

**Ms Dunne has referred this Decision Notice to the Upper Tribunal to determine, in the case of the decision to impose a financial penalty; 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: whether to dismiss 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 Ms Dunne 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

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To: **Heather Imogen Dunne**

Individual  
Reference

Number: **HID00002**

Date: **2 January 2024**

### **1. ACTION**

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

- (1) impose on Heather Imogen Dunne (Ms Dunne) a financial penalty of £399,817 pursuant to section 66 of the Act; and
- (2) make an order, pursuant to section 56 of the Act, prohibiting Ms Dunne from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

1.2. The Authority would have imposed a financial penalty of £494,917, consisting of £317,316 disgorgement plus interest in the amount of £82,501, and £95,100 as the punitive element. However, as Ms Dunne has provided verifiable evidence that payment of the full amount of the financial penalty would cause her serious financial hardship, the Authority has decided to reduce the financial penalty to £399,817, being the disgorgement figure including interest.

## **2. SUMMARY OF REASONS**

### **Background**

- 2.1. Heather Dunne is a Pension Transfer Specialist ("PTS") who, from 30 July 2010 until 28 June 2018, was approved by the Authority to perform the CF30 (Customer) controlled function at Financial Solutions Midhurst Limited ("FSML"). Ms Dunne (operating as a sole-trader firm), trading as HDIFA, was an Appointed Representative ("AR") of FSML from 31 August 2012. Ms Dunne was the sole PTS at HDIFA and, through her sole-trader firm, provided Defined Benefit Pension Transfer advice to customers under the responsibility of FSML.
- 2.2. Notwithstanding the responsibility accepted by FSML as Principal of HDIFA, as a PTS and CF30 Ms Dunne was responsible for ensuring that the Pension Transfer advice she provided complied with the relevant rules and requirements of the regulatory system and accordingly that she acted with due skill, care and diligence as an approved person carrying out her controlled function. This included ensuring that she operated a Defined Benefit Pension Transfer advice process which mitigated against the risk of customers receiving unsuitable advice which would lead them to make irreversible decisions in respect of their valuable pension benefits, against their best interests.
- 2.3. A PTS is an individual who has passed the required examinations and provides Pension Transfer advice, or a second-level check on such advice, to customers. Ms Dunne was a sole practitioner and therefore she did not need to perform a second-level check. As a PTS the Authority expected her to have a high level of knowledge and expertise in relation to the provision of Pension Transfer advice.

### **The two-adviser advice model**

- 2.4. The two-adviser advice model is where one firm provides Pension Transfer advice and another firm provides investment advice on the proposed onward investment if the Pension Transfer were to proceed. During the period when HDIFA was an AR of FSML, although it was permissible for two advisers to provide advice in this way, the Pension Transfer adviser still needed to take into account the overall investment strategy the customer was contemplating and also needed to carry out a comparison between the benefits likely (on reasonable assumptions) to be paid under the Defined Benefit Pension Scheme ("DBPS") with the benefits afforded by the Proposed Arrangement, before advising a customer to transfer out of a DBPS (as required by COBS 19.1.2R (as then in force)). If the destination

investment was not considered suitable for the customer, then the Pension Transfer was not suitable for the customer.

- 2.5. The two-adviser advice model introduces additional risks because the Pension Transfer adviser may have limited or no oversight over how subsequent investment advice is provided to the customer, meaning customers may not receive complete advice on all the necessary aspects of the Pension Transfer, making the advice unsuitable. An adviser needs to take reasonable steps to ensure that the customer understands the firm's comparison and its advice. These risks need to be appropriately managed by the Pension Transfer adviser.
- 2.6. Ms Dunne, trading as HDIFA, operated a deficient two-adviser advice model. Another regulated firm (an introducing adviser) introduced the customer to HDIFA in order to receive Pension Transfer advice, Ms Dunne provided that advice and then, once the Pension Transfer was completed and the funds were deposited in cash, advice on the onward investment was provided by the introducing adviser. In view of this, the Suitability Reports and Personal Recommendations, prepared by Ms Dunne as part of her Pension Transfer advice, were issued to the introducing adviser to present to the customer on her behalf, in circumstances where she had not carried out the comparison required under COBS 19.1.2R (as then in force). Ms Dunne did not meet the customer and did not have oversight over how the introducing adviser presented her Pension Transfer advice to the customer or of the investment advice provided by the introducing adviser. This meant that Ms Dunne did not take into account the overall suitability of the destination investment in giving her advice to the customer on the suitability of the Pension Transfer, which she was required to do.
- 2.7. In January 2013 and in April 2014, the Authority issued alerts relevant to the two-adviser advice model operated by Ms Dunne. The first alert, dated 18 January 2013, reminded financial advisers that the advice on a Pension Transfer must take account of the overall investment strategy the customer is contemplating. The second alert, dated 28 April 2014, then also stated that "*the suitability of the underlying investment must form part of the advice given to the customer*".
- 2.8. On 3 and 4 January 2015, FSML's external compliance consultant drew Ms Dunne's attention to these alerts, as well as to the need to consider the overall suitability of the investment advice. Ms Dunne challenged the points made by the external compliance consultant and continued to use her deficient two-adviser advice model, including after FSML had itself raised concerns that the model was non-

compliant in February 2016. The Authority considers that, in operating a deficient two-adviser advice model, including in circumstances where concerns had been raised that it was non-compliant, Ms Dunne demonstrated a lack of competence and capability in performing her PTS role and exposed her customers to a significant risk that their pension funds would be transferred out of their DBPS into investments which were unsuitable for them.

