directly contributed to the loss he's suffered

conclusions

As I've said above, the key consideration in this case is whether FIE and FIFS were entitled to promote the investment to Mr C. 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 FIE and FIFS therefore weren't entitled to promote to Mr C. 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 (and FIE, acting as its AR) didn't treat Mr C fairly. This is the reason I'm upholding his complaint.

To be clear, the actions (as I've described them) of either FIE or FIFS on their own are sufficient for the complaint to be upheld.

Putting Things Right

The principal aim of any award I make is to return Mr C to the position he'd be in if FIFS and FIE (acting as an AR of FIFS and with its authority) hadn't promoted UCIS to him. I don't think it's likely that Mr C would have made this investment off his own back and if FIE and 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.

I appreciate FIFS and FIE weren't the only regulated firms involved in the events that led to Mr C switching his pension benefits and investing in a UCIS. But I think any loss he's suffered as a result wouldn't have happened if these firms hadn't approached and promoted to him in the first place. On that basis, I'm satisfied it's appropriate to hold FIFS responsible for any loss.

As I've said, my aim in awarding fair compensation is to put Mr C back into the position he would likely have been in, but for the inappropriate actions of FIFS and FIE. If he hadn't been approached and promoted investments when he shouldn't have been, I think he wouldn't have switched his pension to the SIPP and it would most likely have remained with AXA, invested in the same funds as it had been before he was contacted by FIE.

Any loss Mr C has suffered should be determined by obtaining the notional value of the pension from AXA on the basis that it had remained in the same fund(s), and subtracting the current value of the SIPP from this notional value. If the value of the SIPP is higher than the notional value, there's a gain and no redress is payable.

I consider the notional value outlined above is the fairest way of resolving this complaint. But if AXA isn't able to calculate a notional value, an alternative approach will be needed. To compensate Mr C fairly in this situation, FIFS should compare the performance of the SIPP with that of the FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index). This is made up of a range of indices with different asset classes, mainly UK equities and government bonds and, in my view, is a reasonable proxy for the sort of returns Mr C could have achieved from suitable investments.

Any compensation amount should if possible be paid into Mr C'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 C as a lump sum after making a notional reduction to allow for future income tax that would otherwise have been paid.

If Mr C hasn't yet taken any tax-free cash from his plan, 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional reduction 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 C within 28 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 28 days, that it takes FIFS to pay Mr C.

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

other considerations

My aim is to return Mr C to the position he would have been in but for the actions of FIFS. This is complicated where an investment is illiquid (meaning it can't be readily sold on the open market), as its value can't be determined. That appears to be the case here.

To calculate the compensation, FIFS should agree an amount with the SIPP provider as a commercial value, then pay the sum agreed to the SIPP plus any costs, and take ownership of the investment. If FIFS is unable to buy the investment, it should give it a nil value for the purposes of calculating compensation. The value of the SIPP used in the calculations should include anything FIFS has paid into the SIPP and any outstanding charges yet to be applied to the SIPP should be deducted.

In return for this, FIFS may ask Mr C to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on what he receives. FIFS will need to meet any costs in drawing up the undertaking. If FIFS asks Mr C to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

The SIPP only exists because of the illiquid investment. In order for the SIPP to be closed and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. I've set out above how this might be achieved by FIFS taking over the investment, or this is something that Mr C can discuss with the SIPP provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. To provide certainty to all parties, I think it's fair that FIFS pay Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

I note the comments of Mr C's representative about his intention to transfer his pension benefits elsewhere once compensation is paid but I can't require the SIPP provider to do anything about a potential exit fee as this complaint is not against that firm. It's also difficult to know what fees might be involved because of the potential for delay before a transfer is possible. I've tried to account for this situation by awarding Mr C five years' worth of SIPP fees and I think that's a reasonable outcome in the circumstances.

additional compensation

I think the problems Mr C has experienced with his pension arrangements as a result of the actions of FIFS and its AR 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 C, 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 C (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 C 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 C 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 C any interest as set out above on the sum of £150,000.

