

Mr Oxberry has referred this Decision Notice to the Upper Tribunal to determine, in the case of the decision to impose a disciplinary sanction: what (if any) the appropriate action is for the Authority to take, and remit the matter to the Authority with such directions as the Tribunal considers appropriate; and in relation to the prohibition order and withdrawal of approval: whether to dismiss the reference or remit it to the Authority with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

Therefore, the findings outlined in this Decision Notice reflect the FCA's belief as to what occurred and how it considers the conduct of Mr Oxberry should be characterised. The proposed action outlined in the decision notice will have no effect pending the determination of the case by the Tribunal. The Tribunal's decision will be made public on its website.



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DECISION NOTICE

To: **Frank Edwin Oxberry**

Individual
Reference
Number: **FEO00001**

Date: **19 March 2024**

1. ACTION

1.1. For the reasons given in this Notice, the Authority has decided to:

- (1) impose on Mr Frank Oxberry a financial penalty of £241,869 pursuant to section 66 of the 2000 Act;
- (2) withdraw, pursuant to section 63 of the 2000 Act, the approval given to Mr Oxberry to perform the SMF27 (Partner) function at SMP; and
- (3) make an order, pursuant to section 56 of the 2000 Act, prohibiting Mr Oxberry from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

2. SUMMARY OF REASONS

- 2.1. Mr Oxberry was approved by the Authority to perform the CF4 (Partner) and CF30 (Customer) controlled functions at St Martin's Partners LLP ("SMP or "the Firm") during the Relevant Period (1 October 2015 to 31 July 2016). SMP was a small financial advice firm based in Essex which was authorised by the Authority during the Relevant Period with permission to conduct regulated activities, including advising on Pension Transfers and Pension Opt Outs.
- 2.2. During the Relevant Period, SMP partnered with First Review Pension Services Ltd ("FRPS"), an introducer firm which was not authorised by the Authority, to design and operate the Pension Transfer Model. FRPS had a material financial interest in promoting investments offered by its parent company, The Resort Group ("TRG"), a property developer based in Gibraltar offering investment opportunities in hotel developments in Cape Verde. These investments were high-risk, illiquid and unregulated property investments and unlikely to be covered by FOS or FSCS protection and therefore unlikely to be suitable for retail clients. The Authority considers that FRPS designed the Pension Transfer Model, in conjunction with SMP, with a view to bringing about investments of SMP clients' pension funds into TRG. SMP, as a firm authorised by the Authority, had a critical role in that process, namely to provide advice to those clients and thereby provide the statutory basis upon which the trustees of the ceding pension schemes were permitted to authorise the release of members from their schemes.
- 2.3. Under the Pension Transfer Model, SMP failed to gather sufficient information before advising clients on the appropriateness of transferring out of their Defined Benefit Pension Schemes. SMP did not properly take account of clients' financial circumstances and objectives, their attitude to risk and their capacity for loss. Additionally, SMP did not take into account the nature, risks and fees of the actual onward investment and instead based its analysis and advice on a generic onward investment across those clients who were subject to the Pension Transfer Model. Investment advice was intended to be subsequently provided to the clients by the Overseas Adviser Firm, a financial advisory group based in Cyprus and not authorised by the Authority, and which was a business partner of FRPS and TRG.
- 2.4. This meant that SMP was not in a sufficiently informed position to give its clients appropriate advice on the nature of the risks or benefits associated with transferring their pensions. Although SMP cautioned its clients that its advice was subject to limited information and in the majority of cases advised them not to transfer, the fact that its clients had obtained advice from SMP, a firm authorised

by the Authority, nevertheless provided the statutory basis upon which the trustees of the ceding pension schemes were permitted to authorise the release of those members from their schemes. This was not the case for a very small number of SMP's clients whose CETV was below the minimum threshold of £30,000, and for whom the trustees were not under a statutory obligation to check that they had received appropriate independent advice prior to making a transfer.

- 2.5. In addition to FRPS, at least 16 other introducers introduced clients who were advised by SMP during the Relevant Period. SMP advised at least 547 clients under the Pension Transfer Model during the Relevant Period, of which 440 clients were introduced to SMP by FRPS. The total value of the Defined Benefit Pension Schemes on which SMP advised under the Pension Transfer Model was just under £60 million, with an average value of approximately £104,000.
- 2.6. SMP retained 30% of the fees charged to clients under the Pension Transfer Model after paying 70% of the fees to SMP's two advisers, Mr Douglas and Mr Martin, who provided advice under the model. In total, Mr Oxberry received £90,433 in respect of the financial benefit from the fees generated from the Pension Transfer Model.
- 2.7. On 14 June 2019 SMP entered liquidation. The FSCS declared SMP in default on 23 September 2019 and is investigating claims made by SMP's clients who were advised under the Pension Transfer Model. As at 26 May 2022, the FSCS had paid over £9 million in compensation to SMP's clients as a result of loss they had suffered following advice they had received from SMP.

Mr Oxberry's misconduct

- 2.8. The Authority considers that Mr Oxberry failed to comply with Statement of Principle 1 during the Relevant Period in that he failed to act with integrity in carrying out his accountable functions as CF4 (Partner) at SMP. Mr Oxberry's actions in relation to SMP's design and operation of the Pension Transfer Model were reckless. In particular, Mr Oxberry:
 - (a) failed to address the significant risk that clients introduced to SMP by FRPS for the purpose of receiving advice under the Pension Transfer Model would be encouraged by the Overseas Adviser Firm to transfer out of their Defined Benefit Pension Schemes and invest in high-risk, illiquid and unregulated

property investments offered by TRG which were unlikely to be suitable for them, notwithstanding the clear indications he received of FRPS's material financial interest in promoting investments offered by TRG. This risk would have been clear to Mr Oxberry particularly in light of his experience as a financial adviser and his senior position as CF4 (Partner) at SMP. In permitting SMP to operate the Pension Transfer Model with FRPS, Mr Oxberry closed his mind to the significant risk associated with the Firm partnering with FRPS, and unreasonably exposed SMP's clients to this risk;

- (b) failed to have regard to the clear deficiencies in the Pension Transfer Model before permitting the expansion of SMP's business model to include this advice process, notwithstanding that it constituted a significant departure from SMP's usual advice model. The clear deficiencies included that: (i) it failed to take into account the client's attitude to risk, meaning SMP was unable to ascertain whether a Pension Transfer was suitable in accordance with the client's risk tolerance; and (ii) confirmation of advice letters would be issued to the trustees of the ceding schemes at a point where clients had received very limited advice. In doing so, he closed his mind to the risk that SMP's clients' pension funds would be transferred out of their Defined Benefit Pension Schemes into investments which were unsuitable for them;
- (c) failed to take reasonable steps to ensure that SMP performed sufficient due diligence on its partner introducers and the investments which they promoted to clients. This was particularly important as SMP was partnering with a large number of introducers and Mr Oxberry was responsible for business development at the Firm. In doing so, he closed his mind to the risks that would arise from rapidly expanding SMP's business operations to advise clients introduced by unknown introducers using the Pension Transfer Model;
- (d) failed to take reasonable steps to ensure that: (i) SMP obtained independent, expert opinion from SMP's Compliance Consultant to verify the compliance of the Pension Transfer Model; or (ii) these steps were or had been taken, both prior to its implementation and during its operation, notwithstanding the novelty of the advice model for SMP's business and the clear risks of detriment it posed to SMP's clients. In doing so, Mr Oxberry closed his mind to the significant risks associated with the Pension Transfer Model;

(e) failed to take reasonable steps to ensure the effectiveness of SMP's compliance function. The reduced effectiveness of SMP's compliance function, at a time of the reduced office hours of the other CF4 Partner and CF10 (Compliance Oversight) in advance of his planned retirement, and the lack of experience and relevant qualification of SMP's Compliance Manager, to whom day-to-day compliance responsibilities had been delegated, must have been clear to Mr Oxberry as the other of the two CF4 Partners at SMP. Mr Oxberry should have exercised a greater degree of scrutiny over the effectiveness of SMP's compliance function, especially in circumstances where the compliance function was tasked with verifying a high-risk and novel advice process which constituted a significant departure from SMP's usual advice model, and a rapid expansion of SMP's business operations. However, Mr Oxberry failed to exercise any such oversight, and permitted the Pension Transfer Model to operate until the end of the Relevant Period. In doing so, he closed his mind to the risk that the advice received by clients was not compliant with the relevant requirements in COBS; and

(f) failed to respond adequately to a variety of warning signs he received during the operation of the Pension Transfer Model in respect of the clear deficiencies of the advice process and, in doing so, he closed his mind to the clear risks of detriment it posed to SMP's clients. Mr Oxberry was aware, however, of the numbers of clients advised under the model, and that the corresponding fees generated from them (from which Mr Oxberry derived financial benefit) substantially increased up to the end of the Relevant Period.

2.9. The Authority considers Mr Oxberry's failure to comply with Statement of Principle 1 to be serious because:

- (a) it related to a large number of clients whom he took no steps to protect;
- (b) it would have been clear to Mr Oxberry that clients introduced to SMP by FRPS would be encouraged to invest into high-risk, illiquid and unregulated property investments offered by TRG, which were unlikely to be suitable for retail clients, yet he closed his mind and took no steps to address this risk;
- (c) in failing to take reasonable steps to ensure that sufficient due diligence was performed on SMP's partner introducers, Mr Oxberry's misconduct

unreasonably exposed the Firm's clients to a significant risk that their pension funds would be transferred into investments which were unsuitable for them;

(d) the deficiencies of the Pension Transfer Model would have been clear to Mr Oxberry as an experienced financial adviser and a senior manager at SMP; and

(e) Mr Oxberry obtained substantial financial benefits as a result of his failings.

2.10. The Authority therefore has decided to impose on Mr Oxberry a financial penalty of £241,869 for his breach of Statement of Principle 1.

2.11. As a result of Mr Oxberry closing his mind to the clear risks described in paragraph 2.8 above, Mr Oxberry was reckless and failed to act with integrity. For this reason, the Authority considers he is not fit and proper to perform any function in relation to any regulated activity carried on by an authorised person, exempt person, or exempt professional firm. The Authority therefore has decided to make an order prohibiting Mr Oxberry from performing any such functions at an authorised person, exempt person, or exempt professional firm. The Authority considers that doing so is necessary, in order to secure an appropriate degree of protection for consumers.

2.12. The Authority also has decided to withdraw Mr Oxberry's approval in relation to the performance of the SMF27 (Partner) function at SMP. The Authority considers that doing so is necessary in order to secure an appropriate degree of protection for consumers.

3. DEFINITIONS

3.1. The definitions below are used in this Notice:

"the 2000 Act" means the Financial Services and Markets Act 2000;

"the 2001 Order" means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001;

"the 2015 Act" means the Pension Schemes Act 2015;

"the 2015 Regulations" means the Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015;

"ACER" means ACER IM Ltd (dissolved on 29 January 2019);

"the ACER Introducers Agreement" means a partially executed agreement dated 23 November 2015 between ACER and SMP for ACER to introduce third party introducers to SMP;

"the Authority" means the Financial Conduct Authority;

"CETV" means cash equivalent transfer value, which is the cash value of benefits which have been accrued to, or in respect of, a member of a pension scheme at a particular date, representing the expected costs of providing the member's benefits within the scheme;

"COBS" means the Conduct of Business Sourcebook, part of the Handbook;

"Compliance Consultant" means the independent, third-party compliance consultancy engaged by SMP during the Relevant Period;

"Compliance Manager" means SMP's compliance manager to whom Mr Cuthbert delegated compliance responsibilities throughout the Relevant Period;

"the COO" means the Chief Operating Officer;

"Defined Benefit Pension Scheme" means an occupational pension scheme as defined by Article 3(1) of the 2001 Order, namely where the amount paid to the beneficiary is based on how many years the beneficiary has been employed and the salary the beneficiary earned during that employment (rather than the value of their investments);

"DEPP" means the Authority's Decision Procedure and Penalties Manual, part of the Handbook;

"EG" means the Authority's Enforcement Guide set out in the Handbook;

"FOS" means the Financial Ombudsman Service;

"FRPS" means First Review Pension Services Ltd (dissolved on 12 September 2017);

"the FRPS Introducers Agreement" means an agreement between FRPS and SMP dated 1 April 2016 for FRPS to introduce clients to SMP;

"FSCS" means the Financial Services Compensation Scheme;

"Full Advice Model" means a Pension Transfer advice model where a single adviser gives defined benefit transfer advice and investment advice on the proposed onward investment, in order for the Pension Transfer to proceed;

"the Handbook" means the Authority's Handbook of rules and guidance;

"Mr Cuthbert" means Alec Cuthbert, a qualified Pension Transfer Specialist who held the CF4 (Partner), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting), CF30 (Customer) and Responsible for Insurance Mediation functions at SMP during the Relevant Period;

"Mr Douglas" means Adrian Douglas, a qualified Pension Transfer Specialist who held the CF30 (Customer) function at SMP during the Relevant Period;

"Mr Martin" means Liam Martin, a qualified Pension Transfer Specialist who held the CF30 (Customer) function at SMP during the Relevant Period;

"Mr Oxberry" means Frank Oxberry;

"the October 2016 Meeting" means the meeting the Authority held with Mr Oxberry, Mr Cuthbert and Mr Douglas on 3 October 2016;

"the Overseas Adviser Firm" means a financial advisory group based in Cyprus which was not authorised by the Authority and which was a business partner of FRPS and TRG;

"Pension Opt Out" has the meaning given in the Handbook and includes a transaction resulting from the decision of a retail client to opt out of an occupational pension scheme to which his employer contributes and of which he is a member;

“Pension Transfer” has the meaning given in the Handbook and includes the transfer of deferred benefits from an occupational pension scheme (with safeguarded benefits, such as a Defined Benefit Pension Scheme) to a personal pension scheme;

“Pension Transfer Model” means the Pension Transfer advice model operated by SMP during the Relevant Period characterised by advice provided solely on the basis of critical yield values of the ceding scheme against a generic scheme with no consideration of the client’s final investment;

“Pension Transfer Specialist” has the meaning given in the Handbook and includes an individual appointed by a firm to check the suitability of, amongst other things, a Pension Transfer, who has passed the required examinations as specified in the Training and Competence Sourcebook, part of the Handbook;

“Personal Recommendation” means a recommendation that is advice on transfer of pension benefits into a personal pension or SIPP, and is presented as suitable for the client to whom it is made, or is based on a consideration of the client’s circumstances;

“QROPS” means qualifying recognised overseas pension scheme, which is a pension scheme established outside the UK which fulfils certain criteria by HM Revenue & Customs to receive transfers from pension schemes registered in the UK;

“RDC” means the Regulatory Decisions Committee of the Authority (see further under Procedural Matters below);

“Relevant Period” means 1 October 2015 to 31 July 2016;

“SMP” or “the Firm” means St Martin’s Partners LLP;

“Statements of Principle” means the Authority’s Statements of Principle and Code of Practice for Approved Persons;

“Suitability Report” means the report which a firm must provide to its client under COBS 9.4 which, amongst other things, explains why the firm has concluded that a recommended transaction is suitable for the client;

“TRG” means The Resort Group Plc, a property developer based in Gibraltar offering investment opportunities in hotel developments in Cape Verde;

“the Tribunal” means the Upper Tribunal (Tax and Chancery Chamber);

“TVAS” means ‘transfer value analysis’ and is the comparison that a firm must carry out in accordance with COBS 19.1.2R when a firm gives advice or a Personal Recommendation about, amongst other things, a Pension Transfer;

“TVAS Report” means a document that reports to the client in respect of the comparison firms are required to carry on in accordance with COBS 19.1.2R;

“Two-Adviser Model” means a Pension Transfer advice model operated by some firms where one firm gives defined benefit transfer advice and another firm, acting as an introducer, gives investment advice on the proposed onward investment, in order for the Pension Transfer to proceed; and

“Warning Notice” means the Warning Notice given to Mr Oxberry dated 28 September 2022.