### **Ms Dunne's misconduct**

#### *Breach of Statement of Principle 2*

2.9. Between 29 April 2015 and 22 June 2017 ("the Relevant Period"), Ms Dunne breached Statement of Principle 2 by failing to act with due skill, care and diligence in providing Pension Transfer advice. In particular, Ms Dunne failed to:

- (1) communicate information to customers in a way which was clear, fair and not misleading, such that customers were not placed in an adequately informed position from which to make a decision to transfer;
- (2) sufficiently tailor her Suitability Reports to individual customers and used generic standardised reasons in purporting to explain why a recommendation to transfer out of a Defined Benefit Pension Scheme was suitable. Suitability Reports nominally compiled for different customers were substantially identical in content;
- (3) gather all necessary information regarding the customer at the fact-finding stage, including details of their financial situation, investment and specific retirement objectives, and Attitude to Risk. (If a firm does not obtain the necessary information to assess suitability such that there are material information gaps, it must not proceed to make a Personal Recommendation);
- (4) assess properly, on the basis of the information obtained, or give due consideration to, the customer's financial situation, their retirement needs and whether they could financially bear the risks associated with the Pension Transfer;
- (5) assess properly whether the Pension Transfer that was recommended met the customer's specific objectives and was therefore suitable; and

- (6) adequately consider the customer's financial situation and anticipated income needs during retirement when assessing whether it was suitable for them to transfer out of their DBPS.
- 2.10. The combined effect of Ms Dunne's information collection and advice failings created a significant risk of unsuitable Pension Transfer advice being provided to her customers.
- 2.11. During the Relevant Period, Ms Dunne, through HDIFA and as an Appointed Representative of FSML, advised 354 customers on whether to transfer out of their DBPS. Notwithstanding the Authority's guidance, which created as a starting point a presumption of unsuitability in respect of transferring out of a DBPS, Ms Dunne advised 327 of these customers (approximately 92%) to complete a Pension Transfer.
- 2.12. The total value of the transferred funds on which Ms Dunne gave advice during the Relevant Period for FSML was £126,353,674, with an average transfer value per customer of approximately £386,402.
- 2.13. As of 23 December 2022, the Financial Services Compensation Scheme (FSCS) had upheld 10 claims against FSML, nine of them concerning the suitability of Defined Benefit Pension Transfer advice provided by Ms Dunne under the responsibility of FSML during the Relevant Period. The FSCS has paid out a total of £759,377 in compensation to customers. In eight of the 10 claims upheld, the FSCS awarded the claimant the maximum compensation available of £85,000. £759,377 represents the total compensation paid by the FSCS, subject to its limits. The FSCS has calculated that those 10 customers had total, unabated losses of £1,931,560.
- 2.14. The Authority considers Ms Dunne's breach of Statement of Principle 2 to be particularly serious because:
- (1) Defined Benefit Pensions are a financial investment for which a customer's advice needs are high in respect of the decision to transfer out of the Ceding Arrangement;
  - (2) The decision to transfer out of a DBPS can affect customers, and sometimes their dependants, for the rest of their lives;
  - (3) The unsuitable Pension Transfer advice resulted in significant numbers of customers risking their retirement income by transferring out of their DBPS

in circumstances where it was not in their best interests to do so. Some of these customers were vulnerable due to their age, health conditions and financial position;

- (4) Ms Dunne substantially benefited financially from her breach; and
- (5) Ms Dunne was an experienced industry professional and a qualified PTS with extensive experience in Pension Transfer work.

#### *Breach of Statement of Principle 1*

- 2.15. Ms Dunne also demonstrated a lack of integrity, in breach of Statement of Principle 1, by being knowingly involved in the dishonest provision of a backdated Appointed Representative agreement to the Authority, by Richard Fenech (the sole director and shareholder of FSML), to create the false impression that a written agreement had been in place between HDIFA and FSML since 30 August 2012. This was the date that HDIFA was initially appointed as an AR of FSML. However, the agreement was only agreed and signed by Mr Fenech and Ms Dunne on 22 June 2017, after the Authority had intervened and had requested to see a copy of the signed AR agreement.

#### **Sanction**

- 2.16. The Authority has decided to impose on Ms Dunne a financial penalty of £398,760 pursuant to section 66 of the Act in respect of her breaches of Statement of Principle 2 and Statement of Principle 1.
- 2.17. The Authority considers that, as a result of her breach of Statement of Principle 2 and her operation of a deficient two-adviser model, through which she failed to consider the suitability of the destination investment when providing Pension Transfer advice, including after being aware of concerns that she was thereby not complying with the Authority's rules, Ms Dunne lacks the competence and capability to perform the role of a PTS. Having regard also to Ms Dunne's knowing involvement in the dishonest provision of the backdated Appointed Representative agreement to the Authority by Mr Fenech to create a false impression that a written agreement had been in place between FSML and HDIFA since 30 August 2012, the Authority considers Ms Dunne 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 has therefore decided to make a prohibition order in these terms in respect of Ms Dunne.

### **3. DEFINITIONS**

3.1. The definitions below are used in this Decision Notice and in the Annexes:

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

"Appointed Representative" or "AR" means, pursuant to section 39 of the Act, a person (other than an authorised person) who is a party to a contract with an authorised person (the Principal) which permits or requires him to carry on regulated activities in respect of that business for which the Principal has accepted responsibility in writing.

"the AR Regulations" means the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001.

"Attitude to Risk" means the customer's attitude to, and understanding of, the risk of giving up safeguarded benefits for flexible benefits.

"the Authority" means the body corporate previously known as the Financial Services Authority and renamed on 1 April 2013 as the Financial Conduct Authority.

"Ceding Arrangement" or "Ceding Scheme" means the customer's existing pension arrangement or scheme with safeguarded benefits.

"CETV" means Cash Equivalent Transfer Value, which is a lump sum available to the member upon transferring their pension benefits into an alternative pension. It is calculated according to actuarial principles.

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

"Critical Yield" means an illustration of the annual growth rate (net of charges) that the customer would need to obtain upon investment of the CETV in order to replicate the benefits provided by the Defined Benefit Pension Scheme.

"DBAAT" means the Authority's Defined Benefit Advice Assessment Tool, published on the Authority's website, and used to help firms understand how the Authority assesses the suitability of Defined Benefit Pension Transfer related investment advice.

"Defined Benefit Pension Scheme", "Defined Benefit Pension" or "DBPS" means an occupational pension that pays out a defined benefit or guaranteed specified

amount to the pension holder based on factors such as the number of years worked and the customer's salary.

"Defined Contribution Pension Scheme" or "DC" means a pension that pays out a non-guaranteed and unspecified amount depending on the defined contributions made and the performance of investments.

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

"EG" means the Authority's Enforcement Guide.

"FOS" means the Financial Ombudsman Service.

"FSML" means Financial Solutions Midhurst Limited (dissolved).

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

"HDC Limited" means Heather Dunne Consulting Limited, a para-planning company owned by Ms Dunne that has since dissolved.

"HDIFA" means Heather Dunne Independent Financial Adviser.