If FIFS doesn't pay the recommended amount below, then any investment currently illiquid should be retained by Mr C. This is until any future benefit that he may receive from the investment together with the compensation paid by FIFS (excluding any interest) equates to the full fair compensation as set out above.

FIFS may request an undertaking from Mr C that either he repays to it any amount he may receive from the investment thereafter or if possible, transfers the investment at that point. FIFS will need to meet any costs in drawing up the undertaking.

Mr C should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

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

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

My Decision

My decision is that I uphold this complaint.

If Mr C 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 C to accept or reject my decision before 12 April 2021.

Jim Biles
Ombudsman

Extract from Provisional Decision:

My Provisional Findings

We've received detailed 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. I note FIFS's representative has referred to our response to a different case. I've read that assessment carefully, but I think it's relevant to note that it was only the initial view of the adjudicator and that the case doesn't appear to have been considered by an ombudsman. In any event, I must consider each case on its own individual merits and that's what I've done here.

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 and the structures that could be used to facilitate this without promoting a particular investment. It also referred potential investors to an IFA, Sovereign, for advice and FIE completed a fact find with the consumer to assist it with that. FIE was a separate company to FIFS, but it had been an AR of FIFS since August 2012.

- The second stage involving Sovereign. Its role was to provide advice on whether an investment was suitable for Mr C. Sovereign also arranged the SIPP and the switch of Mr C's pension benefits. Sovereign was a regulated business in its own right and it's not appropriate for me to comment on its actions here, except where this is relevant to the outcome of the complaint about FIFS.

- The final stage was the promotion of the specific land investment by FIFS.

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. The DISP rules also set out the framework for determining what complaints I can and can't consider.

In terms of Mr C's case, I'm satisfied he's an eligible complainant, that we have territorial jurisdiction, and that he complained within the time limits set out in the DISP rules. Another point that needs to be addressed is whether the complaint relates to an activity we cover. Under DISP 2.3.1, we 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.

Based on the process as described by FIFS' representative, this complaint involves the actions of two firms, FIE and FIFS. This complaint is against FIFS, which was directly authorised and I don't think there's any grounds for disputing that it's responsible for its own actions. At the time Mr C's investment was made, FIE was a separate firm but it was also an AR of FIFS. To determine whether I can consider the actions of FIE as part of the complaint, I must decide whether FIFS can be held responsible for the alleged actions of its AR.

DISP 2.3.3 says:

> *Complaints about acts or omissions include those in respect of activities for which the firm… is responsible (including business of any appointed representative or agent for which the firm... has accepted responsibility).*

So the issue of whether FIFS (the principal firm) is responsible for the alleged actions of FIE (its AR) involves a three stage test:

- step 1 - identify the specific acts complained of;
- step 2 - consider whether those acts are regulated activities or ancillary thereto; and
- step 3 - consider whether the principal firm was responsible for those activities by reason of section 39 of FSMA, agency or vicarious liability.

What are the acts complained of?

In his complaint form, Mr C said his investment was *mis-sold*. The overall process of *selling* the investment incorporated a number of different activities, including promoting the investment, advising on it, and arranging it. Some of these activities were carried out by FIE and FIFS. While FIFS's representative believes the complaint is solely about advice given to Mr C, I think that's too narrow an interpretation. Because the complaint incorporates a much wider range of issues, I don't accept that my consideration should be restricted to the issue of advice.

Are these acts regulated activities or ancillary to regulated activities?

Regulated activities are specified in the RAO. Along with other investors, Mr C invested in plots of land with a view to planning permission being obtained in the future when the land could be sold at a profit. It seems to be accepted the scheme is a UCIS. Units in a collective investment scheme (CIS) are specified as investments (article 82).

Based on my understanding of the submissions from FIFS' representative, it's accepted that it carried out various regulated activities set out in the RAO in connection with Mr C's investment. These include establishing and operating a CIS (article 51), arranging deals in investments (article 25), and agreeing to arrange deals in investments (article 64).