4. FACTS AND MATTERS

Background

Mr Oxberry and SMP

- 4.1. Mr Oxberry was approved by the Authority to perform the CF4 (Partner) function at SMP from July 2011 and the CF30 (Customer) function at SMP from April 2012 and held these functions throughout the Relevant Period. Prior to his approval as CF4 (Partner) and CF30 (Customer) at SMP, Mr Oxberry was approved by the Authority at other firms authorised by the Authority as CF21 (Investment Adviser) and as CF30 (Customer).
- 4.2. SMP was a small financial advice firm based in Chelmsford, Essex which was authorised by the Authority during the Relevant Period to, amongst other things, advise on Pension Transfers and Pension Opt Outs. SMP was formed as a partnership between Mr Oxberry and Mr Cuthbert. SMP entered liquidation on 14 June 2019.

- 4.3. Throughout the Relevant Period, Mr Oxberry and Mr Cuthbert were the only two CF4 Partners at SMP and were both the owners of the Firm. Mr Oxberry has described himself as being in charge of the Firm and being responsible for its business development.
- 4.4. Mr Cuthbert was the Firm's CF10 (Compliance Oversight) and delegated responsibility for day-to-day compliance oversight to the Compliance Manager. The Compliance Manager, unlike Mr Cuthbert, was not a qualified Pension Transfer Specialist, nor did he hold compliance related controlled functions.
- 4.5. Mr Douglas and Mr Martin, who were both employees of a company which they owned jointly, were brought into SMP as consultants by Mr Oxberry in September 2015 and provided advice to Pension Transfer clients. Both Mr Douglas and Mr Martin provided advice to SMP's clients under the Pension Transfer Model throughout the Relevant Period. Mr Oxberry did not himself provide direct advice to clients of SMP during the Relevant Period.
- 4.6. During the Relevant Period, SMP operated out of a small, open plan office with Mr Oxberry, Mr Martin, Mr Douglas and the Compliance Manager all sitting in close proximity on the same floor.

Pension transfers

- 4.7. Pensions are a traditional and tax-efficient way of saving money for retirement. The benefits someone obtains from their pension, particularly under a Defined Benefit Pension Scheme, can have a significant impact on their quality of life during retirement and, in some circumstances, can affect when an individual is able to retire. A Defined Benefit Pension Scheme is particularly valuable because it offers a secure, guaranteed income for life to members, which typically increases each year in line with inflation.
- 4.8. It is possible to "transfer out" of a Defined Benefit Pension Scheme. This involves the scheme member giving up the guaranteed benefits associated with membership in exchange for a CETV, which is typically then invested in a defined contribution pension. Pursuant to section 48 of the 2015 Act, where the value of the assets in a Defined Benefit Pension Scheme exceeds £30,000, pension providers must ensure members take "appropriate independent advice" before

allowing a transfer to proceed. Pension Transfer Specialists are suitably qualified individuals with permission to advise on such Pension Transfers in accordance with the Authority's rules.

- 4.9. Unlike a Defined Benefit Pension Scheme, a defined contribution pension does not provide a guaranteed income for its members but sets the payments that are required to be paid into the fund to provide a pension benefit, and is itself highly dependent on the performance of the underlying investment. Pursuant to COBS 19.1.6G, the Authority sets out a general starting assumption for an authorised firm that transferring out of a Defined Benefit Pension Scheme will not be suitable for a retail client, unless the firm can clearly demonstrate, on contemporaneous evidence, that the transfer is in the client's best interests. This is in light of the valuable guaranteed benefits offered by Defined Benefit Pension Schemes.
- 4.10. Pension Transfer Specialists such as Mr Douglas and Mr Martin must also be overseen by senior managers like Mr Oxberry, who take appropriate practical responsibility for their firms' arrangements in accordance with relevant regulatory requirements. This ensures robust governance arrangements, well-defined lines of responsibility, effective internal control mechanisms to monitor and report risks as well as orderly record-keeping, to enable the Authority to monitor the firm's compliance with requirements.
- 4.11. Authorised firms and Pension Transfer Specialists act as gatekeepers between clients and the transfer of their pension. Accordingly, clients place significant trust in them to provide advice on Defined Benefit Pension Scheme transfers. It is the responsibility of the Pension Transfer Specialist to understand the client's needs and account for all the relevant individual circumstances and how these might affect the advice provided when advising on the suitability of any Pension Transfer.

FRPS/TRG/ACER/The Overseas Adviser Firm

- 4.12. FRPS was a UK firm which was not authorised by the Authority. TRG was the parent company of FRPS from the start of the Relevant Period until 7 July 2016. FRPS was dissolved on 12 September 2017.
- 4.13. On 8 February 2016, The Pensions Regulator issued a Final Notice, in respect of an Occupational Pension Scheme which identified Matthew Welsh, a Director of ACER, a firm not authorised by the Authority, as a former Trustee of that scheme,

in which the underlying investments were found to be high risk and illiquid. These investments were considered by an independent review to be promising implausibly high returns, including investments in TRG, which were described as being in a class of investments which had been highlighted by Action Fraud as “potentially fraudulent”. On 11 July 2016, a BBC Panorama programme aired which focused on FRPS’s close connections to TRG, a property developer based in Gibraltar which offered investments in hotel developments in Cape Verde, and how FRPS was said to have solicited pension reviews and encouraged pension transfers into TRG’s investments.

- 4.14. The property investments offered by TRG were: (1) illiquid as they could only be sold upon completion and potentially lacked a viable secondary market; and (2) unlikely to be covered by FOS or FSCS protection. These investments were high risk and were unlikely to be suitable for retail clients.
- 4.15. According to Mr Martin, FRPS was a business partner of the Overseas Adviser Firm, a financial advisory group based in Cyprus which was not authorised by the Authority and which did not have the relevant permissions to advise on pension transfers in the UK.

Design of the Pension Transfer Model

- 4.16. In October 2015, Mr Douglas was introduced through Mr Martin to Mr Welsh. Mr Welsh introduced introducers to SMP, including FRPS. Mr Welsh was seeking a partner for FRPS, which itself was seeking a firm authorised by the Authority to assist with providing the transfer advice component of advice under an advisory model which was similar to a Two-Adviser Model.
- 4.17. In October 2015, discussions took place between SMP, FRPS and ACER, which were attended by Mr Oxberry, Mr Douglas and Mr Martin, following which it was agreed that an advice model, the Pension Transfer Model, would be established at SMP. During those discussions, Mr Oxberry agreed SMP would establish an advice process which would become the Pension Transfer Model. Mr Douglas described Mr Oxberry’s sign-off of the Pension Transfer Model as follows: “[...] *Mr Welsh had a chat with all of us, but mainly Frank because if Frank didn’t agree to run the business through his company then there wasn’t one to be run through.*” All clients advised using the Pension Transfer Model were brought to SMP via introducers or financial advisers.

- 4.18. At least 547 clients were advised by SMP using the Pension Transfer Model during the Relevant Period, of which 440 were introduced to SMP via FRPS. The total value of the Defined Benefit Pension Schemes of these 547 clients was just under £60 million, with an average value of approximately £104,000. According to Mr Douglas, FRPS gave its assurances to SMP that it would ensure that all clients would be fully advised by the Overseas Adviser Firm prior to those clients proceeding with Pension Transfers. In reality, the confirmation of advice letters provided by SMP, as an authorised independent adviser, satisfied the requirement under section 48 of the 2015 Act that the trustees of the members defined benefit scheme must check that those members had received “appropriate independent advice” before proceeding with a Pension Transfer, thereby providing the legal authority to the trustees of clients’ ceding schemes to release members from their schemes.
- 4.19. The Authority considers that Mr Oxberry received clear indications during the Relevant Period of the risks to SMP’s clients arising from FRPS, TRG and the Overseas Adviser Firm being connected entities with a shared financial interest in promoting TRG’s high-risk property investments. In particular:
- (a) in or around mid-October 2015, Mr Oxberry and Mr Douglas attended a meeting with the COO of TRG. This meeting took place during the time in which it was proposed to Mr Oxberry that SMP should advise clients introduced by FRPS, and the discussions related to developing an advice process (which would become the Pension Transfer Model) for SMP to advise FRPS’s clients;
 - (b) on 24 October 2015, following their meeting, the COO of TRG emailed Mr Douglas, copying Mr Oxberry, and providing due diligence which had been requested at their meeting including TRG’s consolidated financial statements and an investor presentation dated October 2015 which clarified the nature of its investment proposals. The Managing Director of FRPS was also copied to this email, in which the COO of TRG stated, “*I am sure the [Managing Director of FRPS] will be back in due course to discuss how we get underway in respect of the TVAS process. There is a clear desire to work with you if we can get the pricing right for both parties*”. The COO of TRG then sent to Mr Douglas another email on the same day, copying in Mr Oxberry, with valuation reports for four hotel resorts in Cape Verde “*as promised*”. These documents

were received at the time when SMP was discussing with FRPS the creation of the Pension Transfer Model;

- (c) on 26 October 2015, Mr Douglas emailed the Managing Director of TRG, copying Mr Oxberry, stating, *"Good to meet you [...] There's no rush at all as we're concentrating on sorting the TVAS advice route through [the Overseas Adviser Firm], but if you get the chance to send across some due diligence-style information on TRG then we can read at our leisure!"* The Managing Director of TRG responded the same day, copying in Mr Oxberry, stating, *"I will send this through tomorrow without fail"*;
- (d) on 30 October 2015, a staff member of FRPS emailed a staff member of SMP, copying Mr Oxberry, Mr Douglas and the Managing Director of FRPS, stating, *"Further to my conversation with Frank today, could you confirm Frank and Adrian Douglas's availability in November so we can organise a meeting with [the Managing Director of FRPS] and myself and [the Overseas Adviser Firm]"*;
- (e) SMP received the ACER Introducers Agreement signed on behalf of ACER and dated 23 November 2015, to be executed by Mr Oxberry or Mr Cuthbert on behalf of SMP, in which FRPS and TRG were referred to together as *"3rd Party Introducer 1: FRPS / The Resort Group"*. This agreement provided that SMP would pay to ACER £200 or £250 for each client introduced to SMP via these entities. It also provided that ACER would introduce other third-party introducers to SMP (having already introduced FRPS to SMP in October 2015). Mr Douglas negotiated and drafted the ACER Introducers Agreement and sent a subsequent draft of this agreement to Mr Oxberry by email on 18 January 2016. Mr Oxberry, on behalf of SMP, ultimately signed the FRPS Introducers Agreement on 1 April 2016, which provided that SMP would receive from FRPS £795 for every client referral for which SMP advised;
- (f) in an email of 17 February 2016 to Mr Douglas and Mr Oxberry, Mr Welsh requested that the appendix of the ACER Introducers Agreement be updated before they signed it to include the *"following introductions that [they] have now made"*, including TRG, FRPS and the Overseas Adviser Firm in close proximity with each other (amongst other entities).

- 4.20. Notwithstanding these clear indications which he received of the connections and shared financial interests of FRPS and the Overseas Adviser Firm in promoting TRG's investments, Mr Oxberry failed to address the risks that the Pension Transfer Model would be used to bring about investment of SMP clients' pension funds into investments offered by TRG and that these investments were unlikely to be suitable for SMP's clients.

SMP's Pension Transfer Model as compared with the Full Advice and Two-Adviser Model

The Full Advice Model

- 4.21. During the Relevant Period, Mr Douglas and Mr Martin provided advice on Defined Benefit Pension Scheme transfers to clients using the Full Advice Model. The Full Advice Model differed from SMP's Pension Transfer Model and operated as follows:
- (a) a range of information would be gathered from the client by an adviser, including information about the client's financial goals and circumstances, their attitude to risk and their capacity for loss;
 - (b) a letter and report would be sent to the client and a meeting arranged to discuss these findings. A TVAS Report would set out, amongst other things, a comparison relating to specific benefits (for example, death benefits) and a critical yield calculation. The critical yield offers guidance based on set assumptions (expressed as a percentage) on the level of return the client's proposed onward investment will need to achieve, up to the point they start drawing from the pension, to match the benefits they would receive from their Defined Benefit Pension Scheme. The timing from the initial client contact through to the provision of the TVAS Report would usually take three to four weeks;
 - (c) the adviser would also advise on the onward investment product into which the client's Defined Benefit Pension Scheme funds would be released. To advise the client, the adviser would compare the client's ceding scheme against the proposed onward investment. This would provide the client with a clear understanding of their existing benefits and their projected entitlements if they were to transfer their pension. The adviser would assess

the suitability of the proposed transfer in light of the client's circumstances, objectives and risk tolerance; and

- (d) if the adviser's personal recommendation was for a client to proceed with a Pension Transfer, SMP would provide a confirmation of advice letter to the trustee of the client's occupational pension scheme, authorising the trustee to release and transfer the client's funds.

4.22. In summary, the Full Advice Model consisted of a single adviser giving two separate pieces of advice: (1) whether clients should give up their safeguarded Defined Benefit Pension Scheme; and (2) how their pension funds should be invested, should the Pension Transfer proceed. It was critical that the advice given covered both parts of the Pension Transfer, which cannot be advised on in isolation. This is because, in order to determine the suitability of a Pension Transfer, the adviser must assess the proposed investment against the projected performance of the ceding scheme and consider whether that proposed investment is suitable in accordance with the client's circumstances and attitude to risk.

4.23. At SMP, each Full Advice Model case took several months from initial contact to completion with the transfer of funds. Instead of earning a flat fee (as for advice under the Pension Transfer Model), SMP would charge the client its normal rates which would be significantly greater. In some cases, clients who were referred for advice under the Pension Transfer Model were switched to the Full Advice Model. No criticism of the Full Advice Model as operated by the Firm is made by the Authority.

The Two-Adviser Model

4.24. In contrast, a Two-Adviser Model differs in that one firm provides defined benefit transfer advice (paragraphs 4.21(a), (b) and (d) above) and another firm provides investment advice on the proposed onward investment (paragraph 4.21(c) above), if the Pension Transfer were to proceed.

4.25. It is common for clients who use a Two-Adviser Model to have the process of their Pension Transfers managed by introducers who manage the client's end-to-end journey on the client's behalf. Using this model, the introducers can organise two separate advisers to provide advice on the separate parts of the client's Pension Transfer.

- 4.26. However, the Two-Adviser Model introduces additional risks over the Full Advice Model because the Pension Transfer advisers may have limited oversight over how onward investment advice is provided to the client, meaning clients may not receive complete advice on all the necessary aspects of the transfer. These risks need to be appropriately managed by the Pension Transfer advisers.

SMP's Pension Transfer Model

- 4.27. SMP's Pension Transfer Model was more akin to the Two-Adviser Model, in that SMP only advised on the Pension Transfer out of the ceding scheme and did not advise on aspects relating to the onward investment of the pension funds.
- 4.28. Mr Oxberry permitted SMP's Pension Transfer Model to operate during the Relevant Period notwithstanding its significant and clear deficiencies, which are set out at paragraphs 4.29 to 4.49 below.