"Mr Fenech" means Richard Fenech, the sole director and shareholder of FSML.

"Normal Retirement Date" means the date (typically linked to the customer's age, for example 65) on which the pension scheme is due to pay the customer their member benefits.

"Pension Commencement Lump Sum" or "PCLS" means a tax-free lump sum of money that can be drawn from the pension fund at retirement.

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

"Pension Transfer" means a transfer payment made in respect of any safeguarded benefits with a view to obtaining a right or entitlement to flexible benefits under another pension scheme.

"Pension Transfer Specialist" or "PTS" means an individual who has passed the required examinations as specified in the Training and Competence Sourcebook



part of the Handbook and is employed by a firm to give, or check, the suitability of Pension Transfer advice.

“Personal Recommendation” means advice on the transfer of Defined Benefit Pension Scheme benefits into an arrangement with flexible benefits, explaining amongst other things why the adviser has concluded that the recommended transaction is suitable for the customer.

“Preferred Retirement Date” means the date when the customer plans to retire.

“Principal” means the authorised person who is party to a contract with the Appointed Representative, or who is responsible for the acts of the Appointed Representative under section 39 of the Act.

“the Principles” means the Authority’s Principles for Businesses set out in the Handbook.

“Proposed Arrangement” means the arrangement with flexible benefits into which the customer would move their funds from the Ceding Arrangement.

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

“the Relevant Period” means the period of 29 April 2015 to 22 June 2017.

“Statements of Principle” or “APER” means the Authority’s Statements of Principle and Code of Practice for Approved Persons issued under section 64A(1)(a) of the Act.

“Suitability Report” means the report which a firm must provide to its customer under COBS 9.4.1R which, amongst other things, explains why the firm has concluded that a recommended transaction is suitable for the customer.

“SUP” means the Supervision Manual, part of the Handbook.

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

“TVAS” means “Transfer Value Analysis” and is the comparison that a firm was required to carry out in accordance with COBS 19.1.2R prior to 1 October 2018, when a firm gave advice or a Personal Recommendation about, amongst other things, a Pension Transfer.

“TVAS Report” means a document that sets out for the customer a comparison of the benefits likely (on reasonable assumptions) to be paid under the Ceding Arrangement with the benefits afforded by the Proposed Arrangement, which firms were required to carry out in accordance with COBS 19.1.2R (and prepare in accordance with COBS 19.1.3R and 19.1.4R) prior to 1 October 2018.

“the Warning Notice” means the warning notice issued to Ms Dunne dated 6 March 2023.

#### **4. FACTS AND MATTERS**

##### **Background**

- 4.1. Ms Dunne began working in the financial services industry in 1985 and has had extensive experience working as a PTS since qualifying in 1995. She set up Heather Dunne (a sole-trader firm), trading as HDIFA, in 2007 where she was the sole PTS and was therefore responsible for all Pension Transfer advice provided to HDIFA’s customers.
- 4.2. Ms Dunne began providing Pension Transfer advice as an external PTS for FSML in 2010 and then as an Appointed Representative through her firm, HDIFA, from 31 August 2012. Ms Dunne held the CF30 (Customer) controlled function at FSML from 30 July 2010 until 28 June 2018.
- 4.3. Whilst FSML was responsible for ensuring that HDIFA complied with the relevant rules and requirements of the regulatory system in carrying on the business for which FSML had accepted responsibility, to the same extent as if FSML had expressly permitted it, Ms Dunne was still required to act with due skill, care and diligence in carrying out her CF30 (Customer) function. This included ensuring that Pension Transfer advice that she provided was suitable for her customers and complied with the relevant rules and requirements of the regulatory system.
- 4.4. During the Relevant Period, HDIFA advised 354 customers on whether to transfer funds out of their DBPS into alternative arrangements. Approximately 92% of those customers were advised to complete a Pension Transfer out of their Ceding Arrangement.
- 4.5. In 2017, the Authority carried out a review of FSML’s approach to Defined Benefit Pension Transfer advice, focussing in particular on Ms Dunne’s processes and procedures and the suitability of the Defined Benefit Pension Transfer advice that she provided to customers. The Authority undertook this review after monitoring

the market for advice on Defined Benefit Pension Transfers and identifying firms that had increased volumes of Pension Transfers. As part of its review, the Authority visited the offices of HDIFA on 15 June 2017.

- 4.6. On 16 June 2017, following intervention by the Authority, FSML applied for voluntary requirements to be imposed on it, whereby FSML was required to cease all regulated activities relating to Defined Benefit Pension Transfer business. This requirement was amended on 8 August 2017 to reflect the Authority's agreement that it should apply to HDIFA only and not to FSML's own, limited, DBPS business.

### **Defined Benefit Pension Transfers**

- 4.7. Pensions are generally understood to be a traditional and tax-efficient way of saving money for retirement. The value of an individual's pension can have a significant impact on their quality of life during retirement and will determine how early they can afford to retire. Pensions are, in most cases, a primary resource for ensuring financial stability during retirement. For some people, they are the only means of funding retirement.
- 4.8. Customers who engage firms to provide them with advice in relation to their pensions, be it from an Appointed Representative or from an authorised firm, place significant trust in those providing the advice. Where an advice business fails to conduct its affairs in a manner that is compliant with the Authority's regulatory requirements, this exposes its customers to a significant risk of harm. This is particularly so in the case of Defined Benefit Pension Transfer advice where it is critical that customers are provided with suitable advice on transferring their valuable benefits, taking a holistic and sufficiently detailed view of their individual circumstances.
- 4.9. It is important that Principals and their Appointed Representatives exercise reasonable care when advising customers regarding their Pension Transfers and ensure that suitable advice is provided to customers taking into account all of the relevant circumstances. It is also important that Appointed Representatives do not attempt to abdicate responsibility for unsuitable advice on the basis that they are operating under the responsibility and oversight of their Principal. This is even more important when customers have no option but to make a decision regarding their pension.
- 4.10. Transfer out of a DBPS involves giving up valuable guaranteed benefits in exchange for a Cash Equivalent Transfer Value which is typically invested in a

Defined Contribution Pension Scheme. If a customer leaves a DBPS, they may have to purchase an annuity to obtain a guaranteed level of income. Alternatively, they may rely on income from investments. However, there is often no guarantee as to the amount or duration of that income.