The activity of arranging deals in investments is defined as:

> *(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> > *(a) a security,*
> > *(b) a contractually based investment, or*
> > *(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,*
>
> *is a specified kind of activity.*
>
> *(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.*

I think the evidence also shows FIE was also involved in the regulated activity of arranging investments. For example, FIFS provided us with copies of letters from FIE to Mr C dated 11 December 2013 and 8 January 2014, in which it enclosed share certificates for his land purchase and confirmed the relevant funds had been transferred to the management company's bank account.

The submissions from its representative also confirm FIFS was involved in promoting its UCIS investment to Mr C, once Sovereign had completed its part of the process. By contacting Mr C initially, I think FIE was also engaged in this activity and I'll say more about that later on in this decision. 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 and/or ancillary to the activities or arranging and agreeing to arrange investments that FIFS and FIE were 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.*

As an ancillary activity to that of arranging Mr C's investment, I'm satisfied a complaint about promoting it by either FIE or FIFS is within our jurisdiction to consider as set out in DISP 2.3.1.

Is FIFS responsible for the acts of FIE by reason of section 39 of FSMA, agency or vicarious liability?

DISP 2.3.3 says:

> *complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for which the firm…has accepted responsibility)*.

So, a principal is answerable for complaints about the acts or omissions of its AR in relation to the business it has accepted responsibility for.

On the subject of appointed representatives, at the relevant time, section 39 of FSMA said:

> *(1) If a person (other than an authorised person) –*
>
> > *(a) is a party to a contract with an authorised person ("his principal") which -*
> >
> > > *(i) permits or requires him to carry on business of a prescribed description, and*
> > >
> > > *(ii) complies with such requirements as may be prescribed, and*
> >
> > *(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,*
>
> *he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility…*
>
> *(3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.*

So, under section 39, the principal is required to accept responsibility for *"that business"*, which is a reference back to *"business of a prescribed description"*. However, the case of Anderson v Sense Network (2018) makes it clear the words *"part of"* in section 39 allow a principal firm to accept responsibility for only part of the generic *"business of a prescribed description"*. In other words, FIFS was entitled to appoint FIE as a representative and limit the scope of the regulated activities it could carry out and that it would be responsible for.

Further clarification on this point was provided by the appeal judgement in the Anderson v Sense case, which set out that only restrictions on *"what"* generic business could be conducted would limit the principal's responsibility. In contrast, restrictions on *"how"* that business is to be conducted don't limit a principal's responsibility under section 39. In other words, a principal can't avoid responsibility for activities it authorised an AR to carry out just because those activities weren't carried out in the way it wanted them to be.

In terms of the acts of FIE being complained about here, the above means FIFS is responsible for them if they include acts for which it accepted responsibility under section 39 of FSMA.

The AR agreement set out the terms of the arrangement between FIFS and FIE. This document is very brief and the only reference to what FIE (and therefore its employees) was authorised to do is in sections 2 and 3, which said:

> *2. The appointment is made in accordance with the rules of the Financial Services Authority (FSA) and authorises the Representative to make arrangements enabling clients to enter into agreements with the Principal for financial business in the categories for which the Principal is authorised.*
>
> *3. The Representative shall carry on financial business solely through the Principal in accordance with the rules of FSA and the Principal's compliance manual. The Principal hereby accepts responsibility for the financial business conducted by the Representative pursuant to this agreement.*

So, FIFS authorised FIE to *make arrangements* to enable clients to enter into agreements with FIFS for business in the categories for which it was authorised. And I think it's clear this is what FIE was doing when it initially contacted Mr C, spoke to him about investing, completed a fact find, and then referred him to an IFA. The process as described by FIFS's representative is that FIE's role was to find and introduce clients for its UCIS investments. It wasn't finding and introducing clients for Sovereign's IFA business, it was actually arranging for those clients to be reviewed by the IFA with a view to them investing in a UCIS with FIFS.

conclusions on jurisdiction

Taking everything into account, I'm satisfied FIFS was engaged in various regulated activities involved in operating, promoting and arranging Mr C's investment. I also believe FIE was engaged in the regulated activity of arranging and promoting investments. Further, I'm satisfied these were activities FIE was authorised to carry out under the terms of its AR agreement with FIFS and that FIFS is therefore responsible for its acts.