Limited information obtained from clients

- 4.29. Under SMP's Pension Transfer Model, SMP's advisers sought very limited information from clients. The extent of the information provided was limited to the client's contact information and general information regarding their ceding scheme. This information was commonly provided by introducers and not directly by the clients themselves. Further, SMP's advisers did not meet any of the clients advised through the Pension Transfer Model and the Firm's primary point of contact was introducers, rather than clients themselves. On the occasions where SMP's advisers conversed with clients directly, this was on an ad hoc basis to address client queries and was not to receive the client's full financial or personal circumstances, with a view to providing complete transfer advice.
- 4.30. According to Mr Douglas and Mr Martin, it was the expectation of SMP's Pension Transfer Specialists and compliance function that the full client information gathering exercise, and the provision of full advice by a third-party financial adviser such as the Overseas Adviser Firm, would take place after SMP's initial involvement of providing an advice letter based on a TVAS Report (see paragraph 4.18).
- 4.31. When the relevant client's details were required, in order to generate an accurate TVAS Report and consequently issue a Personal Recommendation, much of the

inputted information was assumed to be correct by Mr Douglas and Mr Martin without further enquiry (including the client's employment status and estimated retirement age).

- 4.32. The Authority assessed a sample of 21 advice files of clients who were advised by SMP under the Pension Transfer Model during the Relevant Period. The Authority found that all 21 advice files were non-compliant with relevant regulatory requirements because of material information gaps in the collection of client information. Due to these material information gaps, the Authority was unable to assess the suitability of the transfer advice given by SMP. In particular, SMP's advisers failed to gather:
- (a) information on the client's knowledge and experience relevant to the specific investment, as required by COBS 9.2.1R(2)(a) and 9.2.3R;
 - (b) information on the client's financial situation, including information on the source and extent of their regular income, their assets and regular financial commitments, as required by COBS 9.2.1R(2)(b) and 9.2.2R(3); and
 - (c) information about the client's investment objectives, including their preferences regarding risk taking and their risk profile, as required by COBS 9.2.1R(2)(c) and 9.2.2R(2).

Use of a model portfolio within the TVAS Report

- 4.33. During the Relevant Period, COBS 19.1.2R(1) required that a firm preparing and providing a transfer analysis had to compare the benefits likely (on reasonable assumptions) to be paid under a Defined Benefit Pension Scheme with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before advising a retail client to transfer out of a Defined Benefit Pension Scheme. COBS 19.1.3G(1) required that this comparison should take into account all of the client's relevant circumstances, and COBS 19.1.3G(4) required that this comparison should be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds would be invested.
- 4.34. However, since SMP did not receive from the introducer for the purposes of the TVAS any information regarding the onward investment or the likely expected

returns of the assets into which the client's funds would be invested, each client's TVAS Report had to be generated based on limited information.

- 4.35. Instead, when client TVAS Reports were produced, the advisers made assumptions for each client that they would be investing into a generic personal pension scheme. The TVAS calculation for all clients advised under the Pension Transfer Model was therefore entirely unreliable, in failing, amongst other things, to account for the reality of the proposed onward investment.

Personal Recommendation to transfer based solely on TVAS calculation

- 4.36. COBS 9.2.1R required that when making a Personal Recommendation, an authorised firm must obtain necessary information regarding the client's knowledge and experience relevant to the specific investment, financial situation and investment objectives. Instead, SMP, through its advisers, based its client advice solely on a TVAS Report and a critical yield calculation. This placed its clients at risk because it issued Personal Recommendations and facilitated Pension Transfers without fully considering the client's circumstances or suitability.

- 4.37. SMP's template advice letter included a statement that the recommendation provided within the advice letter considered "*the critical yield in isolation*" and that its recommendation "*does not take into account [...] personal circumstances or attitude to risk and objectives*".

- 4.38. Further, if SMP's TVAS Report generated a critical yield above a certain threshold (initially 7.5%, and later 6%), SMP would not recommend the client to transfer out of their current scheme. Therefore, this percentage threshold was not a figure individually applied to each client's circumstances in accordance with, for example, their individual attitudes to investment risk.

Confirmation of advice letter issued to the ceding scheme trustee

- 4.39. Following the generation of a TVAS Report, SMP issued confirmation of advice letters which were addressed to the ceding scheme trustee. These letters were provided to the client's introducers and would be forwarded to the ceding scheme trustee as the basis of the authority to transfer the client's pension funds.

4.40. The template confirmation of advice letters issued by SMP contained the following declarations:

(a) SMP was "*authorised and regulated by the Financial Conduct Authority, FCA No 537804 [...] to carry on the regulated activity in 53E [sic] of the Regulated Activities Order*" to advise on Pension Transfers;

(b) confirmation that Mr Douglas or Mr Martin held "*the appropriate permission under Part 4A of the Financial Services and Markets Act 2000 [...] to carry on the regulated activity (advising on conversion or transfer of pension benefits) in Article 53E of the FCA Regulated Activities Order*";

(c) confirmation that Mr Douglas or Mr Martin had advised the client, with the following templated statement: "*I, [Adrian Douglas/ Liam Martin] can confirm that I have given advice solely in relation to a Transfer Valuation Advice Report in respect of [the client's] benefits in [the client's Defined Benefit Pension Scheme]*"; and

(d) depending on whether the client's critical yield lay above or below SMP's critical yield threshold (see paragraph 4.38), a recommendation regarding whether the client should transfer their pension benefits with the statement of either:

(i) "*Based on the TVAS only we do not recommend that [the client] transfers their pension benefits away from [the client's Defined Benefit Pension Scheme]*"; or

(ii) "*Taking the critical yield in isolation [...] we would normally recommend that [the client] considers transferring their pension benefits away from [the client's Defined Benefit Pension Scheme].*"

4.41. SMP's template confirmation of advice letters were also issued with a declaration that the client was advised solely on the basis of a critical yield analysis and that the Firm's advice "*does not take into account the client's personal circumstances, attitude to risk and objectives*". Further, the letters contained a caveat that the adviser did not give advice regarding the receiving investment scheme. For the purposes of the trustees' legal position for releasing members from their schemes,

it was immaterial as to whether SMP had advised the client whether to transfer out of their Defined Benefit Pension Scheme or not.

- 4.42. Despite the caveats in these confirmation of advice letters, these letters from SMP, an authorised independent adviser, provided the statutory basis upon which ceding scheme trustees were able to release clients' funds from their Defined Benefit Pension Schemes. It was not necessary for the purposes of section 48 of the 2015 Act for trustees to have sight of the underlying advice given by the adviser once written confirmation of advice was received in the form prescribed by Regulation 7 of the 2015 Regulations, confirming that advice had been provided by an authorised independent adviser with permission to advise on Pension Transfers. Trustees were not responsible for verifying the adequacy of the advice obtained by clients and relied on the authorised independent adviser to have discharged its regulatory responsibilities to advise on Pension Transfers appropriately.
- 4.43. SMP provided confirmation of advice letters for the vast majority of clients it advised under the Pension Transfer Model (at least 484 out of 547 clients), including those clients whom the Firm had advised should not proceed with a Pension Transfer. This included clients whom the Compliance Manager described as being in the category of "*definitely never transfer*", such as those with critical yield values of above 15%.

Misleading 'Reasons to Transfer' letters directed to clients who wished to proceed with a Pension Transfer against advice

- 4.44. Prior to April 2016, in cases where the critical yield was above the 7.5% or 6% threshold and SMP's advice was not to transfer, a confirmation of advice letter would be provided if confirmation was obtained that the client still wanted to transfer.
- 4.45. From April 2016, SMP changed its internal processes to require clients who wished to proceed with a Pension Transfer to complete a 'Reasons to Transfer' letter confirming that they had not received full advice but still wished to proceed with a Pension Transfer based on the TVAS Report and critical yield. This was a template letter containing an empty box, which the client was expected to complete in their own words and handwriting, giving the reason for their transfer.

- 4.46. An example of SMP's failure to place such clients in an informed position is the case of Ms W, whose 'Reasons to Transfer' letter provided her reasons for deciding to transfer her fund and included a signed disclaimer stating:

"I can confirm, that although I have not received full advice, as recommended in your letter, I still wish to go ahead based on the Transfer Value Analysis Report and the critical yield required of 8.1%.

Please, therefore confirm to the trustees that I have received the required level of advice in order for the funds to be released.

I understand that I will be losing all guarantees attached to my transferred plan."

- 4.47. Ms W's file included no evidence that the Firm attempted to explain further the risks associated with the transfer, such as the loss of all defined benefit guarantees. The reason for transfer was purely based on the critical yield of 8.1%, which, as set out above, fails to consider the client's financial situation or investment objectives, and applies an arbitrary critical yield threshold (of 6%), which ignores the client's investment risk tolerance.

- 4.48. Further, the template letter was also misleading because of the following statements: "[...] although I have not received full advice [...] I still wish to go ahead based on the Transfer Value Analysis Report" and "[...] I have received the required level of advice in order for the funds to be released." SMP's advisers stated that the "full advice" was not provided by SMP, but the "full" and "required level of advice" was received from the relevant financial adviser, such as the Overseas Adviser Firm. However, the Authority considers that this communication was misleading and failed to treat clients fairly, because it assumed that clients understood the difference between SMP's limited advice and the complete advice they could have received under a Full Advice Model. The statements imply that:

- (a) Ms W was placed in an informed position to understand SMP's incorrect belief that its critical yield analysis did not constitute full advice, but was nonetheless sufficient to facilitate a Pension Transfer; and
- (b) Ms W appreciated the difference between the limited advice she received from SMP, and the more extensive advice she could have received under a Full

Advice Model, but nonetheless confirmed that SMP's TVAS-only advice should form the basis of her decision.

- 4.49. No steps were taken to ensure clients fully understood the implications of the 'Reasons to Transfer' letter which, together with the confirmation of advice letter, facilitated Pension Transfers from Defined Benefit Pension Schemes based on limited advice. Therefore, SMP wrote to Ms W in an unclear and misleading way. Such conduct placed clients at risk, because clients were exposed to SMP's seriously flawed advice process but were not given sufficient warning their pension funds would be better safeguarded through receiving full and comprehensive advice.

Operation of the Pension Transfer Model

Novelty of model and rate of expansion of SMP's business

- 4.50. Mr Oxberry was aware that the Pension Transfer Model was a novel advice process, and that it represented a significant and rapid expansion in SMP's business operations. In particular:
- (a) Mr Oxberry was aware that, prior to the Relevant Period, SMP conducted advice solely using the Full Advice Model, where SMP's advisers would obtain directly from its clients information regarding the client's financial situation and objectives, attitude to transfer or investment risk and capacity for financial loss (see paragraphs 4.21 to 4.22). Mr Oxberry was therefore aware that the proposed Pension Transfer Model constituted a significant departure from SMP's usual advice model where there would be a detailed discussion of the client's circumstances;
 - (b) no proper due diligence or prior research was conducted on advice models similar to the Pension Transfer Model before it was implemented by SMP;
 - (c) Mr Oxberry was aware that the Pension Transfer Model entailed a rapid expansion of SMP's business operations. Prior to the Pension Transfer Model's adoption, SMP's advisers had advised approximately ten clients regarding their Defined Benefit Pension Scheme transfers. Moreover, each Full Advice Model case took several months to complete (see paragraph 4.23). Under the Pension Transfer Model, however, the limited fact-find and accelerated

provision of advice allowed SMP to achieve a significant volume of transfer advice. At least 547 clients were advised in a 9 month period from November 2015 to July 2016, with at least 139 cases in April 2016, 76 cases in May 2016, and 137 cases in June 2016. Mr Oxberry was aware during the Relevant Period of SMP's significantly increased number of clients being advised. On 16 January 2016, Mr Douglas sent an email to Mr Oxberry concerning the current and immediate pipeline of cases under the Pension Transfer Model, such as his projections that the "*short term promised pipeline*" of cases would be "20 – 25 per week / 80 – 100 per month". Mr Douglas also commented, "*We have been offered significantly more but cannot take the business currently*"; and

- (d) SMP had not, prior to the Relevant Period, had any relationship with third-party introducers and the introduction of at least 17 new introducers to the Firm, via Mr Douglas and Mr Martin, represented a major change in direction for SMP.

Failure to ensure SMP's Compliance Consultant was consulted

- 4.51. At no time during the establishment or operation of the Pension Transfer Model was SMP's Compliance Consultant approached by SMP to advise on the compliance of the Pension Transfer Model. The Compliance Consultant was also not made aware of the Pension Transfer Model during its regular audits or visits to SMP's offices (in November 2015 and January 2016).
- 4.52. There is no evidence to show that Mr Oxberry sought or caused the Firm to seek advice from the Compliance Consultant, or sought an expert second opinion, as to whether the Pension Transfer Model was compliant, or that he took any action to ensure that either of these steps was or had been taken. This was notwithstanding the novelty of the model and the rate of expansion of SMP's business that it represented, of which Mr Oxberry was aware (see paragraph 4.50).

Failure to ensure that SMP conducted adequate due diligence on introducers

- 4.53. Mr Oxberry was also aware that Mr Douglas and Mr Martin were advising a high number of clients without first ensuring that satisfactory due diligence was conducted on the relevant introducers. Mr Oxberry did not address the risks to clients of partnering with a large number of unknown introducers because he

considered it to be the responsibility of Mr Cuthbert to ensure that adequate due diligence was performed. Furthermore, he took no steps to ensure that satisfactory due diligence was conducted on the relevant introducers and closed his mind to the material risks to SMP's clients that those unknown introducers would bring about investments of clients' pension funds into investments which were unsuitable for them.

4.54. SMP's onboarding of introducers consisted of:

- (a) a high-level questionnaire which only requested basic information on the introducer, namely its name and address, in addition to details on the type of introduction it would be making to SMP, its projected figures for the number of introductions it would make, and its fees. This questionnaire was not completed for every introducer, nor was the questionnaire consistently followed up on and no central record of introducers was kept;
- (b) a generic introducer agreement to be entered into between SMP and the introducer. However, in certain instances the introducer agreement was signed many months after Pension Transfers were finalised.

No additional due diligence was undertaken on introducers and no formal process for carrying out meaningful due diligence was in place. The extent of due diligence performed on introducers was wholly inadequate for the purposes of safeguarding clients. SMP's Compliance Consultant reached the conclusion, in September 2016, that *"it [was] unclear if due diligence has been completed on any of the introducers."*

4.55. Moreover, Mr Oxberry did not challenge Mr Cuthbert, Mr Douglas or Mr Martin on whether it was appropriate for Mr Welsh to introduce additional introducers to SMP (in circumstances where SMP was unfamiliar with partnering with introducers which necessitated the exercise of greater care and due diligence). At the time of ACER's introduction of FRPS to SMP, Mr Welsh had been subject to a Determination Notice given (but not published) by The Pensions Regulator, which found that Mr Welsh was the trustee of an Occupational Pension Scheme in which the underlying investments were found to be high risk and illiquid and considered by an independent review to be promising implausibly high returns, including investments in TRG which were described as being in a class of investments which had been highlighted by Action Fraud as *"potentially fraudulent"*. The Authority

has seen no evidence that Mr Oxberry was aware of the Determination Notice and Mr Oxberry has stated that he was not aware of The Pensions Regulator's Final Notice (which was published on 8 February 2016) and the associated risks for SMP's business of partnering with Mr Welsh.