- 4.11. A Defined Contribution Pension Scheme, in contrast to a DBPS, is a scheme in which employer and employee capital contributions are invested so that a fund is built up which may be accessed after the age of 55. However, the investment and mortality risk are borne by the member. Defined Contribution Pension Schemes may be either occupational (work) or personal schemes.
- 4.12. The introduction of pension freedoms in April 2015 for Defined Contribution Pension Schemes made transferring out of a DBPS appear a potentially attractive option for some people to consider. However, since 1 November 2007, Authority guidance has provided that, given the valuable nature of the guaranteed benefits provided under a DBPS, an adviser's default assumption should be that transferring out of a DBPS and giving up those benefits will not be suitable for a customer. That is the default position unless the adviser can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the customer's best interests (COBS 19.1.6G).

#### **HDIFA's Pension Transfer advice process**

- 4.13. HDIFA's Pension Transfer advice process would begin with HDC Limited preparing and issuing an initial fact find document, known as a 'datasheet', for the introducing adviser to complete with the customer, together with a letter of authority for the customer to sign. The completed 'datasheet', which provided a basic assessment of the customer's circumstances, would then be sent back to HDC Limited together with the signed letter of authority for HDC Limited to prepare an initial report to assist the introducing adviser in determining whether the Pension Transfer should be considered further.
- 4.14. If the initial report indicated that it was worth looking into the Pension Transfer further, and that the customer wished to proceed, HDIFA would provide a fuller fact find document, known as a 'pension review questionnaire' as well as terms of business, a customer agreement and confirmation of fees. On receipt of that completed documentation, HDC Limited would prepare a Suitability Report and Personal Recommendation on behalf of HDIFA which were then issued to the introducing adviser to go through with the customer in person. Ms Dunne never

met with the customer and did not have oversight over how the introducing adviser presented her Pension Transfer advice to the customer.

- 4.15. If HDIFA recommended a Pension Transfer, and the customer wished to proceed, the introducing adviser would then obtain a signed application form and discharge form from the customer, as well as any other documents required to effect the transfer, and would return them to HDC Limited, who then liaised with the Ceding Scheme and the new provider until the Pension Transfer was completed. Once HDIFA received its adviser remuneration and signed off the Pension Transfer process, the introducing adviser would again meet with the customer and take over the agency of the new plan and put in place the investments.

#### ***Initial and ongoing transfer fees***

- 4.16. The fee model that HDIFA utilised during the Relevant Period was one whereby the introducing adviser would pay an initial one-off fee to HDC Limited, in order to obtain an initial report. The fee for this service during the Relevant Period rose from £200 to £500 per report.
- 4.17. Thereafter, HDIFA operated a charging model (as permitted during the Relevant Period) whereby it would charge a fee to the customer where the Personal Recommendation was to proceed with the Pension Transfer. This fee was payable even when the customer chose not to follow the recommendation to proceed with the Pension Transfer. However, where the recommendation was not to transfer out of the DBPS, no fee was charged to the customer.
- 4.18. The fees charged by HDIFA to customers for Suitability Reports provided by Ms Dunne via HDIFA were then based on a percentage of the CETV of the pension funds in the Ceding Arrangement that the customer wished to transfer out of, to be deducted from the funds that would be transferred out of the DBPS. The introducing adviser was also able to select what, if any, fee, they wished to receive, which amount would then also be deducted from the transferred funds.

#### **Ms Dunne's operation of the two-adviser advice model**

- 4.19. Ms Dunne trading as HDIFA operated a two-adviser advice model (see paragraphs 2.4 to 2.5 above), which meant that she provided the Pension Transfer advice whilst another firm, acting as an introducer, gave the separate investment advice. The two-adviser adviser model operated by Ms Dunne was deficient as, when giving her advice to the customer on the suitability of the Pension Transfer, Ms Dunne did not consider the overall suitability of the proposed new investment.

## **Concerns raised with Ms Dunne's operation of the two-adviser advice model**

### *The Authority's investment advice alerts issued in 2013 and 2014*

- 4.20. On 18 January 2013, the Authority published an alert which reminded financial advisers that *"where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating"*. On 28 April 2014, the Authority issued a further alert which stated that, *"If the underlying investment is not suitable for the customer, then the overall advice is not suitable."*

### *Concerns raised by FSML in December 2014.*

- 4.21. By a letter to Ms Dunne dated 11 December 2014, Mr Fenech stated that he was: *"[...] very concerned with the risk associated with your business model, which is totally dependent upon introduced business from IFAs and other advisory firms where there would appear to be very little vetting procedure."*
- 4.22. Mr Fenech went on to set out a series of conditions that HDIFA would have to adhere to in order to continue as FSML's Appointed Representative. The conditions included file reviews and competency assessments on an annual basis, and further supervision. Although HDIFA's Principal, FSML, failed to take any corrective action in respect of HDIFA's business model and only commissioned a single compliance review (see paragraphs 4.23 to 4.26 below), Ms Dunne did not take any steps to rectify the position either. Having previously queried with the Authority the effect of the contents of the alerts on her business model and having received no indication that her model, as she described it to the Authority, was inappropriate, she considered that her business was operating compliantly.

### *Concerns raised by an external compliance consultant in January 2015*

- 4.23. On 3 and 4 January 2015, Ms Dunne corresponded with an external compliance consultant employed by FSML, through emails copying in Mr Fenech, regarding the contents of a presentation that Ms Dunne was preparing for authorised financial advisers. In the course of this correspondence, the external compliance consultant told Ms Dunne that her two-adviser advice model did not meet regulatory requirements.

- 4.24. In an attachment to an email sent on 3 January 2015, in response to Ms Dunne's statement that "*Investment advice is completed by the referring firm*", the external compliance consultant commented that "*Transfer advice cannot be given in isolation. [...] Investment advice must be considered by HD but then the agency is transferred to the referring firm*" and referred Ms Dunne to the 2013 and 2014 alerts.
- 4.25. On 4 January 2015, Ms Dunne replied that she had discussed her two-adviser advice model with the Authority, who had no concerns with it. The external compliance consultant replied that they considered her response to be "*confounding for a number of reasons*", and asked to see written confirmation from the Authority "*that you can separate the advice on investments and transfers*" and that the 2013 and 2014 alerts "*do not apply and why they don't apply*". The external compliance consultant also referred to a provisional decision by the FOS which had considered the alerts, and which stated that "*The adviser had a duty as part and parcel advising Mr X whether or not to transfer to a SIPP to consider the proposed investment strategy*". The external compliance consultant commented "*Whether one agrees with the view is neither here nor there. The point is that the FOS is already considering cases in light of the two alerts.*"
- 4.26. Ms Dunne responded later on 4 January 2015, challenging the points made by the external compliance consultant and making it clear, based on her previous discussions with the Authority, that she would not change her advice process. The external compliance consultant did not respond to Ms Dunne, who, following this exchange, continued to operate her deficient two-adviser advice model.