Merits

As I've already said, I'm satisfied both FIE and FIFS were involved in the activity of promoting investments and that this was ancillary to the regulated activities of arranging and agreeing to arrange investments. There were rules covering the promotion of UCIS at the time Mr C 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.*

The CIS Exemptions Order sets out circumstances where this restriction doesn't apply and FIFS's representative has referred specifically to article 13, which says:

> *The scheme promotion restriction does not apply to any communication which:*
>
> *(a) does not relate to units of a particular unregulated scheme identified (directly or indirectly) in the communication; and*
>
> *(b) does not identify (directly or indirectly) any person who operates a collective investment scheme or sells units.*

I've considered this point carefully, but I don't think I could reasonably conclude this exception applies here in respect of the actions of either FIE or FIFS. Even if Mr C's recollections aren't correct and FIE didn't discuss the particular scheme in the New Forest, the whole process described by FIFS's representative was designed to end with an investment in one of its schemes. So I don't think it's reasonable to believe FIE didn't (either directly or indirectly) identify FIFS as the eventual scheme operator. In terms of FIFS' actions after Sovereign had completed its part of the process, it clearly was promoting its own scheme and this exception wouldn't therefore apply.

There were other exceptions to the general prohibition on promoting particular UCIS. At the time of Mr C's investment, section 4.12.1 of The Conduct of Business Sourcebook (COBS) set out that:

> *(1) 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.*
>
> *(2) Where the left-hand column in the table in (4) refers to promotion to a category of person, this means that the invitation or inducement:*
>
> > *(a) is made only to recipients who the firm has taken reasonable steps to establish are persons in that category; or*
> >
> > *(b) is directed at recipients in a way that may reasonably be regarded as designed to reduce, so far as possible, the risk of participation in the collective investment scheme by persons who are not in that category.*

The table referred to set out various categories of client to whom it was acceptable to promote UCIS. I've reviewed this carefully and the only categories that I think could potentially apply here are 2, 7 and 8 and I've considered each of these carefully.

A category 7 person was defined as:

> *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 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.

This 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 needs to follow the appropriate steps *itself*. 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 – 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.

FIFS's representative has not suggested that either FIE or FIFS took the steps set out in COBS 3.5.3 that meant Mr C could have been treated as an elective professional client. And I've found nothing else in the evidence provided to indicate it did either. That means neither firm could rely on this exclusion to promote UCIS to him.

A category 8 person was defined as:

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.

Again, I think the wording of the rule means the steps described had to be taken by the firm, so FIE or FIFS, before promoting UCIS to Mr C. There's nothing in the description of the process by FIFS' representative or the other evidence provided that I believe shows either firm carried out an assessment of Mr C's expertise, experience and knowledge, or that they gave the necessary written warning or obtained a separate statement from him. So again, that means neither FIFS or FIE could rely on this exclusion to promote UCIS to him.

Finally, a Category 2 person was defined as:

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 UCIS to Mr C under this particular exemption, the firm doing the promotion would have first needed to take reasonable steps to satisfy itself that such an investment was suitable for him.

In terms of FIE, I've seen no evidence to indicate that it carried out such an assessment before contacting Mr C to promote UCIS. The description of the process by FIFS's representative is consistent with this interpretation and seems to accept there was no consideration of suitability before Mr C was referred to Sovereign, by which time I'm satisfied promotion had already taken place. In the circumstances, I don't think FIE was entitled to rely on this exemption.

For FIFS, there's also nothing in the process described by its representative or the other evidence I've seen to indicate it carried out a suitability assessment. Instead, it seems to have relied on this having been done by Sovereign at the previous stage of the process.

In my view, the wording of this category is less clear than the others I've considered in saying that the firm promoting the investment must assess suitability itself. Instead, it says the firm must *take reasonable steps* to ensure the scheme being promoted is suitable and FIFS might want to argue that includes accepting the word of an IFA that has completed its own assessment.