Warning signs in respect of the clear deficiencies and risks of the Pension Transfer Model

4.56. During the operation of the Pension Transfer Model, Mr Oxberry was presented with a number of warning signs in respect of the clear deficiencies of the model and the risks of detriment it posed to SMP's clients. In particular:

- (a) On 1 April 2016, Mr Oxberry was notified by the Compliance Manager that an introducer had written directly to a ceding scheme trustee using a Letter of Authority drafted by the introducer which purported to be SMP's Letter of Authority. Mr Oxberry responded that this was "*unacceptable*" and demanded answers from Mr Douglas and Mr Martin. However, this did not lead Mr Oxberry to question the suitability of SMP's partner introducers or their continuing involvement, nor did it lead to a wider review of SMP's relationship with third-party introducers or SMP's controls;
- (b) on 11 April 2016, the Compliance Manager expressed to Mr Oxberry his distrust of SMP's partner introducers, including FRPS. As a result of this distrust, the Compliance Manager changed SMP's processes in May 2016 to ensure clients received a copy of SMP's advice letter directly from SMP, rather than via the introducer. Despite knowing that the Firm's Compliance Manager did not trust FRPS, Mr Oxberry did not cause to be carried out a wider review of SMP's relationship with third-party introducers or of SMP's controls to protect clients, and SMP therefore continued to facilitate Pension Transfers on the basis of its very limited advice; and
- (c) on 13 May 2016, SMP's Compliance Manager warned Mr Oxberry that FRPS, which constituted a "*fair proportion*" of SMP's fee income, appeared to be using an offshore trustee for their clients. The Compliance Manager warned that this offshore trustee only ran QROPS from overseas locations, which suggested clients were being led by FRPS to invest into overseas, unregulated and potentially high-risk investment schemes. This built on the clear indications which Mr Oxberry had previously received during the design

stages of the Pension Transfer Model of the connections between FRPS and TRG (see paragraph 4.19). However, despite these warnings, Mr Oxberry failed to instruct a meaningful response, such as undertaking comprehensive due diligence on the investments promoted by introducers and an assessment of whether they were appropriate destinations for clients' pension funds. As a result, Mr Oxberry failed to address the risk that FRPS would continue to invest clients' pensions funds into overseas investments which were unlikely to be suitable for them, such as TRG.

Mr Oxberry had the authority at SMP to question or terminate SMP's relationship with third-party introducers, but he did not do so notwithstanding the warning signs referred to above, and he failed to bring the Pension Transfer Model to an end at an earlier point before the end of the Relevant Period.

4.57. These were clear warning signs that SMP's clients were being exposed to a significant risk of detriment arising from the practices of introducers. The rate of clients advised under the Pension Transfer Model continued to increase (see paragraph 4.50), together with the fees generated from the Pension Transfer Model. Mr Oxberry was incentivised by these increased revenues to allow the Pension Transfer Model to continue to operate:

(a) between November 2015 and March 2016, SMP retained the benefit of £25,597 of the fees arising from the Pension Transfer Model (following payment of 70% commission to Mr Douglas and Mr Martin's jointly owned company), of which Mr Oxberry was entitled to receive £16,638; and

(b) between April 2016 and July 2016, SMP retained the benefit of £113,532 of the fees (following payment of 70% commission to Mr Douglas and Mr Martin's jointly owned company), of which Mr Oxberry was entitled to receive £73,795.

Failure to ensure the effectiveness of Compliance

4.58. Mr Oxberry did not, as one of two CF4 Partners at SMP, oversee the work of Mr Douglas and Mr Martin adequately. Mr Oxberry sought to devolve his entire responsibility for this to Mr Cuthbert and, in his absence, the Compliance Manager.

- 4.59. The Pension Transfer Model operated on a high-volume basis, using administrative staff to assist with highly templated work without sufficient consideration of individual client needs. For instance, approximately 42% of TVAS Reports were found to have been provided by SMP's administrative staff or paraplanners, and not SMP's more experienced and approved CF30 (Customer) advisers, but which were claimed to have been checked by SMP's CF30 (Customer) advisers. For example, in repeated instances, a single-life critical yield value was applied instead of a joint-life critical yield suitable for married clients, resulting in SMP erroneously advising clients to proceed with Pension Transfers. Mr Oxberry, in failing to oversee the operation of the Pension Transfer Model, notwithstanding his awareness of the significant expansion of the business and operational challenges that it represented to SMP, closed his mind to the risk that clients would be exposed to financial detriment.
- 4.60. Moreover, the reduced effectiveness of SMP's compliance function during the Relevant Period to supervise the advice provided by Mr Douglas and Mr Martin appropriately would have been clear to Mr Oxberry. This was in light of:
- (a) Mr Cuthbert's reduction in his office hours ahead of his planned retirement. Mr Cuthbert was largely absent from SMP's offices, sometimes not coming in for some weeks, although he was contactable by telephone. SMP's Compliance Manager, who reported to Mr Cuthbert, was therefore expected to handle the day-to-day compliance work at the Firm;
 - (b) the Compliance Manager's inexperience and lack of relevant qualification for overseeing Pension Transfer advice and the fact that, unlike Mr Cuthbert, he was not a qualified Pension Transfer Specialist; and
 - (c) the close proximity in which Mr Oxberry worked with the compliance function at SMP's offices (see paragraph 4.6).

Taking into account the factors set out above, it is the Authority's view that it was not open to Mr Oxberry to abrogate his responsibility as a CF4 and one of the only two partners in SMP with respect to the proper functioning of SMP's compliance function.

5. FAILINGS

- 5.1. The statutory and regulatory provisions relevant to this Notice are referred to in Annex A.
- 5.2. By reason of the facts and matters set out above, Mr Oxberry breached Statement of Principle 1.

Statement of Principle 1

- 5.3. The Authority considers that during the Relevant Period, Mr Oxberry acted recklessly and thereby failed to act with integrity in carrying out his accountable functions at SMP as CF4 (Partner), in breach of Statement of Principle 1. Mr Oxberry closed his mind to the clear risks arising in relation to SMP's design and operation of the Pension Transfer Model and failed to take appropriate action in light of them. In particular, Mr Oxberry recklessly:

- (a) failed to address the significant risk that clients introduced to SMP via FRPS for the purpose of receiving advice under the Pension Transfer Model would be encouraged to transfer out of their Defined Benefit Pension Schemes and invest into high-risk, illiquid and unregulated property investments offered by TRG which were unlikely to be suitable for them. This was notwithstanding the clear indications he received that FRPS, TRG and the Overseas Adviser Firm were connected entities with a shared financial interest in promoting TRG's high-risk property investments. The Authority considers that Mr Oxberry was the responsible Partner at SMP for the Firm's relationship with FRPS, in participating in discussions with FRPS, which were not attended by Mr Cuthbert, and being copied into key correspondence with FRPS and TRG during the design stage of the Pension Transfer Model. Mr Oxberry also ultimately signed the FRPS Introducers Agreement between SMP and FRPS in April 2016. In permitting SMP to operate the Pension Transfer Model with FRPS, Mr Oxberry closed his mind to the significant risk associated with the Firm partnering with FRPS, and unreasonably exposed SMP's clients to this risk;

- (b) failed to have regard to the clear deficiencies in the Pension Transfer Model before permitting the expansion of SMP's business model to include this advice process, notwithstanding that it constituted a significant departure from SMP's usual advice model. Mr Oxberry closed his mind to the significant risk that SMP's clients would proceed with a Pension Transfer without

receiving complete advice. The clear deficiencies in the Pension Transfer Model included that:

- (i) it failed to take into account the client's attitude to risk, meaning SMP was unable to ascertain whether a Pension Transfer was suitable in accordance with the client's risk tolerance;
- (ii) it failed to gather information on the client's financial situation and income needs throughout retirement, meaning SMP was unable to determine whether a client could bear the risks of losing the guaranteed income they would otherwise receive during their retirement from their Defined Benefit Pension Scheme;
- (iii) it failed to gather information on the client's knowledge and experience of relevant investments, meaning SMP was unable to assess whether its clients fully understood the financial implications of its advice;
- (iv) Personal Recommendations were provided to clients on the basis of very limited information gathered from the client and solely on the basis of a TVAS Report;
- (v) the TVAS Report took no account of the onward investment scheme and instead used a generic personal pension scheme; and
- (vi) confirmation of advice letters were issued to the trustees of the ceding schemes at a point when SMP's clients had received this very limited advice, thereby enabling Pension Transfers.

In closing his mind to and failing to assess these clear deficiencies in the Pension Transfer Model, Mr Oxberry unreasonably exposed the SMP's clients to a significant risk that their pension funds would be transferred out of their Defined Benefit Pension Schemes into investments which were unsuitable for them;

- (c) failed to take reasonable steps to ensure that SMP performed sufficient due diligence on its partner introducers and the investments which they promoted to clients, notwithstanding that Mr Oxberry was responsible for business development at SMP. The Pension Transfer Model entailed a rapid expansion

of SMP's business operations, with the Firm partnering with numerous introducers to receive and advise significantly greater numbers of clients, therefore placing a significant number of clients at greater risk. SMP did not historically have any relationship with third-party introducers and the introduction of at least 17 introducers to the Firm represented a major change in direction regarding the methods in which clients would be introduced to SMP. Mr Oxberry closed his mind to the risks that would arise from rapidly expanding SMP's business operations to advise clients introduced by unknown introducers using the Pension Transfer Model;

- (d) Mr Oxberry failed to seek advice from the Compliance Consultant, or an expert second opinion, as to whether the Pension Transfer Model was compliant, or failed to ensure that these steps were or had been taken, both prior to its implementation and during its operation. This was despite there being two visits by SMP's Compliance Consultant to SMP during the Relevant Period, in November 2015 and January 2016, when Mr Oxberry could have checked whether the Pension Transfer Model was compliant with relevant regulatory requirements. In failing to seek advice from the Compliance Consultant, or an expert second opinion, or failing to ensure that these steps were or had been taken, Mr Oxberry closed his mind to the significant risks associated with the Pension Transfer Model;
- (e) failed to take reasonable steps to ensure the effectiveness of SMP's compliance function. The reduced effectiveness of SMP's compliance function must have been clear to Mr Oxberry as one of only two CF4 Partners at SMP. The Authority considers that Mr Oxberry should have exercised a greater degree of scrutiny over the effectiveness of SMP's compliance function, especially in circumstances where the compliance function was tasked with verifying a high-risk and novel advice process which constituted a significant departure from SMP's usual advice model, and a rapid expansion of SMP's business operations. However, Mr Oxberry failed to exercise any such oversight, and permitted the Pension Transfer Model to operate until the end of the Relevant Period. In doing so, he closed his mind to the risk that the advice received by clients was not compliant with the relevant requirements in COBS; and
- (f) failed to respond adequately to a variety of warning signs (referred to in paragraphs 4.56 and 4.57) he received during the operation of the Pension

Transfer Model in respect of the clear deficiencies of the advice process and, in doing so, closed his mind to the clear risks of detriment it posed to SMP's clients. Mr Oxberry took no reasonable steps to rectify potential issues; instead, he permitted the model to keep operating until the end of the Relevant Period, during which time the numbers of clients advised under the model (which he was aware of), and the corresponding fees generated from them (from which Mr Oxberry derived financial benefit) substantially increased up the end of the Relevant Period.

6. SANCTION

Financial Penalty

- 6.1. The Authority's policy for imposing a financial penalty is set out in Chapter 6 of DEPP. DEPP 6.5B sets out the details of the five-step framework that applies in respect of financial penalties imposed on individuals in non-market abuse cases.

Step 1: disgorgement

- 6.2. Pursuant to DEPP 6.5B.1G, at Step 1 the Authority seeks to deprive an individual of the financial benefit derived directly from the breach where it is practicable to quantify this.
- 6.3. Mr Oxberry derived direct financial benefit from the fees generated by the Pension Transfer Model. SMP received £463,766 from its partner introducers during the Relevant Period in connection with the Pension Transfer Model, of which it retained 30% (£139,129) following a 70% pay-away to a company jointly owned by Mr Douglas and Mr Martin. Of this sum of £139,129, the Authority considers that Mr Oxberry directly received the benefit of £90,433 further to an agreement with Mr Cuthbert that he would be entitled to a greater share of the profits of the partnership, and that this benefit stemmed directly from his breach.
- 6.4. The Authority has charged interest on Mr Oxberry's benefits at 8% per year from the end of the Relevant Period to the date of this Notice, amounting to £55,236.
- 6.5. Step 1 is therefore £145,669.

Step 2: the seriousness of the breach

- 6.6. Pursuant to DEPP 6.5B.2G, at Step 2 the Authority determines a figure that reflects the seriousness of the breach. That figure is based on a percentage of the individual's relevant income. The individual's relevant income is the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred, and for the period of the breach.
- 6.7. The period of Mr Oxberry's breach of Statement of Principle 1 was from 1 October 2015 to 31 July 2016. Pursuant to DEPP 6.5B.2G(2), in cases where the breach lasted less than 12 months, the relevant income will be that earned by the individual in the 12 months preceding the end of the breach. The Authority considers Mr Oxberry's relevant income for the 12 month period preceding 31 July 2016 to be £291,586.
- 6.8. In deciding on the percentage of the relevant income that forms the basis of the Step 2 figure, the Authority considers the seriousness of the breach and selects a percentage between 0% and 40%. This range is divided into five fixed levels which represent, on a sliding scale, the seriousness of the breach; the more serious the breach, the higher the level. For penalties imposed on individuals in non-market abuse cases there are the following five levels:
- Level 1 – 0%
 - Level 2 – 10%
 - Level 3 – 20%
 - Level 4 – 30%
 - Level 5 – 40%
- 6.9. In assessing the seriousness level, the Authority takes into account various factors which reflect the impact and nature of the breach, and whether it was committed deliberately or recklessly. DEPP 6.5B.2G(12) lists factors likely to be considered 'level 4 or 5 factors'. Of these, the Authority considers the following factors to be relevant.

Impact of the breach

- 6.10. DEPP 6.5B.2.2G(8) lists factors relating to the impact of a breach committed by an individual.

- 6.11. Mr Oxberry substantially benefitted from the breach (DEPP 6.5B.2G(8)(a)).
- 6.12. Mr Oxberry's breach also caused a significant risk of loss to a very large number of consumers who transferred out of their Defined Benefit Pension Schemes (DEPP 6.5B.2G(8)(c)).
- 6.13. Mr Oxberry's breach caused inconvenience and potential distress to pension holders who transferred out of their Defined Benefit Pension Schemes (DEPP 6.5B.2G(8)(e)).

Nature of the breach

- 6.14. DEPP 6.5B.2.2G(9) lists factors relating to the nature of a breach committed by an individual.
- 6.15. Mr Oxberry's failings occurred over a sustained period (ten months) (DEPP 6.5B.2G(9)(b)).
- 6.16. Mr Oxberry failed to act with integrity because he acted recklessly throughout the Relevant Period (6.5B.2G(9)(e)).
- 6.17. Mr Oxberry, as an individual approved to perform the CF4 (Partner) controlled function, held a senior position in the Firm as one of its two partners (DEPP 6.5B.2G(9)(k)) and was an experienced industry professional.

Whether the breach was deliberate and/or reckless

- 6.18. DEPP 6.5B.2G(10) and (11) list factors tending to show whether the breach was deliberate or reckless. The Authority considers that the factors tending to show the breach was reckless are present in this case (DEPP 6.5B.2G(11)).