*Concerns raised by FSML in February 2016*

- 4.27. Just over a year after the external compliance consultant raised concerns regarding Ms Dunne's two-adviser advice model, Mr Fenech again wrote to Ms Dunne, on 26 February 2016, setting out a proposed new basis for their business relationship and stating that he would need to put in place "*immediate and enhanced long-term review and monitoring procedures*". The proposed new procedures listed in the letter included, under the heading 'Immediate audit', a review of 15 files to be selected from the past three years by an external compliance consultant or Pension Transfer Specialist and quarterly compliance reviews designed by an external consultant. The letter noted that FSML was aware that the Authority required PTSs such as Ms Dunne to review the ultimate

investment as part of the Pension Transfer process and to ensure that it was suitable for the customer. Mr Fenech stated:

*"I am mindful that HDIFA does not provide the ultimate investment recommendation to the end retail client and that on transfer funds are allocated to cash and then the agency transferred back to the introducing regulated IFA firm. However, the regulator has made it absolutely clear that we have a duty of care to ensure that the ultimate investment is suitable to the client and forms part of the overall transfer process".*

4.28. Mr Fenech then stated:

*"Therefore with immediate effect, we will look at a process to review the existing HDIFA advice process in order to ensure that, whilst HDIFA is not providing the investment advice, there is satisfactory recognition of it to the extent that HDIFA can be comfortable in principle that the intended investment to be recommended by the introducing IFA is indeed appropriate and suitable to the client."*

4.29. However, despite sending this letter to Ms Dunne, Mr Fenech did not ensure that a review of HDIFA's advice process was carried out and did not take any other steps to stop Ms Dunne from operating her two-adviser advice model in the same way as she had done previously. Ms Dunne continued to provide Pension Transfer advice that did not take into account the separate investment advice which was provided once the transfer had already completed. In doing so, Ms Dunne exposed her customers to a significant risk that their pension funds would be transferred out of their DBPS into investments which were unsuitable for them.

### **Ms Dunne's Responsibilities as a CF30 and Pension Transfer Specialist**

#### *Increase in DBPS business undertaken by Ms Dunne*

4.30. Following HDIFA's appointment as an Appointed Representative of FSML in August 2012, Ms Dunne undertook around 40 Pension Transfer advice cases per year. In 2013 and 2014 her case volume was less than 60 to 70 cases per year. However, there was a significant increase in Ms Dunne's business following the introduction of pension freedoms for DC schemes in April 2015.

#### *HDIFA's compliance arrangements with FSML*

4.31. Given the high volume of Pension Transfer advice business undertaken by HDIFA, it was important that Ms Dunne took appropriate steps to ensure the quality and



suitability of the Pension Transfer advice being provided to her customers, notwithstanding the oversight and responsibility of FSML.

- 4.32. This included establishing and maintaining adequate risk management systems and policies and procedures that were sufficient to ensure that the Pension Transfer advice process complied with the rules and requirements of the regulatory system, including, in particular compliance with the relevant Pension Transfer rules in COBS.
- 4.33. As the sole proprietor of HDIFA and as a PTS and CF30 Ms Dunne had responsibility for ensuring HDIFA's compliance with the Authority's rules. She was therefore responsible for ensuring that in giving Pension Transfer advice she complied with the relevant requirements and standards of the regulatory system.

#### **Background to the Authority's review of Ms Dunne's Pension Transfer advice**

- 4.34. The Authority monitored the Defined Benefit Pension Transfer advice market and visited and reviewed the processes of firms that were active in this market. As part of its review, the Authority visited the offices of HDIFA on 15 June 2017 and reviewed a sample of eight of its advice files from the Relevant Period, of which seven were assessed as containing unsuitable advice. Having reviewed the processes adopted by HDIFA in respect of this workstream, the Authority identified concerns including the following:
- (1) Assessing a customer's Attitude to Risk in isolation from their long-term aims and investment objectives;
  - (2) Producing Suitability Reports which were very long and unclear, and which contained generic information that was not sufficiently tailored to suit the circumstances and advice needs of the individual customer; and
  - (3) Ms Dunne confirmed during the Authority's visit that the statement made on HDIFA's website that it will "*look for a reason to transfer rather than not to*" was at odds with her belief that most customers should not consider a Pension Transfer. The wording was subsequently removed from HDIFA's website.

### **The Authority's review of Ms Dunne's Pension Transfer advice**

- 4.35. Subsequently, in 2019-2020, the Authority requested and assessed a statistically representative sample of 17 of HDIFA's Pension Transfer files from the Relevant Period against the relevant rules in COBS (as in force during the Relevant Period) relating to suitability. The results of the Authority's file reviews revealed the following:
- (1) Failure to collect the necessary information to give Pension Transfer advice in 100% of cases, with the consequence that in 71% of total cases the Authority was unable to assess whether Ms Dunne's advice was suitable (see "*Information collection failures*" below);
  - (2) Ms Dunne gave unsuitable Pension Transfer advice in 100% of those cases it was able to assess for suitability (see "*Unsuitable Pension Transfer Advice*" below); and
  - (3) Ms Dunne failed to provide the required disclosure to the customer in 100% of cases (see "*Poor Quality Communication with Customers*") below.