The circumstances in which it's appropriate for one firm to rely on *information* provided by another – which in this case would be information from Sovereign that FIFS's UCIS investments were suitable for Mr C - 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 C 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 Sovereign, 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 C essentially involved moving his pension funds to an 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 Sovereign's word that this proposition was suitable without at least seeing evidence to demonstrate this was the case. Failure to obtain sufficient evidence before promoting UCIS 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 would have been treating Mr C fairly.

At this stage, it's not clear what evidence FIFS obtained from Sovereign at the time to make sure it was satisfied the investments it was promoting were suitable for Mr C. But in connection with this complaint, it has provided some of Sovereign's documentation, including a fact find and risk profiling questionnaire. I've reviewed these documents carefully to consider whether it would have been reasonable for FIFS to determine its UCIS was suitable for him before promoting it.

The fact find records that Mr C was a self-employed property developer/landlord earning £100,000 per year and, in addition to his main residence, on which there was an outstanding mortgage, he owned two rental properties worth between £60,000 and £100,000 each. The fact find also records that he had a share portfolio worth £30,000 in which he traded monthly. It was noted that he had a *"good degree of investment experience"* and that he'd generated his share portfolio from an initial investment of £5,000.

The fact find wasn't signed by Mr C, so it's not clear he saw it or agreed with the contents. And in contrast to what was recorded, he told our adjudicator he was actually earning £30,000 per year and had no other savings or investments. He also said he had no investment experience, other than the two buy-to-let properties, and that the money switched to his Avalon SIPP was the only pension savings he had.

The land investment 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 Mr C 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. In addition, and aside from any disagreement about the contents of the fact find, Mr C was investing a considerable sum of money that accounted for most of his pension benefits. This was a very different proposition to investing a modest amount in shares and trading them with a view to achieving growth, which Mr C denies having done anyway.

FIFS has also provided a copy of a risk profiling questionnaire that appears to have been completed at the time of sale. This included a number of statements for respondents to say whether they *"strongly disagree, disagree, neither agree nor disagree, agree or strongly agree"*, with each answer attributed a points score. The scoring section hasn't been completed, but adding the points for the recorded answers, it looks like Mr C's attitude to risk was assessed as eight on a scale of one to ten, where ten was the most speculative. The questionnaire also records he was looking to invest for 10 or more years and that large losses would have a low impact on his future lifestyle.

Like the fact find, the risk profiler wasn't signed by Mr C either. So again, it's not clear he saw or agreed with the contents. If correct, the recorded answers indicate Mr C was willing to accept some risk. For example, it was recorded he *"agreed"* with statements such as:

- *I would be willing to risk a percentage of my income/capital in order to get a good return on an investment;*
- *I would accept potential losses in order to pursue long-term investment growth; and*
- *I would be happy investing a large proportion of my income/capital in a high-risk investment.*

But I think it's worth noting that there was the opportunity for Mr C to *"strongly agree"* (or *"strongly disagree"*) with any of the statements in the questionnaire but he didn't do so. While the recorded answers suggest he was willing to expose his capital to some risk, I don't think they show he was willing to accept a particularly high degree of risk in exchange for a potentially higher return.

I think Mr C's recollection of his circumstances and the fact the documents aren't signed throw significant doubt on their accuracy. But even if the contents are accepted as accurate, I don't think the fact he was recorded as having built a comparatively small share portfolio shows he was a particularly knowledgeable or experienced investor and certainly not in terms of the investment FIFS promoted to him. It may have been the case that Mr C was willing to take some risk with his money, but I don't think the documentation provided demonstrates it was appropriate to advise him to make an unregulated, high-risk, specialised investment.

So if FIFS had obtained this information from Sovereign at the time, as I think it ought to have done to comply with the Principles, I don't think it could reasonably have concluded that it was entitled to promote UCIS to Mr C.

Taking everything into account, I don't think it was reasonable for either FIE or FIFS to consider that any of the exclusions covering the promotion of UCIS applied in Mr C's case. So I think I can only reasonably conclude that both firms should have concluded they couldn't promote to him and refrained from doing so. It's for this reason that I'm proposing to uphold this complaint.