Level of seriousness

- 6.19. DEPP 6.5B.2G(12) lists factors likely to be considered 'level 4 or 5 factors'. Of these, the Authority considers the following factors to be relevant:
 - (1) Mr Oxberry's breach caused a significant loss or risk of loss to individual consumers, investors or other market users (DEPP 6.5B.2G(12)(a));

(2) Mr Oxberry failed to act with integrity (DEPP 6.5B.2G(12)(d)); and

(3) Mr Oxberry committed the breach recklessly (DEPP 6.5B.2G(12)(g)).

6.20. DEPP 6.5B.2G(13) lists factors likely to be considered 'level 1, 2 and 3 factors'. The Authority considers that none of these apply.

6.21. Taking all of these factors into account, the Authority considers the seriousness of the breach to be level 4 and so the Step 2 figure is 30% of £291,586.

6.22. Step 2 is therefore £87,475.

Step 3: mitigating and aggravating factors

6.23. Pursuant to DEPP 6.5B.3G, at Step 3 the Authority may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the breach.

6.24. The Authority considers that the following factors aggravate the breach:

(1) on 18 January 2013 and 28 April 2014, the Authority issued alerts to firms advising on Pension Transfers with a view to investing pension monies into unregulated products through investment wrappers. These clearly related to the advice the Firm under Mr Oxberry was providing and were intended to prevent precisely the type of consumer detriment which occurred in this case. Mr Oxberry's conduct took place after the Authority's two alerts (DEPP 6.5B.3G(2)(k)); and

(2) in April 2015 and March 2016, the Authority sent copies of the alerts referred to above to SMP and highlighted the Authority's concerns. Notwithstanding that the Authority had publicly called for an improvement in standards in relation to the behaviour constituting the breach or similar behaviour, and provided these alerts to the Firm, Mr Oxberry failed to cease its operation (DEPP 6.5B.3G(2)(a)).

6.25. The Authority considers that there are no factors that mitigate the breach.

6.26. Having taken into account these aggravating factors, the Authority considers that the Step 2 figure should be increased by 10%.

6.27. Step 3 is therefore £96,222.

Step 4: adjustment for deterrence

6.28. Pursuant to DEPP 6.5B.4G, if the Authority considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches, then the Authority may increase the penalty.

6.29. The Authority considers that the Step 3 figure of £96,222 represents a sufficient deterrent to Mr Oxberry and others, and so has not increased the penalty at Step 4.

6.30. Step 4 is therefore £96,222.

Step 5: settlement discount

6.31. Pursuant to DEPP 6.5B.5G, if the Authority and the individual on whom a penalty is to be imposed agree the amount of the financial penalty and other terms, DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the Authority and the individual reached agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.

6.32. No settlement discount applies. Step 5 is therefore £96,222. In accordance with the Authority's usual practice this is to be rounded down to £96,200.

Penalty

6.33. The Authority has therefore decided to impose a total financial penalty of £241,869 (the Step 1 and Step 5 figures added together) on Mr Oxberry for breaching Statement of Principle 1.

Prohibition Order and Withdrawal of Approval

- 6.34. The Authority has the power to prohibit individuals under section 56 of the 2000 Act and to withdraw an approval given by the Authority in relation to the performance by a person of a function under section 63 of the 2000 Act. The Authority has had regard to the guidance in Chapter 9 of EG and FIT 2 of the Handbook, including the criteria at EG 9.3.2 and FIT 2.1.3, in considering whether to impose a prohibition order on Mr Oxberry, and whether to withdraw his approval in relation to his performance of the SMF27 (Partner) function at SMP.
- 6.35. In considering whether to impose a prohibition order, the Authority has had regard to all relevant circumstances of the case. In particular, in relation to EG 9.3.2 and FIT 2.1.3, the Authority has considered Mr Oxberry's fitness and propriety, his reckless and knowing misconduct displaying a lack of integrity and disregard for customers' interests and the regulatory system, and the severity of the risk which Mr Oxberry poses to consumers and to confidence in the financial system.
- 6.36. The Authority considers that it is appropriate and proportionate in all the circumstances to withdraw Mr Oxberry's approval in relation to his performance of the SMF27 (Partner) function at SMP, and also to prohibit Mr Oxberry from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm, on the grounds that his conduct during the Relevant Period demonstrates a reckless lack of integrity.

7. REPRESENTATIONS

- 7.1. Annex B contains a brief summary of the key representations made by Mr Oxberry and by the third parties who chose to make representations, namely the Resort Group Plc and Mr Welsh, in response to the Warning Notice and how they have been dealt with. In making the decision which gave rise to the obligation to give this Notice, the Authority has taken account of all of the representations made by Mr Oxberry and by the third parties, the Resort Group Plc and Mr Welsh, whether or not set out in Annex B.

8. PROCEDURAL MATTERS

- 8.1. This Notice is given to Mr Oxberry under sections 57, 63 and 67 and in accordance with section 388 of the 2000 Act.

- 8.2. This Notice is given to SMP as an interested party pursuant to section 63(3) of the 2000 Act.

Decision maker

- 8.3. The decision which gave rise to the obligation to give this Notice was made by the RDC. The RDC is a committee of the Authority which takes certain decisions on behalf of the Authority. The members of the RDC are separate to the Authority staff involved in conducting investigations and recommending action against firms and individuals. Further information about the RDC can be found on the Authority's website:

<https://www.fca.org.uk/about/committees/regulatory-decisions-committee-rdc>

The Tribunal

- 8.4. Mr Oxberry has the right to refer the matter to which this Notice relates to the Tribunal. Under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Mr Oxberry has 28 days from the date on which this Notice is given to him to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a signed reference notice (Form FTC3) filed with a copy of this Notice. The Tribunal's contact details are: Upper Tribunal, Tax and Chancery Chamber, Fifth Floor, Rolls Building, Fetter Lane, London EC4A 1NL (tel: 020 7612 9730; email: fs@hmcts.gsi.gov.uk).
- 8.5. Further information on the Tribunal, including guidance and the relevant forms to complete, can be found on the HM Courts and Tribunal Service website:

<http://www.justice.gov.uk/forms/hmcts/tax-and-chancery-upper-tribunal>

- 8.6. A copy of Form FTC3 must also be sent to the Authority at the same time as filing a reference with the Tribunal. A copy should be sent to William Byrne at the Financial Conduct Authority, 12 Endeavour Square, London E20 1JN.
- 8.7. Once any such referral is determined by the Tribunal and subject to that determination, or if the matter has not been referred to the Tribunal, the Authority will issue a final notice about the implementation of that decision.

Access to evidence

8.8. Section 394 of the 2000 Act applies to this Notice.

8.9. The person to whom this Notice is given has the right to access:

- (1) the material upon which the Authority has relied in deciding to give this Notice; and
- (2) any secondary material which, in the opinion of the Authority, might undermine that decision. There is no secondary material.

Third party rights

8.10. A copy of this Notice is being given to the following persons as third parties identified in the reasons above and to whom in the opinion of the Authority the matter to which those reasons relate is prejudicial. Each of these parties have similar rights of representation and access to material in relation to the matter which identifies them:

- (1) The Resort Group Plc;
- (2) St Martin's Partners;
- (3) Alec Cuthbert;
- (4) Matthew Welsh;
- (5) The Chief Operating Officer of The Resort Group Plc;
- (6) The Managing Director of The Resort Group Plc; and
- (7) The Managing Director of First Review Pension Services Ltd.

Interested parties

8.11. This Notice is being given to SMP as an interested party in the withdrawal of Mr Oxberry's approval in relation to his performance of the SMF27 Partner function at SMP pursuant to section 63(3) of the 2000 Act. The rights of SMP to:

- a) have access to evidence pursuant to section 394 of the 2000 Act, as described above; and
- b) refer to the Tribunal any decision to withdraw Mr Oxberry's approval, pursuant to section 63(5) of the 2000 Act

are limited to that action.

Confidentiality and publicity

- 8.12. This Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). In accordance with section 391 of the Act, a person to whom this Notice is given or copied may not publish the Notice or any details concerning it unless the Authority has published the Notice or those details.
- 8.13. However, the Authority must publish such information about the matter to which a Decision Notice or Final Notice relates as it considers appropriate. The persons to whom this Notice is given or copied should therefore be aware that the facts and matters contained in this Notice may be made public.

Authority contacts

- 8.14. For more information concerning this matter generally, contact William Byrne (direct line: 020 7066 9821/email: william.byrne@fca.org.uk) at the Authority.

Tim Parkes

Chair, Regulatory Decisions Committee

ANNEX A

RELEVANT STATUTORY AND REGULATORY PROVISIONS

1. RELEVANT STATUTORY PROVISIONS

The 2000 Act

- 1.1. The Authority's operational objectives, set out in section 1B(3) of the 2000 Act, include the consumer protection objective of securing an appropriate degree of protection for consumers (section 1C) and the integrity objective of protecting and enhancing the integrity of the UK financial system (section 1D).
- 1.2. Section 56 of the 2000 Act provides that the Authority may make an order prohibiting an individual from performing a specified function, any function falling within a specified description or any function, if it appears to the Authority that that individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, exempt person or a person to whom, as a result of Part 20, the general prohibition does not apply in relation to that activity. Such an order may relate to a specified regulated activity, any regulated activity falling within a specified description, or all regulated activities.
- 1.3. Section 63 of the 2000 Act provides that the Authority may withdraw an approval issued under section 59 if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.
- 1.4. Section 66 of the 2000 Act¹ provides that the Authority may take action against a person if it appears to the Authority that he is guilty of misconduct and the Authority is satisfied that it is appropriate in all the circumstances to take action against him.
- 1.5. During the Relevant Period, under section 66(2) of the 2000 Act (in force until 6 March 2016) misconduct included failure, while an approved person, to comply with a Statement of Principle issued under section 64 of the 2000 Act or to have been

¹ Section 66 was amended and section 66A added during the Relevant Period, but those changes are not material to the manner in which the Authority has exercised its powers as set out in this Notice.

knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that approved person by or under the 2000 Act.

- 1.6. During the Relevant Period, under section 66A of the 2000 Act (in force from 7 March 2016) a person was guilty of misconduct if, inter alia, he at any time failed to comply with rules made by the Authority under section 64A of the 2000 Act and at that time was an approved person, or had been knowingly concerned in a contravention of relevant requirement by an authorised person and at that time the person was an approved person in relation to the authorised person.

The 2015 Act and the 2015 Regulations

- 1.7. Section 48(1) of the 2015 Act provides that trustees or managers of a defined benefit pension scheme are, and were during the Relevant Period, required to check that a member of the scheme had received appropriate independent advice before, amongst other things, making a transfer payment in respect of any of the benefit with a view to acquiring a right or entitlement to flexible benefits for the member under another pension scheme.
- 1.8. Section 48(8) of the 2015 Act provides that “appropriate independent advice” means advice that is given by an authorised independent adviser and meets any other requirement specified in regulations made by the Secretary of State. Regulation 3 of the 2015 Regulations provides that the advice must be specific to the type of relevant transaction proposed by the member.
- 1.9. Section 48(8) of the 2015 Act provides that “authorised independent adviser” means a person who has permission under Part 4A of the 2000 Act, or resulting from any other provision of the 2000 Act, to carry on a regulated activity specified in regulations made by the Secretary of State and meets such other requirements as may be specified in regulations made by the Secretary of State for the purpose of ensuring that the person is independent. Regulation 4 of the 2015 Regulations provides that the specified regulated activity is the activity described in article 53E of the 2001 Order, which is the activity of advising on the conversion or transfer of pension benefits.
- 1.10. Section 48(3) of the 2015 Act provides that the Secretary of State may by regulations create an exception to section 48(1) in the case of a member or survivor whose subsisting rights in respect of safeguarded benefits under the scheme, or safeguarded benefits under the scheme and any other schemes, are worth less than a specified amount. Regulation 5 of the 2015 Regulations provides that the

trustee or members are not required to carry out the check required under section 48(1) of the 2015 Act if the total value of the member or survivor's benefits under a defined benefit pension scheme is £30,000 or less on the valuation date.

1.11. Regulation 7 of the 2015 Regulations provides that confirmation from the member that appropriate independent advice has been received must be in the form of a statement in writing from the authorised independent adviser providing the advice confirming:

(a) that advice has been provided which is specific to the type of transaction proposed by the member;

(b) that the adviser has permission under Part 4A of the 2000 Act to carry on the regulated activity in article 53E of the 2001 Order;

(c) the firm reference number of the company or business in which the adviser works for the purposes of authorisation from the Authority to carry on the regulated activity in article 53E of the 2001 Order; and

(d) the member's name, and the name of the scheme in which the member has subsisting rights in respect of safeguarded benefits to which the advice given applies.

2. RELEVANT REGULATORY PROVISIONS

Statements of Principle and Code of Practice for Approval Persons

2.1. The Authority's Statements of Principle and Code of Practice for Approved Persons have been issued under section 64 of the 2000 Act². The Code of Practice for Approved Persons sets out descriptions of conduct which, in the opinion of the Authority, do not comply with a Statement of Principle. It also sets out factors which, in the Authority's opinion, are to be taken into account in determining whether an approved person's conduct complies with a Statement of Principle.

2.2. During the Relevant Period, Statement of Principle 1 stated:

"An approved person must act with integrity in carrying out his accountable functions."

² Section 64A of the 2000 Act from 7 March 2016.

- 2.3. During the Relevant Period, accountable functions are in summary: the Authority's controlled functions; the Prudential Regulatory Authority's controlled functions; and any other functions in relation to the carrying on a regulated activity; in relation to the authorised persons in relation to which that person is an approved person.

Conduct of Business Sourcebook

- 2.4. The following rules and guidance in COBS (as were in place during the Relevant Period) are relevant to assessing suitability of Pension Transfer advice given to clients:

- 2.5. COBS 2.1.1R stated that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

- 2.6. COBS 4.2.1R(1) stated that a firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

- 2.7. COBS 9.2.1R stated that:

(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.

(2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:

(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(b) financial situation; and

(c) investment objectives;

so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

- 2.8. COBS 9.2.2R(1) stated that a firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a

reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

(a) meets his investment objectives;

(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and

(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

2.9. COBS 9.2.2R(2) stated that the information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

2.10. COBS 9.2.2R(3) stated that the information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

2.11. COBS 9.2.3R stated that the information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

(1) the types of service, transaction and designated investment with which the client is familiar;

(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;

(3) the level of education, profession or relevant former profession of the client.

- 2.12. COBS 9.2.6R stated that if a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him.
- 2.13. COBS 9.4.1R(4) stated that a firm must provide a suitability report to a retail client if the firm makes a personal recommendation to the client and the client enters into a pension transfer, pension conversion or pension opt-out.
- 2.14. COBS 9.4.7R stated that the suitability report must, at least:
- (1) specify the client's demands and needs;
 - (2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client;
and
 - (3) explain any possible disadvantages of the transaction for the client.
- 2.15. COBS 19.1.1R stated that if an individual who is not a Pension Transfer Specialist gives advice or a personal recommendation about a Pension transfer, a pension conversion or pension opt-out on a firm's behalf, the firm must ensure that the recommendation or advice is checked by a Pension Transfer Specialist.
- 2.16. COBS 19.1.2R stated that a firm must:
- (1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;
 - (2) ensure that that comparison includes enough information for the client to be able to make an informed decision;
 - (3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and

(4) take reasonable steps to ensure that the client understands the firm's comparison and its advice.

2.17. COBS 19.1.3G explained the information that should be contained within a comparison. In particular, the comparison should:

(1) take into account all of the retail client's relevant circumstances;

(2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;

(3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up;

(4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested; and

(5) where an immediate crystallisation of benefits is sought by the retail client prior to the ceding scheme's normal retirement age, compare the benefits available from crystallisation at normal retirement age under that scheme.