#### **Information collection failures**

- 4.36. The requirement for a firm to take reasonable steps to ensure that a Personal Recommendation is suitable for its customer is set out in COBS 9.2.1R, which includes, in this context, a recommendation to transfer or not to transfer a pension. To be able to take reasonable steps to ensure the suitability of the Pension Transfer advice to its customers, a firm must first obtain the necessary information regarding the customer's (a) knowledge and experience in the investment field relevant to the Pension Transfer; (b) financial situation; and (c) investment objectives (COBS 9.2.1R(2)(b)). Making a Personal Recommendation without first obtaining the necessary information from a customer increases the risk of a firm providing unsuitable advice to them.
- 4.37. If a firm does not obtain the necessary information to assess suitability, it must not proceed to make a Personal Recommendation to its customer (COBS 9.2.6R). The Authority's review of 17 customer files found that in 12 cases, the files contained insufficient information such that Ms Dunne should not have proceeded to make a recommendation as a full assessment of suitability could not be made. This therefore put the customer at risk of receiving unsuitable advice.

*Failure to gather information on the customer's financial situation*

- 4.38. Information about a customer's financial situation, including details of their additional resources and current expenditure, is key to assessing the extent of their reliance on the income provided by their Defined Benefit Pension during retirement, as well as their capacity for loss (COBS 9.2.2R). Out of the 17 files reviewed by the Authority, 11 of the files failed to record sufficient information regarding the source and extent of the customer's regular income, their assets (including liquid assets) and their regular financial commitments. The missing information meant that the advice was provided in breach of regulatory requirements (in particular COBS 9.2.2R(3)), therefore putting customers at risk of receiving unsuitable advice.
- 4.39. For example, Customer A was noted as having the objective of using a Pension Commencement Lump Sum from their DBPS to build houses which would then be rented or sold. Despite this objective being recorded on the customer's file, no information was obtained about the anticipated proceeds or income which could be generated from this, or the costs and timescales involved. The initial report stated that it could be possible to raise a mortgage or other borrowing to meet this objective, rather than accessing the customer's Defined Benefit Pension funds early. However, the Suitability Report does not mention this option or why it was discounted.
- 4.40. Furthermore, although the customer had a mortgage and other short-term liabilities, there was no evidence that details of these, including repayment dates and outstanding values, had been obtained. Without this key information about the customer's financial circumstances, Ms Dunne was not in a position to assess how reliant the customer would be on the income from the Proposed Arrangement in retirement.
- 4.41. In another example, Customer B had the objective of using a PCLS from their DBPS to supplement their income and reduce their working hours, however Ms Dunne did not obtain details to confirm by how much the customer wanted to reduce their hours and what the customer's resulting earned income would be. Without this information, Ms Dunne was not in a position to advise the customer as to whether this option was suitable, by taking into account the rate at which the PCLS would be drawn.
- 4.42. Ms Dunne also failed to obtain details of the customer's entitlement to the state pension, with the Suitability Report simply recording "*you will of course be able*

*to draw on your state pension, once you are eligible. [...]”.* This meant it was not possible for Ms Dunne to assess the extent of the customer’s reliance on their other pension assets, and what level of depletion, if any, could be tolerated before the state pension commenced.

*Failure to gather income and expenditure in retirement details*

- 4.43. During the course of its file review exercise, the Authority found that there was a failure to discuss and obtain details of the customer’s anticipated income needs and expenditure during retirement. Information, including the basic cost of living, lifestyle expenditure and discretionary expenditure during retirement was missing in nine of the files reviewed. The fact find form used, which was completed by the introducing adviser, requested this information where retirement was planned within 12 months, but otherwise this was not addressed. As a consequence, Ms Dunne was unable to assess the extent to which the customer was reliant on income from their Defined Benefit Pension during retirement.
- 4.44. Further, the Authority’s file review exercise revealed that there was a common failure to clearly capture information about the customer’s or their spouse’s state pension entitlements. For example, in the case of Customer C, information about the benefits payable under the customer’s Defined Benefit Pension Scheme was not recorded on file and their entitlement and their spouse’s entitlement to a state pension had not been established either. Without this information, Ms Dunne was not in a position to determine the level of reliance on the DBPS or evaluate whether these potential resources could be used to achieve specific customer objectives.

**Unsuitable Pension Transfer advice**

- 4.45. The overarching suitability requirement (COBS 9.2.1R) is for a firm to take reasonable steps to ensure that a Personal Recommendation, which includes, in this context, a recommendation to transfer or not to transfer a pension, is suitable for its customer.
- 4.46. A firm should therefore 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 customer’s best interests. If the firm cannot clearly demonstrate this, then it should assume the transaction will not be suitable.
- 4.47. Only five of the 17 files reviewed by the Authority were capable of being assessed for suitability of Pension Transfer advice. This was due to Ms Dunne’s non-

compliant information collection practices which meant that there were material information gaps in 12 of the 17 files reviewed (71%). Of the five files which were deemed capable of assessment, all five were found to have contained unsuitable Pension Transfer advice. The advice given to transfer was unsuitable for a variety of reasons which are detailed below. Many files failed for multiple reasons.

*Customers reliant on their Defined Benefit Pension Scheme*

- 4.48. During the course of its review, the Authority assessed that in three of the five DBPS cases which contained unsuitable Pension Transfer advice, the customer was reliant on income from the Ceding Arrangement. These customers either had no other assets, or limited assets, which could be used to supplement any shortfalls in their retirement income needs. This was because their DBPS was assessed to be their primary source of income during retirement and they had no capacity to bear the risk of losing that income. For example, without the income they would be unable to meet non-discretionary expenditure.
- 4.49. Ms Dunne's advice to customers to transfer out of a Defined Benefit Pension Scheme, which would have ensured that they were paid guaranteed benefits, exposed customers to the risk of not being able to meet their income needs during retirement. The Authority considers that Ms Dunne did not have a reasonable basis for believing that these customers could financially bear the risks related to the Pension Transfers recommended in their cases with regard to giving up the guaranteed income.
- 4.50. Customer D, for example, was 60 and married at the time that they received advice from Ms Dunne. The customer had two adult children still living at home. The customer and their spouse both had significant long term health issues. The customer's only other source of income was their state pension which they were entitled to be paid from the age of 66. They had no other investments, significant liabilities and an income shortfall each month. Customer D's financial situation was such that they could not withstand losses for the following reasons:
- (1) Apart from their state pension, the customer's Defined Benefit Pension was their only source of guaranteed income during retirement. There was no evidence on file that the customer would be able to meet their non-discretionary expenditure without it (although the customer's non-discretionary expenditure was itself unclear).