2.18. COBS 19.1.6G stated that when advising a client who is, or is eligible to be, a member of a defined benefit pension scheme (as defined in the Handbook) or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only consider a transfer, conversion or opt out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests.

2.19. COBS 19.1.7G stated that when a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up.

The Fit and Proper Test for Approved Persons

- 2.20. The part of the Authority's Handbook entitled "The Fit and Proper Test for Approved Persons" ("FIT") sets out the criteria that the Authority will consider when assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.
- 2.21. FIT 1.3.1G states that the Authority will have regard to a number of factors when assessing the fitness and propriety of a person. The most important considerations will be the person's honesty, integrity and reputation, competence and capability, and financial soundness.

Enforcement Guide

- 2.22. The Authority's policy in relation to prohibition orders and withdrawals of approval is set out in Chapter 9 of the Enforcement Guide ("EG").
- 2.23. EG 9.1 states that the Authority may exercise this power where it considers that, to achieve any of its regulatory objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities or to restrict the functions which he may perform.
- 2.24. EG 9.3.1 provides that when the FCA has concerns about the fitness and propriety of an approved person, it may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw its approval, or both.
- 2.25. EG 9.3.2 provides that when the Authority decides whether to make a prohibition order against an approved person and/or withdraw their approval the Authority will consider all the relevant circumstances of the case. These may include, but are not limited to:
- (2) Whether the individual is fit and proper to perform functions in relation to regulated activities;
 - (5) The relevance and materiality of any matters indicating unfitness;
 - (8) The severity of the risk which the individual poses to consumers and to confidence in the financial system.
- 2.26. EG 7 sets out the Authority's approach to exercising its power to impose a financial a penalty.

Decision Procedures and Penalties Manual

2.27. Chapter 6 of Decision Procedures and Penalties Manual (“DEPP”) which forms part of the Authority’s Handbook, sets out the Authority’s policy for imposing a financial penalty. The Authority applies a five-step framework to determine the appropriate level of financial penalty. DEPP 6.5B sets out the details of the five-step framework that applies to financial penalties imposed on individuals in non-market abuse cases, which can be accessed here:

<https://www.handbook.fca.org.uk/handbook/DEPP/6/5B.html>

2.28. The Authority’s approach to financial penalties is set out in Chapter 7 of EG, which can be accessed here:

<https://www.handbook.fca.org.uk/handbook/EG/7/?view=chapter>

ANNEX B

Frank Oxberry's Representations

1. A summary of the key representations made by Mr Oxberry and of the Authority's conclusions in respect of them (in bold type) is set out below.

Regulatory environment

2. SMP was a firm providing a limited TVAS-related service to give to a client an indicator as to whether or not there might be merit in considering a transfer out of a Defined Benefit Pension Scheme. Mr Oxberry considered that this was akin to a triage service to weed out patently unsuitable cases and highlight cases where a transfer might be justified.
3. The above approach did not have "obvious deficiencies". During the Relevant Period it was not uncommon for financial advice firms to undertake a preliminary assessment of potential suitability for transfer in defined benefit pension cases. The extent of this practice became so widespread that the Authority considered that it had to take action to address what it regarded as an issue: see the Authority's Consultation Paper in June 2017³ ("CP 17/16") and the subsequent Policy Statement in March 2018⁴ ("PS 18/06"), requiring, amongst other things, that Pension Transfer advice be given by way of a Personal Recommendation, and requiring a full assessment of a scheme member's circumstances. Before this point the regulatory environment was not clear.
4. SMP was not alone in utilising a more limited review model in connection with potential Pension Transfers. This was clearly a very widespread problem and had been exacerbated by the Authority failing to give clear guidance. The relevant finalised guidance and rules were published at the end of March 2018 – over 18 months after the end of the Relevant Period – and by this point in time, the Authority had made much clearer its expectation of firms.
5. Although Mr Oxberry has accepted in hindsight that the Pension Transfer Model was non-compliant (as the process strayed into giving a Personal Recommendation), the model was not so out of step with market practice as to be clearly a reckless process such that he, as a CF4 (Partner), should have spotted that it was obviously flawed and done something about it. It is important to place any alleged failures of Mr Oxberry into the appropriate regulatory context, and the Authority should not act in a disproportionate way with respect to Mr Oxberry.
6. **SMP provided Personal Recommendations by way of the Pension Transfer Model to certain of its retail clients. Mr Oxberry's reference to the widespread practice, requiring addressing by the Authority, in CP 17/16 and PS 18/06 related to firms which had been undertaking a preliminary assessment without making a Personal Recommendation. Contrary to Mr Oxberry's contention, the relevant regulatory environment during the Relevant Period was clear and the Authority's case has not been advanced with the benefit of post-PS 18/06 hindsight. COBS 19.1.2R(1) in particular stated that a firm was required to: "compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension**

³ <https://www.fca.org.uk/publication/consultation/cp17-16.pdf>

⁴ <https://www.fca.org.uk/publication/policy/ps18-06.pdf>

scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits". The TVAS produced under the Pension Transfer Model did not comply with this requirement. For the reasons set out in this Notice, and referred to at paragraphs 24 – 35 below, the Authority is of the view that Mr Oxberry's conduct was reckless and lacking in integrity.

- 7. The Authority had also published guidance before the Relevant Period, namely the two alerts dated 18 January 2013 and 28 April 2014 concerning firms advising on Pension Transfers with a view to investing pension monies into unregulated products through investment wrappers. These alerts were specifically drawn to SMP's attention.**

Structure of SMP and roles of individuals

8. SMP was a small regional firm and took compliance very seriously. It maintained a compliance function that operated independently, it staffed the function appropriately and proportionately and it also provided an external compliance resource for the SMP compliance function to use, as and when it saw fit. SMP allocated to a director and senior manager of the Firm (Mr Cuthbert) responsibility to manage and oversee the Firm's compliance function and to report to the management as a whole (and Mr Oxberry in particular) any relevant compliance matters.
9. The system in place at SMP allocated to Mr Cuthbert responsibility for compliance, with support from the Compliance Manager (and external consultants), and it was Mr Cuthbert's responsibility to bring any relevant matters to Mr Oxberry's attention. This system was perfectly adequate for a small firm such as SMP. Mr Oxberry and SMP complied with the Authority's rules, amongst other things, to establish, implement and maintain adequate policies and procedures taking into account the nature, scale and complexity of the Firm's business⁵. If the compliance function failed to assess and monitor the Pension Transfer Model properly, Mr Cuthbert and SMP's compliance function must take responsibility for this, and the Authority should not seek to attribute responsibility for this alleged failure to Mr Oxberry.
10. The SMP compliance function was not ineffective at the time. Although Mr Cuthbert was coming into the SMP offices for around 3 days a week, he was available at all times and his focus remained on compliance. He was still doing his job. Although the Compliance Manager was not a Pension Transfer Specialist, he was very experienced from a compliance perspective and had dealt with compliance matters before he joined SMP. He joined SMP on that basis and in the full expectation of taking over from Mr Cuthbert on Mr Cuthbert's forthcoming retirement.
11. The Pension Transfer Model was not a significant expansion of SMP's business. The anticipated income for SMP was a small fraction of its overall turnover. Mr Oxberry's role of business development did not mean he would oversee the compliance function's review of any new business. His role was to generate potential workflows relating to clients or potential lines of business. Whether or not SMP pursued any

⁵ SYSC 6.1.2R during the Relevant Period.

opportunities fell to compliance, headed up by Mr Cuthbert, which had to approve the relevant business. Mr Oxberry was not involved in that process nor in the compliance function's final decision as to whether to proceed. Mr Oxberry relied on the SMP compliance function to investigate the proposals for the Pension Transfer Model to arrive at a decision as to whether the business was compliant, and the Firm could proceed with it. He did not simply rely on the assurances of Mr Douglas and Mr Martin. There was a clear division of responsibility between Mr Oxberry, and Mr Cuthbert and the compliance function; ensuring business was conducted in a compliant manner was the responsibility of Mr Cuthbert. It cannot be the case that all partners in a firm have to be responsible for all aspects of its business.

12. **The Pension Transfer Model represented a rapid and novel expansion of SMP's business operations both in terms of: (1) the accelerated rate and increased volume at which clients were advised, with at least 547 new clients being advised in a nine month period, and an anticipated caseload of 20-25 cases per week; and (2) the number of new business relationships with introducers, involving at least 17 introducers with which SMP had not worked previously. Mr Oxberry had a key role in overseeing this expansion of the business and to take reasonable steps to ensure the Pension Transfer Model was compliant; this was not solely within the remit of SMP's compliance function.**
13. **During the Relevant Period SMP retained £139,129.80 after payment of the commission to Mr Douglas and Mr Martin, a substantial sum for a period of nine months' business. This was not a small fraction of the overall turnover of SMP for the period in question.**
14. **Although Mr Cuthbert led SMP's compliance function, the Authority considers that the due diligence on the Firm's partner introducers was within Mr Oxberry's accountable areas of the business as CF4 (Partner) and cannot be attributed solely to the compliance function of the Firm. SMP, a small firm with two CF4 Partners, was embarking on a novel and rapid expansion of its business operations at a time of reduced effectiveness of the compliance function due to: (i) Mr Cuthbert's reduction in his hours/time spent in the office ahead of his planned retirement; and (ii) the Compliance Manager's lack of relevant experience - not being a qualified Pension Transfer Specialist meant that he was unable to address the deficiencies of the Pension Transfer Model and adequately monitor the Pension Transfer advice given by the two qualified Pension Transfer Specialists, Mr Douglas and Mr Martin.**
15. **In addition, SMP did not seek advice from the Compliance Consultant to verify the compliance of the Pension Transfer Model prior to, during or after its implementation. This was notwithstanding the Compliance Consultant visiting SMP's offices on 18 November 2015 to carry out a compliance audit, around the same time the Pension Transfer Model was being set up. Mr Oxberry failed to ensure or check that SMP had obtained such advice.**

16. In the case of *Alistair Burns v The Financial Conduct Authority*⁶ the Tribunal stated that, whilst “it is permissible for a board to vest prime responsibility... for compliance in one of their number who is more expert than others... it does not absolve the other members of the board from obtaining a sufficient understanding of the business of the firm which they are ultimately responsible for managing, the key issues that are likely to arise out of its business model, and the manner in which they are being addressed”⁷. The Authority considers that Mr Oxberry failed to obtain a sufficient understanding of this part of the business of the Firm, and in particular adequately inform himself of the key issues arising out of the Pension Transfer Model and how they were being addressed. A key issue was why significant breaches (whether suspected or actual) of the relevant requirement and standards of the regulatory system were arising (taking into account of the systems and procedures in place)⁸.

Mr Oxberry’s conduct and recklessness

17. Mr Oxberry denies that he unreasonably failed to address the suspicious signs of certain risks of which he is said to have been aware. Mr Oxberry was not involved in the initial creation of the Pension Transfer Model, so cannot have been aware of any suspicious signs relating to that. Mr Oxberry has no recollection of a discussion with Mr Welsh in October 2015 (as referenced at paragraph 4.17 of the Notice). The ACER Introducers Agreement was negotiated by Mr Douglas, not by Mr Oxberry. Although the document was prepared for signature by either Mr Cuthbert or Mr Oxberry, the document does not fix Mr Oxberry with knowledge of a “suspicious sign” that SMP might be becoming involved in a scheme allegedly designed by FRPS to transfer client pensions into TRG investments.
18. Although Mr Oxberry attended a meeting with TRG in October 2015, this did not signify an active involvement in the matters then at hand. FRPS and TRG were considered two separate entities by SMP and by Mr Oxberry, and e-mails from TRG provided some due diligence information on TRG and their investments (the hotel resorts). Mr Oxberry’s understanding of the meetings was that SMP was looking to work with FRPS as an introducer and that responsibility for making those arrangements and undertaking due diligence rested with the compliance function at SMP. Separately, TRG wanted SMP to consider recommending its investments to SMP clients. The link between FRPS and TRG is not sufficient to show that Mr Oxberry was aware or should have suspected (by reason of any “suspicious signs”) that FRPS might be intending to abuse the TVAS process to transfer their clients into potentially unsuitable TRG investments. Mr Oxberry has no recollection of attending any further meetings in relation to FRPS and there is no evidence to indicate that Mr Oxberry was “actively involved” generally in SMP’s dealings with FRPS.
19. Mr Oxberry did not play an active role in approving the Pension Transfer Model; he did not have the experience or understanding to make a judgement call on whether the Pension Transfer Model was compliant. Mr Oxberry did not, therefore, “sign off” the Pension Transfer Model; he merely gave the go-ahead to consider a potential

⁶ [2018] UKUT 0246 (TCC).

https://assets.publishing.service.gov.uk/media/5b61add9e5274a5f5a33a3ec/Alistair_Rae_Burns_v_FCA.pdf

⁷ *Alistair Burns v FCA* [2018] UKUT 0246 (TCC) at paragraph 285.

⁸ APER 4.7.5G. Although this is in relation to Statement of Principle 7, the Authority considers that the same requirement for the individual to take such reasonable steps as envisaged within the guidance applies in this case.

new business stream; the process and Pension Transfer Model was "signed off" by SMP's compliance function and Mr Cuthbert. Mr Oxberry was justified in expecting that they would arrive at the right conclusion around compliance issues like the Pension Transfer Model. If the Pension Transfer Model was non-compliant, as it relied simply on TVAS data, that is something that was also being done by hundreds of other firms. Any deficiency on the part of SMP in advising on that limited basis cannot have been "clear" or obvious.

20. The alleged warning signs, as set out in paragraph 4.56, do not indicate obvious risks of detriment to SMP's clients and clear deficiencies in the Pension Transfer Model. A report by the Compliance Manager to Mr Cuthbert, that confirmation of advice letters were being issued to ceding scheme trustees in all cases, was a report to Mr Cuthbert not to Mr Oxberry. It cannot therefore have been a warning sign for Mr Oxberry. The issuing of advice letters (following advice not to transfer) was not unusual, nor a warning sign of obvious deficiencies and risks in the Pension Transfer Model. The fact that one introducer involved in the Pension Transfer Model had written to a ceding scheme trustee using SMP's Letter of Authority without SMP's knowledge was not a deficiency or risk in the Pension Transfer Model; it was a simple compliance and conduct issue with a specific introducer that was an isolated incident needing to be dealt with (which it was).
21. A report by the Compliance Manager to Mr Oxberry and Mr Cuthbert that FRPS appeared to be using an offshore trustee for the clients they introduced was not a warning sign to Mr Oxberry of obvious deficiencies with the Pension Transfer Model. The fact that the Compliance Manager expressed to Mr Oxberry and Mr Cuthbert that he did not trust FRPS appears to have been a personal comment made in an e-mail in March 2016. It does not indicate, nor is it a warning sign of, obvious deficiencies and risks in the entire Pension Transfer Model, and Mr Oxberry was justified in not treating it as such.
22. The Authority's reliance on The Pensions Regulator's Determination Notice, referred to in paragraph 4.55 of the Notice, is not understood. A search of The Pensions Regulators' website against Mr Welsh, or ACER, does not reveal the notice and there is no reason for SMP, or Mr Oxberry, to ought to have been aware of the Determination Notice about a third-party entity that simply made reference to Mr Welsh's previous role as trustee of an Occupational Pension Scheme.
23. Accordingly, Mr Oxberry did not turn a blind eye to issues with the Pension Transfer Model, nor were there "obviously suspicious signs" of risks with it. Nothing in the very limited information he had received, through meetings and e-mails, could have given him the impression that the TVAS-based advice process was intended to be manipulated by FRPS in conjunction with TRG. Mr Oxberry was not reckless, nor did he lack integrity.
24. **The Pension Transfer Model, which involved focussing on the TVAS outcome and included a Personal Recommendation, was not a model widely used within the industry.**
25. **The Authority considers that Mr Oxberry's presence at the October 2015 meeting with FRPS and ACER (referred to in paragraph 4.17 of this Notice), and a further meeting in October 2015 with TRG (referred to in paragraph 4.19) together with subsequent correspondence arising from the meetings copied to him, provided him with clear indications of FRPS's financial**

interest in promoting TRG's investments. A further email from FRPS to SMP dated 30 October 2015, copied to Mr Oxberry, sought to organise a meeting between FRPS, SMP and the Overseas Adviser Firm (which was a business partner of FRPS and TRG); this demonstrated the connection between FRPS and the Overseas Adviser Firm. In addition, Mr Douglas sent a copy of the ACER Introducers Agreement to Mr Oxberry on 18 January 2016, which referred to FRPS and TRG effectively as the same introducer: *"3rd Party Introducer 1: FRPS / The Resort Group"*.

26. Accordingly, the Authority considers that Mr Oxberry remained actively involved in the discussions and meetings surrounding the establishment of the Pension Transfer Model with FRPS. To someone in Mr Oxberry's position and with his level of experience, the indications of the connections between FRPS and TRG, and the likely destination of the funds of clients who were advised through the Pension Transfer Model, must have been obvious to him at the time.
27. In the Authority's view, Mr Oxberry had a role in putting in place the ACER Introducers Agreement. The signature block in the ACER Introducers Agreement includes Mr Oxberry's name on behalf of SMP, reflecting that he (along with Mr Cuthbert) had authority on behalf of SMP to sign the ACER Introducers Agreement.
28. As set out in paragraph 4.55 of this Notice, Mr Oxberry's failure to challenge Mr Cuthbert, Mr Douglas and Mr Martin in the circumstances set out therein was important, because if he had done so and SMP had exercised the greater care and due diligence required, SMP would have questioned Mr Welsh as to whether he had been subject to any regulatory investigation/action, before embarking upon the business relationship with ACER. At the time of his introduction to SMP in October 2015, Mr Welsh must have been aware that he was the subject of a Determination Notice given by The Pensions Regulator, dated 18 June 2015, so this fact should have been uncovered and raised concerns with SMP and therefore Mr Oxberry. The Pensions Regulator's Final Notice, dated 8 February 2016, was published on The Pensions Regulator's website. Accordingly, there was also publicly available material during the Relevant Period, which would have raised concerns with SMP and therefore Mr Oxberry, had appropriate due diligence on Mr Welsh been carried out.
29. Mr Oxberry subsequently accepted that an introducer writing to a ceding scheme trustee using SMP's Letter of Authority without SMP's knowledge was unacceptable but has dismissed it as an isolated incident. In the Authority's view, this was a clear warning sign of deficiencies in the Pension Transfer Model and of the risk of detriment to SMP's clients. Accordingly, the Authority considers that Mr Oxberry should have (i) questioned the suitability of SMP's partner introducers and SMP's continuing involvement with them, and (ii) caused a review of SMP's relationship with third-party introducers and SMP's controls to be carried out.
30. The report by the Compliance Manager that FRPS appeared to be using an offshore trustee for the clients it introduced was an indication that clients were being led by FRPS to invest in overseas, unregulated and potentially

high-risk investments. This followed the clear indications which Mr Oxberry had already received during the design of the Pension Transfer Model of the connections between FRPS, TRG and the Overseas Adviser Firm. The Compliance Manager's email stated that the offshore trustee "*only run QROPS out of Guernsey/Gibraltar*", which suggested the possible involvement of TRG, which Mr Oxberry would have known was based in Gibraltar. That the main introducer involved in the Pension Transfer Model (which introduced 440 of the at least 547 clients advised under the model) was using an offshore trustee for the clients it introduced was a clear warning sign (which Mr Oxberry closed his mind to) of deficiencies in the Pension Transfer Model and the risk of detriment to SMP's clients.

31. **The comment made by the Compliance Manager that he did not trust FRPS, was made in the context of a suggestion by the Compliance Manager that clients should receive a copy of SMP's advice letter directly from SMP, rather than via the introducer. This was another warning sign (which Mr Oxberry closed his mind to) that SMP's clients were being exposed to a significant risk of detriment arising from the practices of an introducer.**
32. **The failure by an individual to act on serious risks to which the individual closes his mind may constitute reckless conduct. In determining whether an individual's conduct was reckless, it is necessary to take into account the individual's level of experience and their position, to decide how obvious the risks were. In this regard Mr Oxberry was an experienced financial adviser and one of the two CF4s (Partner) at SMP.**
33. **The Authority considers that Mr Oxberry closed his mind to clear indications of the risks of detriment to SMP's clients arising from the deficiencies in Pension Transfer Model (as set out in paragraph 5.3 of this Notice). These risks must have been clear to him in the light of his experience and his role at SMP, and he failed to take appropriate action to avoid them.**

Financial Penalty and Prohibition

34. Mr Oxberry considers that it is not appropriate to impose any financial penalty, or prohibition, on him as he has not acted in breach, does not lack integrity and has not been reckless (also see submission on limitation).
35. The figure referred to in the Notice, namely, £139,129 (see paragraph 6.3 of this Notice), relates to the gross income received by SMP not Mr Oxberry. The figure for SMP's gross income should not be utilised for disgorgement purposes, since it does not reflect the actual benefit to Mr Oxberry and does not meet the criterion set out in DEPP 6.5B.1.G, which is to "deprive an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided)".
36. It is difficult for Mr Oxberry to establish and extract the precise operational costs incurred for the Pension Transfer business alone from the operational costs of SMP's business as a whole and to provide documentary evidence in support. He has provided his best estimates. Mr Oxberry considers that there were three areas of additional operational costs for SMP which should be taken into account, when

assessing the actual benefit to him. These additional operational costs relate to increases in SMP's: (1) staff costs; (2) rental costs; and (3) regulatory fees.

37. Mr Oxberry recalls two additional staff being employed by SMP at around the start of the Relevant Period (not working exclusively on the Pension Transfer Model), with an annual additional cost to SMP of around £60,000. He estimates that two staff overall were assigned to assisting with the Pension Transfer Model.
38. SMP moved to larger, more expensive, premises around the time Mr Douglas and Mr Martin joined the Firm: SMP had been paying rent at around £9,000 per month before they joined; during the Relevant Period SMP paid rent at around £16,000 per month; and after Mr Douglas and Mr Martin left SMP, the Firm reverted back to the smaller size premises, costing around £8,000 per month. Mr Oxberry estimates that the rental costs associated with the operation of the Pension Transfer Model should be estimated at around £8,000 per month. In addition, SMP incurred an increase in regulatory fees arising out of an increased turnover because of the operation of the Pension Transfer Model. Mr Oxberry has not been able to quantify the increase in SMP's regulatory fees due to the Pension Transfer Model. Mr Oxberry considers that these additional operational expenses should be taken into account when assessing the actual benefit to him. If these are all taken into account, Mr Oxberry received no direct benefit from the operation of the Pension Transfer Model.
39. In any event, Mr Oxberry did not receive a share of the gross income received by SMP – instead he received a share of the *profit* on this sum (which is the element anticipated to be used by DEPP 6.5B.1G⁹) and this share was much lower. In the 18-month period up to September 2016 (i.e. covering the entirety of the Relevant Period) SMP's pre-tax profit margin was 17.9% (namely pre-tax profit of £423,513 on income of £2,366,516). The figures provided by Mr Oxberry to the Authority indicate that Mr Oxberry was entitled to around 65% of SMP's profits during the Relevant Period, the remainder being paid to Mr Cuthbert. If the increase in operational costs, referred to in paragraphs 36-38 are not taken into account when assessing the direct benefit to Mr Oxberry, the financial benefit derived directly from the breach is £16,187¹⁰.
40. The seriousness of the breach should be appropriately assessed at level 2 seriousness. The level 4 or 5 factors as set out in DEPP 6.5B.2G(12) do not apply: any losses were primarily caused by the actions of introducers and of Mr Douglas and Mr Martin, who brought their scheme to SMP, and the losses were not caused by Mr Oxberry. Furthermore, any breach resulting from an alleged lack of oversight was inadvertent and was neither deliberate nor reckless. The level 1, 2 or 3 factors do apply, as follows: little profit was made by Mr Oxberry as a result of an alleged lack of oversight; there is no evidence that the alleged breach indicated a widespread problem at the firm and the alleged breach was at worst inadvertent or negligent. The financial penalty, at Step 2, should therefore be 10% of £291,586, namely £29,158.

⁹ DEPP 6.5B.1G: The Authority will seek to deprive an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided) where it is practicable to quantify this. The Authority will ordinarily also charge interest on the benefit. Where the success of a firm's entire business model is dependent on breaching the Authority's rules or other requirements of the regulatory system and the individual's breach is at the core of the firm's regulated activities, the Authority will seek to deprive the individual of all the financial benefit he has derived from such activities.

¹⁰ Total pre-tax profit for SMP is 17.9% of the gross income received by SMP, i.e. £139,129 = £24,904; Mr Oxberry received 65% of £24,904 = £16,187.

41. There should be no uplift for aggravating factors. Mr Oxberry relied on the compliance function to ensure that the business was run compliantly and was entitled to rely on it to deal with any issues highlighted by the Authority, including the alerts referred to in the Notice. Mr Oxberry did not believe that SMP was providing regulated advice on Pension Transfers and was not in a position to determine that regulated advice was actually being given, which would give rise to various regulatory obligations. As SMP's compliance function did not consider that regulated advice was being given by SMP, Mr Oxberry was not in a position to determine otherwise, whether as a result of the alerts or anything else. The alerts are, therefore, not relevant aggravating factors.
42. Accordingly, the total financial penalty should be £29,158 (if the operational expenses are all taken into account) or £45,346 if they are not (exclusive of interest).
43. **The Authority considers that it is appropriate and proportionate to impose a financial penalty, and prohibition order, on Mr Oxberry as he has acted in breach, and lacks integrity.**
44. **DEPP 6.5B.1G provides that the Authority will seek to deprive an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided), where it is practicable to quantify this. The Authority accepts that operational expenses which are directly referable to the Pension Transfer Model are deductible from the benefit received by SMP and thus may be taken into account before calculating the benefit received by Mr Oxberry. Accordingly, the commission payments made to Mr Douglas and Mr Martin have been appropriately deducted as operational expenses.**
45. **On the other hand, operational expenses which are general business overheads of SMP's business (and therefore not directly referable to the Pension Transfer Model) are not deductible. Mr Oxberry has provided inadequately evidenced estimates for increases of expenditure SMP incurred around the time of the Relevant Period. The Authority notes that the two additional staff members employed did not exclusively work for SMP on the Pension Transfer Model, and the amount of time they did work on it is unclear. It also appears to the Authority that the increase in rental expenditure was incurred irrespective of the revenue generated from the Pension Transfer Model. Finally, Mr Oxberry has not provided an estimate of any relevant increase in regulatory fees, but in any event the Authority considers that these would not have been directly referable to the Pension Transfer Model. Accordingly, the Authority considers that the three specified additional operational expenses are more appropriately characterised as increases in general business overheads of SMP's business. The Authority has therefore (for the purposes of disgorgement) not made any deductions from the income received by SMP from the operation of the Pension Transfer Model other than the commission payments made to Mr Douglas and Mr Martin.**
46. **According to Mr Oxberry, he received around a 65% profit share during the Relevant Period, the remainder being paid to Mr Cuthbert. On that basis the financial benefit derived directly from the breach and received**

by him is £90,433 (exclusive of interest). The Step 1 figure for disgorgement is therefore £90,433.

47. **The Authority considers that Mr Oxberry was reckless and that he failed to act with integrity in relation to the design and operation of the Pension Transfer Model. His actions caused a significant loss or risk of loss to individual consumers and level 4 and 5 factors as set out at paragraph 6.19 of this Notice apply. The seriousness of the breach is appropriately assessed at level 4 seriousness. The financial penalty, at Step 2, is therefore 30% of £291,586, namely £87,475.**
48. **The Authority considers that the Authority's alerts to firms advising on Pension Transfers with a view to investing pension monies into unregulated products through investment wrappers, in January 2013 and April 2014, and sent to SMP in April 2015 and March 2016 are relevant aggravating factors for Mr Oxberry. These alerts related to the activities of the Firm with respect to consumers and were intended to prevent precisely the type of consumer detriment which occurred in this case. They were not matters solely for the compliance function of the Firm but rather for its senior managers, which included Mr Oxberry. The Authority considers that a 10% aggravating uplift is an appropriate and proportionate uplift in the circumstances of the case.**

Limitation

49. The limitation period for the Authority being able to take disciplinary action against Mr Oxberry, pursuant to section 66 of the Act, is six years from the point at which the Authority either had knowledge of Mr Oxberry's misconduct or had information from which the misconduct can reasonably be inferred (section 66(5)(a)). Proceedings against a person are to be treated as begun when a warning notice is given to him; the warning notice was issued to Mr Oxberry on 28 September 2022. Mr Oxberry's disciplinary case was time-barred as the Authority had information from which his misconduct could be reasonably inferred before 28 September 2016, and accordingly a financial penalty cannot now be imposed by the Authority.
50. The case of *Haward v Fawcetts*¹¹ makes it clear that a claimant¹² need not fully appreciate that it has a clear claim against an adviser; there should merely be sufficient information to justify the claimant setting about investigating the facts, to see if the relevant party may have been negligent. The *Haward* case sets the bar relatively low as to when the clock starts running for limitation purposes. The Authority does not have to know that there was misconduct, or a prima facie case of, or probable, misconduct. The relevant point to determine is the point when the circumstances objectively justified the Authority looking more closely at matters to see if there had been misconduct by Mr Oxberry.
51. The Authority considers that the date on which it had information from which Mr Oxberry's misconduct can reasonably be inferred is 3 October 2016, and that this information was imparted to it no earlier than at the meeting it had on that date with, amongst others, Mr Oxberry ("the October 2016 Meeting"). However, with

¹¹ [2006] UKHL 9.

¹² This was a professional negligence case where sections 14 and 14A of the Limitation Act 1980 were discussed.

respect to Mr Douglas and Mr Martin the Authority accepts that it had the necessary information before this date as regards similar misconduct arising out of the same circumstances. Mr Oxberry does not agree that limitation with respect to him runs from a later date than for Mr Douglas and Mr Martin.