- (2) Ms Dunne did not demonstrate the basis for concluding that Customer D was able financially to bear the risk of transferring out of their DBPS in order to meet their specific objectives. The objective of wanting to access the maximum PCLS in order to pay a large bill and for 'home improvements' was prioritised at the expense of giving up a guaranteed income.
- (3) At the time of the advice, the customer was approximately 14 months away from reaching the Normal Retirement Age specified by their Defined Benefit Pension Scheme. Although an early retirement factor would have been applied to the PCLS there was the option to access funds in this way via their DBPS. Given the customer's low Attitude to Risk and given that a guaranteed income was important to them, foregoing these safeguarded benefits was not in their best interests.

*Lack of evidence to support specific customer objectives*

- 4.51. Ms Dunne failed to demonstrate why other specific objectives which drove Pension Transfers were in the customer's best interests, when reviewing the customer's circumstances and having regard to the primary purpose of a pension. For example, Ms Dunne failed to provide sufficient evidence on files to demonstrate that specific customer objectives, including maximising benefits payable upon death, flexibility and maximising access to tax-free cash, were in the customer's best interests. Failure to demonstrate why meeting these specific objectives was in the customer's best interests was observed in all five cases assessed by the Authority as being unsuitable for transfer during the course of its review.
- 4.52. Given that the primary purpose of a pension is to meet the income needs of an individual during retirement, maximising the customer's death benefits or treating the flexibility of alternative arrangements as a high priority, creates an increased risk that this is at the expense of that primary purpose. There may therefore be a trade-off that must be resolved in the best interests of the customer given their circumstances (COBS 9.2.1R(1) and 9.2.2R(1)(b)).
- 4.53. The file reviews carried out by the Authority revealed examples of where this tension was resolved in favour of a Pension Transfer, but where the firm did not demonstrate why this was in the customer's best interests. For example, in the case of Customer E they intended to use the tax-free PCLS to renovate a property. However, the exact amount required for the renovation was not captured, with the pension review questionnaire recording this as 'unspecified'.

- 4.54. In the case of Customer F, other means of raising cash were not considered such as releasing equity from the customer's main residence that had no mortgage over it. The documented intention was initially to use the tax-free PCLS for "*leisure, travel and make home improvements*". However, it was noted in internal company documents that this objective was unlikely to be appropriate and the objective was later revised to the customer wishing to draw a tax-free PCLS of £10,000, with no consideration being given to using the customer's ISAs instead.
- 4.55. Further, the customer indicated in the pension review questionnaire that they would prefer death benefits in the form of a lump sum, however, Ms Dunne did not explore the option of obtaining additional life insurance to meet this objective. The initial report provided to the customer confirmed "*this could possibly be better arranged by life cover,*" however, this option is not mentioned in the Suitability Report.

#### *Multiple failures*

- 4.56. All cases that failed the assessment during the course of the Authority's review, on the basis of unsuitable Pension Transfer advice, were found to have failed to meet regulatory requirements.
- 4.57. Customer G, for example, was married and worked full time. They had a DBPS based on 16 years pensionable service, as well as access to an occupational Defined Contribution Pension Scheme. The couple owned their own home and had a small emergency fund but held no other investments. Their combined current expenditure was recorded, however, no anticipated expenditure in retirement figures had been captured on file. The customer's stated objectives were firstly to take a tax-free PCLS at age 55, second, to maximise the tax-free lump sum available at retirement, and third, to maximise death benefits payable. However:
- (1) notwithstanding these clear objectives, no attempt was made to quantify the customer's liabilities including the outstanding mortgage balance and term or the customer's anticipated income needs during retirement;
  - (2) Ms Dunne recommended transferring out of the Ceding Arrangement when there was strong reliance on the income payable from the Defined Benefit Pension Scheme;
  - (3) no sustainability assessment was completed showing how their lifestyle could be affected by transferring, or how crystallising some of the benefits in an unplanned way might impact the funds over time. Ms Dunne therefore

did not demonstrate that the customer could bear the risk of a Pension Transfer; and

- (4) the customer's only investment experience was entering into their employer's Defined Contribution Pension Scheme, such that there was nothing to suggest that they would understand the attendant risks of the Pension Transfer.

### **Poor Quality Communication with Customers**

- 4.58. COBS contains the Authority's rules about the provision of information to customers so that firms can ensure that consumers have all the necessary information to make an informed decision and are, ultimately, treated fairly. Ms Dunne failed to comply with COBS rules regarding the provision of information to customers in 100% of the cases reviewed by the Authority. This was for the reasons set out in paragraphs 4.59 to 4.62 below.

#### *Suitability Report Failings*

- 4.59. In the cases reviewed by the Authority, each customer received an initial report which stated it was not intended to meet the Authority's requirements for Pension Transfer advice. This report was issued by HDC Limited, the technical para-planning firm owned by Ms Dunne. The initial report formed the basis for the Suitability Report, however, HDIFA was not involved in the completion of the fact find document, risk profile questionnaire or customer objective setting.
- 4.60. Ms Dunne was then obliged to provide each of her Pension Transfer advice customers with a Suitability Report. The Suitability Report was prepared for Ms Dunne by HDC Limited. Ms Dunne was obliged to set out in the report, as a minimum, the customer's demands and needs; why she had concluded that the Pension Transfer was suitable for the customer having regard to the information provided by the customer; and any possible disadvantages of the transfer for the customer (COBS 9.4.7R). The report was therefore a written record of the customer's circumstances as well as Ms Dunne's Personal Recommendation and the reasons supporting it.
- 4.61. The Authority also found the Suitability Reports produced in the individual cases reviewed to be lengthy, complex, and likely to confuse the customer because of the technical language used throughout. The reports reviewed were highly templated and contained multiple repetitions and caveats, and information which was not relevant to the customer. In the case of Customer H, the report included



superfluous information regarding pension contributions in circumstances where the customer had no pensionable income and four pages in the middle of the report were devoted to phased drawdown when the customer wanted a tax-free PCLS upfront and no income. The reports therefore failed to meet the requirements set out in COBS 4.2.1R to be fair, clear and not misleading.

- 4.62. The effect of these failings is exacerbated where the Suitability Report did not provide a meaningful assessment of the alternatives to transfer, or explain why a transfer was in the best interests of the customer. In the case of Customer I, who wished to draw a tax-free PCLS, the Suitability Report did not set out why the option of accessing benefits from the existing scheme had been discounted, particularly as it appears this would have met the customer's objective to raise a capital sum, whilst providing a secure guaranteed income during retirement. Some customers had not been told that their specific objectives could be met through their existing DBPS and therefore Ms Dunne failed to explain why the recommendation was suitable (COBS 9.4.7R(2)).