52. One of the central planks of the Authority's case against Mr Oxberry is that as a partner of SMP he was personally responsible for ensuring that reasonable steps were taken to ensure that the firm complied with the relevant regulatory requirements¹³. The Authority has repeatedly emphasised that there were significant and clear deficiencies in the Pension Transfer Model and that those deficiencies must have been obvious to Mr Oxberry in light of his experience as a financial adviser and his senior position at SMP.
53. In light of the Authority's position, it must follow that, once the Authority had sufficient information relating to the "obviously" flawed Pension Transfer Model to infer or to justify looking into misconduct, the clock started running for limitation purposes with respect to Mr Oxberry. If the Authority had information from which it could reasonably infer misconduct on the part of Mr Douglas and Mr Martin in connection with the Pension Transfer Model before the October 2016 Meeting, then it must at the same time have been able reasonably to infer misconduct on the part of Mr Oxberry.
54. Up to the end of April 2016, the Authority had received various reports relating to potentially concerning Pension Transfers involving SMP and which appeared to indicate that SMP was giving transfer advice without considering the destination of the transferred funds (a regulatory breach and indicative of a non-compliant process). The Authority instigated contact with SMP on 9 March 2016 with regard to its Pension Transfer activities. In May 2016 the Authority requested client files to investigate the advice process and these were provided to the Authority by SMP on 18 May 2016. It is clear from these documents that SMP must have been operating a non-compliant process: they clearly contain information from which, on the Authority's case (namely that Mr Oxberry was responsible for ensuring regulatory compliance and overseeing the business) misconduct by Mr Oxberry could be inferred.
55. On 26 July 2016, the Authority wrote to SMP setting out its concerns and requesting further information. This was provided on 9 August 2016 by SMP and included further documents relating to its relationships with unregulated introducers and the flawed Pension Transfer Model, re-emphasising the "inherent flaws" of a TVAS-based advice process with no consideration of the client's circumstances or the destination of the funds. The date on which misconduct by Mr Oxberry on the Authority's case (for ensuring regulatory compliance and overseeing the business) could reasonably have been inferred must therefore have been by no later than 9 August 2016. Further information received on 2 August 2016 relating to the provision of confirmation of advice letters also highlighted the inherent flaws in the Pension Transfer Model from which Mr Oxberry's misconduct, on the Authority's case (for ensuring regulatory compliance and overseeing the business), could reasonably be inferred.
56. Accordingly, the Authority had sufficient information and documentation before the October 2016 Meeting from which misconduct on the part of Mr Oxberry could

¹³ Alistair Burns v FCA [2018] UKUT 0246 (TCC) at paragraph 285.

reasonably be inferred in terms at least of appreciating the need to investigate further. As the Authority had the requisite knowledge before 28 September 2016, it is time-barred from imposing the proposed financial penalty on Mr Oxberry.

57. In **Andrew Jeffery v Financial Conduct Authority**^{14 15} the Tribunal held ¹⁶ that: ***“It is not sufficient that the Authority has information in its hands that would give rise to a mere suspicion. Nor is it enough that the information might suggest that there was misconduct, but that the person in question has not been identified as the apparently guilty party. The Authority must either know or be treated, by reasonable inference, as knowing of the misconduct by a particular person. The reference in s[ection] 66(4) to “the misconduct” (our emphasis) clearly refers to the particular misconduct in respect of which action is to be taken against a particular person, and not to conduct of a similar nature in respect of which information may have been obtained earlier.”***
58. The Tribunal also held that:¹⁷ ***“The Authority must, however, have sufficient knowledge of the particular misconduct, or such knowledge must be capable of being reasonably inferred, to justify an investigation. Mere suspicion is not enough, nor is any general impression that misconduct may have taken place”.*** In relation to the culpability of individuals, DEPP 6.2.7G states that: ***“[...] disciplinary action will not be taken against an approved person performing a significant influence function or a senior conduct rules staff member simply because a regulatory failure has occurred in an area of business for which he is responsible.”*** Regarding a breach of the Statements of Principle, APER 3.1.4G provides: ***“An approved person will only be in breach of a Statement of Principle where he is personally culpable”.***
59. Accordingly, mere knowledge that a person was involved in the management of an area of a firm where regulatory breaches appear to have occurred is insufficient in itself to draw a reasonable inference that the individual was guilty of misconduct, and therefore would not be sufficient in itself to trigger the time limit under section 66(4) of the Act. Mr Oxberry may have been one of the two CF4 Partners at the Firm; but being a partner, in itself, is insufficient to amount to the knowledge the Authority is required to have for the purposes of section 66(4) of the Act.
60. The Authority had had no contact with Mr Oxberry prior to the October 2016 Meeting. The Authority’s email and telephone contact with SMP, prior to this meeting, had been solely with Mr Cuthbert, except for one telephone call with the Compliance Manager on 30 March 2016, when Mr Cuthbert was not available. Neither Mr Cuthbert nor the Compliance Manager at any time mentioned Mr Oxberry’s involvement in any of the contacts the Authority had with them prior to arranging the October 2016 Meeting.
61. Whilst the Authority received material relating to SMP’s Pension Transfer Model in the months before the October 2016 Meeting, Mr Oxberry was not

¹⁴ FS/2010/0039.

¹⁵ https://assets.publishing.service.gov.uk/media/5752d271ed915d3c89000024/Andrew_Jeffery.pdf

¹⁶ paragraph 334: Andrew Jeffery v FCA.

¹⁷ paragraph 337: Andrew Jeffery v FCA.

identified in this material other than by his signature on certain introducer agreements. The Authority was unaware of Mr Oxberry's personal role in relation to the Pension Transfer Model; all the Authority was aware of was that he was a CF4 (Partner).

62. **The Authority initially requested the October 2016 meeting to be with Mr Cuthbert only; Mr Cuthbert responded requesting that he attend with colleagues but did not specify who they would be. The first time it was confirmed that, amongst others, Mr Oxberry would attend the meeting was in an email to the Authority dated 29 September 2016. This was the first point at which Mr Oxberry's name was included in any correspondence with and in any documentation provided to the Authority in response to its requests for information.**
63. **In light of the Authority's concern to identify actual or potential harm caused to consumers and to address it, the main purpose of the October 2016 Meeting was to clarify how the TVAS-only process operated, to give SMP the chance to explain its actions and also to see if there were any mitigating factors relating to the Authority's concerns. At this stage the Authority had not focussed on the roles of the individuals at the firm, other than noting that Mr Cuthbert had overall responsibility for compliance oversight, as he performed the CF10 (Compliance Oversight) role. Mr Oxberry admitted at the October 2016 Meeting that SMP had "*gone too far*" but did not give an indication of any role he might have played in relation to SMP's TVAS-only advice model, and the Authority did not ask any questions about his specific responsibilities at SMP during the meeting.**
64. **Notwithstanding what is set out above, the Authority is content to adopt the position that the earliest time it could be treated as being aware of the particular misconduct by Mr Oxberry (in respect of which action is being taken against him by the Authority), namely, the matters set out in this Notice, was the October 2016 Meeting.**

Enforcement's unfair approach to the case

65. Mr Oxberry has a number of concerns with the conduct and the approach to the investigation of the Authority's Enforcement case team. The Authority has, amongst other things, taken an overly aggressive stance towards Mr Oxberry and failed to pursue the investigation with appropriate speed. Accordingly, this has been unfair to Mr Oxberry. Mr Oxberry has been co-operative with the Authority throughout the investigation and hired an external, independent compliance consultant to assist with, amongst other things, complying with the Authority's requirements on the Firm.
66. **The decision to give Mr Oxberry this Notice was made on behalf of the Authority by the RDC. As is explained in paragraph 8.2 of this Notice, the RDC is a committee of the Authority which takes certain decisions on behalf of the Authority, and its members are separate from the Authority's staff involved in conducting investigations and recommending action against firms and individuals. The RDC has decided to give this Notice on the basis of the materials before it regarding the conduct of Mr Oxberry.**

67. The submissions made by Mr Oxberry, as to the nature and conduct of the investigation, and his co-operation with the Authority, have been duly considered by the RDC but it considers that they do not undermine the evidence on which the decision is based.

The Resort Group Plc's Representations

1. A summary of the key representations made by TRG and of the Authority's conclusions in respect of them (in bold type) is set out below.
2. The starting point should be for the Authority to seek to avoid causing prejudice to TRG, save to the extent that it considers any matters within the Notice which are prejudicial to TRG are necessary to support the reasons for its action against Mr Oxberry. It is not necessary for the Authority's findings against Mr Oxberry to identify TRG by name rather than anonymising it, consistent with its usual practice.
3. The Notice contains certain passages that refer to TRG in terms that are highly prejudicial to TRG, repeating allegations of potential criminality made more than seven years ago that are denied and have not been proven. These references are unnecessary to support the action against Mr Oxberry and should be removed. The effect of the allegations set out in paragraphs 4.13 and 4.55 insinuate that TRG's activities and investments are potentially fraudulent. This is denied. It repeats a reference by The Pensions Regulator to what appears to be a previous statement made by Action Fraud. Public repetition of a damaging allegation will inevitably increase the harm caused by the initial allegation.
4. None of Mr Oxberry's failings set out in the Notice rely on the allegations of fraud against TRG. The factual background for these findings is established without any need to reference the allegations of fraud against TRG. The high-risk nature of the TRG investments, as both unregulated and illiquid, is very clearly articulated in the Notice. It is inaccurate to conflate the separate and distinct concepts of an investment being high-risk with an investment being fraudulent.
5. There is no evidence that Mr Oxberry was aware of the determination by the Pensions Regulator. Accordingly, it is unnecessary to refer to it, as there is no evidence this would have had any bearing on Mr Oxberry's judgement and decision-making in respect of the Pension Transfer Model or how Mr Oxberry should have assessed Mr Welsh and/or TRG's investments.
6. There is, therefore, no need to include prejudicial allegations of fraud against TRG and these should be removed in the interests of fairness.
7. The reference in paragraph 4.13 to the BBC Panorama documentary in July 2016, two weeks before the end of the Relevant Period, is also irrelevant to the findings against Mr Oxberry and should be removed. The statement refers to matters that are prejudicial to TRG but have not been tested by the Authority. The Authority should not reference unsubstantiated reports of journalists in circumstances where the fact of publication of those reports is not relevant to the facts or circumstances of the breach. By including reference to the Panorama documentary, the Notice suggests that the matters presented in that documentary form part of the background and circumstances of the Authority's case.
8. **Prejudice alone is not a proper basis upon which to decide to anonymise and/or remove reference to TRG's involvement. The appropriate basis, for anonymising and/or removing reference to TRG's involvement arises**

where including such references would amount to unfairness to TRG¹⁸. No such unfairness arises as, whilst the matters within this Notice may be prejudicial to TRG, they are nevertheless relevant, qualified (for example “*potentially fraudulent*”), proportionate and accurate.

9. The Authority considers that the nature of the relationship between TRG, FRPS, SMP and Mr Oxberry is accurately described in this Notice.
10. The information in paragraphs 4.13 and 4.55 is consistent with information that is already in the public domain and attributed to two highly reputable sources, namely a statutory notice of another regulator and Action Fraud (which is run by the City of London Police), and the Authority considers that it is appropriate for this information to be included in this Notice.
11. There was publicly available material during the Relevant Period which ought to have raised concerns with SMP, and Mr Oxberry, in respect of it partnering with ACER and TRG, had it conducted sufficient due diligence on ACER/TRG. The Notice draws a link between Mr Oxberry’s failures of due diligence with respect to matters in the public domain and the investments which TRG promoted to clients.
12. The Authority considers that any prejudice caused to TRG by paragraphs 4.13 and 4.55 of this Notice is outweighed by the fact that these passages demonstrate that this business relationship may have been prevented or curtailed, if appropriate due diligence had been undertaken by Mr Oxberry.
13. With regard to the reference to the Panorama documentary, the Notice contains a brief, factual description of publicly available material. The Panorama documentary forms part of the background and circumstances of the Authority’s case, as regards SMP’s stated reasons for bringing its relationship with FRPS to an end. The Authority notes that Mr Oxberry stated in interview with the Authority: “*when we all see [sic] ... Panorama about [the Pension Transfer Model] and we all went 'No, we've got to stop it'*”. Accordingly, the Authority considers that it is appropriate to refer to the Panorama documentary in the Notice.

¹⁸ Section 393 of the Act envisages that a “third party” could be identified in a statutory notice even if, in the opinion of the Authority, the third party is prejudiced; and the third party will then receive a copy of the notice.

Matthew Welsh's Representations

1. A summary of the key representations made by Mr Welsh and of the Authority's conclusions in respect of them (in bold type) is set out below.
2. ACER acted as the proposer to SMP of potential third-party introducers (not individual investors), such as FRPS. Mr Welsh had no part to play in the advice given by SMP to its clients nor indeed had any direct involvement in relation to the matters complained of in the Notice. The Notice suggests Mr Welsh, and ACER, were extensively involved in Mr Oxberry's dealings with investors and invites criticism and adverse inferences to be drawn against Mr Welsh in a manner that suggests that Mr Welsh and ACER were involved in wrongful acts. In addition, the reference to Mr Welsh being subject to a Determination and Final Notice by The Pensions Regulator (paragraph 4.55) should be removed, as Mr Welsh merely acted as a proposer and performed no other function.
3. ACER should not be named in the Notice and instead referred to as "the Introducer"; this will be consistent in the Notice with the reference to the "Overseas Adviser Firm".
4. Mr Welsh should not be referenced in the Notice; all business conducted with Mr Oxberry by Mr Welsh was on behalf of ACER. The Notice incorrectly implies that he was conducting personal business with SMP.
5. **Prejudice alone is not a basis upon which to decide to remove reference to the involvement of Mr Welsh and/or to anonymise ACER. The appropriate basis for removing reference to Mr Welsh's involvement arises where including such reference would amount to unfairness to him¹⁹. No such unfairness arises as, whilst the matters within the Notice may be prejudicial to Mr Welsh, they are nevertheless relevant, qualified, proportionate and accurate. In addition, no such unfairness arises from naming ACER; it was dissolved on 29 January 2019.**
6. **Mr Welsh's role, as set out in the Notice, is limited to his involvement (acting on behalf of ACER) in proposing introducers such as FRPS to SMP. Mr Welsh is not attributed with a role in the advice provided by SMP or in the operation of the Pension Transfer Model; his role is explained in the section of the Notice entitled "Design of the Pension Transfer Model" (paragraphs 4.16 to 4.20).**
7. **The Authority considers that the information set out in relation to Mr Welsh's involvement with the Occupational Pension Scheme (paragraph 4.55) is relevant to the Authority's case in respect of Mr Oxberry. At the time of his introduction to SMP in October 2015, Mr Welsh was aware that he was the subject of a Determination Notice given by The Pensions Regulator in June 2015; this might have become known to SMP, if it had undertaken appropriate due diligence by questioning Mr Welsh as to whether he had been subject to any regulatory investigation/action, before embarking upon a business relationship with ACER.**

¹⁹ Section 393 of the Act envisages that a "third party" could be identified in a statutory notice even if, in the opinion of the Authority, the third party is prejudiced; and the third party will then receive a copy of the notice.

8. **In addition, the Final Notice, dated 8 February 2016, was published on The Pensions Regulator’s website and would have been publicly available during the Relevant Period. The Final Notice sets out the Panel’s findings that, inter alia, the investments in the Occupational Pension Scheme, which included TRG, were all high-risk and highly illiquid and described in the Final Notice in submissions made by the new trustee to the scheme as “*in a class of investments which had been recently been highlighted by Action Fraud as potentially fraudulent*”. Accordingly, there was publicly available material during the Relevant Period which would have raised concerns with a reasonable and prudent individual in Mr Oxberry’s position in respect of SMP partnering with ACER and TRG/FRPS, had SMP conducted appropriate due diligence on Mr Welsh and TRG. The Notice, at paragraph 4.55, links Mr Oxberry’s failures in due diligence to the matters of concern expressed by The Pension Regulator and accordingly, the Authority considers that the inclusion of the information contained in this paragraph is relevant in order to set out the key facts and matters in Mr Oxberry’s case.**