#### **FSML's provision of a backdated Appointed Representative agreement to the Authority**

- 4.63. In June 2017, the Authority asked FSML to provide it with a copy of the Appointed Representative agreement in place between FSML and HDIFA. Such a written agreement is required by the Authority pursuant to SUP 12.5.5R and should comply with the requirements set out in Regulation 3 of the AR Regulations. This is a fundamental starting point in setting down the key terms agreed between the Principal and the Appointed Representative, with regard to the Principal assuming responsibility and oversight for the Appointed Representative's business activities, as well as being one of the key mechanisms by which the Principal can ensure the AR complies with the requirements and standards of the regulatory system.
- 4.64. In response to the Authority's request, Mr Fenech provided the Authority with a signed copy of an Appointed Representative agreement (Contract for Services) between FSML and HDIFA which was dated 30 August 2012, the date that HDIFA became an Appointed Representative of FSML. When Mr Fenech provided the document to the Authority on 22 June 2017, he did not inform the Authority that the document he had provided was a working draft from January 2015 which had, in fact, only been finalised, agreed and signed by Mr Fenech and Ms Dunne that day, five years after HDIFA was appointed as an Appointed Representative of FSML. Ms Dunne signed this agreement despite being aware that it was backdated

and that Mr Fenech intended to provide it to the Authority, pursuant to a statutory information requirement, as a document purporting to have been signed on 30 August 2012.

- 4.65. In an email exchange between Mr Fenech and Ms Dunne on 22 June 2017, the date the Appointed Representative agreement was signed, Ms Dunne suggested that Mr Fenech make changes to the draft agreement she had been sent by FSML, so that, among other things, it referred to her business address in August 2012 and to the Authority's former name of the Financial Services Authority (FSA). In the email exchange, Ms Dunne gave the following rationale for making these changes:

*"it's worth correcting at least the first two points because those make it abundantly clear it's a document produced after the event, which is the last thing you want to do".*

- 4.66. Mr Fenech made the changes to the agreement that were suggested by Ms Dunne. The Authority considers that Ms Dunne's suggestion that amendments be made to the draft agreement in the ways set out above indicate that she was aware that, in providing the backdated agreement, Mr Fenech was seeking to mislead the Authority into believing that there was a formal and signed Appointed Representative agreement between FSML and HDIFA in place since 30 August 2012. Ms Dunne subsequently stated to the Authority that she had made a mistake under pressure, that she should not have agreed to sign the backdated agreement in these circumstances, that she very much regretted her decision to do so and that she never had any intention to deceive the Authority.

#### **Benefit derived by Ms Dunne**

- 4.67. During the Relevant Period, HDIFA generated £2,087,718 from fees for the Defined Benefit Pension Transfer business.
- 4.68. During the Relevant Period, Ms Dunne received £317,316 by virtue of her 100% ownership of HDIFA arising from Pension Transfer advice provided in relation to FSML.

## **5. FAILINGS**

- 5.1. The regulatory provisions relevant to this Notice are referred to in Annex A.

5.2. Ms Dunne breached Statement of Principle 2 during the Relevant Period by failing to act with due skill, care and diligence in providing Pension Transfer advice. In particular, during the course of its file review exercise in 2019-2020, the Authority found that all 17 files it reviewed were non-compliant with regulatory rules and guidance relating to the suitability of Pension Transfer advice, which resulted in customers being placed in a position of making sometimes difficult and critical choices regarding their pension arrangements, without the benefit of accurate and suitable advice. The outcome of the review revealed failings in Ms Dunne's files that included the following:

- (1) Failure to communicate information to customers in a way which was clear, fair and not misleading, such that customers were not placed in an adequately informed position from which to make a decision to transfer;
- (2) Failure to sufficiently tailor her Suitability Reports to individual customers and the use of generic standardised reasons in purporting to explain why a recommendation to transfer out of a Defined Benefit Pension Scheme was suitable. Suitability Reports nominally compiled for different customers were substantially identical in content;
- (3) Failure to obtain the necessary information from the customer concerning their financial situation;
- (4) Failure to assess properly whether the customer could financially bear the risks associated with the Pension Transfer;
- (5) Failure to assess properly whether the Pension Transfer that was recommended met the customer's specific objectives; and
- (6) Failure to adequately consider the customer's financial situation and anticipated income needs during retirement when assessing whether it was suitable for them to transfer out of their Defined Benefit Pension Scheme.

5.3. Ms Dunne also demonstrated a lack of integrity, in breach of Statement of Principle 1, by being knowingly involved in the dishonest provision of a backdated Appointed Representative agreement to the Authority, by Mr Fenech, to create a false impression that a written agreement had been in place between HDIFA and FSML since 30 August 2012.

5.4. The Authority considers, in light of the matters set out at paragraphs 5.2 and 5.3 above, and in light of the fact that Ms Dunne operated a deficient two-adviser

advice model, including after she was aware of concerns that it was non-compliant, that Ms Dunne is not fit and proper to perform any function in relation to the regulated activity of advising on Pension Transfers and Pension Opt-Outs carried on by an authorised person, exempt person or exempt professional firm.

## **6. SANCTION**

### **Financial penalty**

- 6.1. The Authority's policy for imposing a financial penalty is set out in Chapter 6 of DEPP. In respect of conduct occurring on or after 6 March 2010, 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 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. Ms Dunne derived direct financial benefit from the fees generated by the non-compliant Pension Transfer advice process that she operated during the Relevant Period. Ms Dunne, via HDIFA, received £317,316 for DB Pension Transfer work during the Relevant Period. The Authority considers that Ms Dunne personally received the benefit of £317,316 by virtue of her 100% ownership of HDIFA and that this stemmed directly from Ms Dunne's breach of Statement of Principle 2.
- 6.4. The Authority has charged interest on Ms Dunne's benefits at 4% per year from the end of the Relevant Period to the date of this Notice, amounting to £82,501.
- 6.5. Step 1 is therefore £399,817.

#### ***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 Ms Dunne's breach, consisting of her breach of Statement of Principle 1 and her breach of Statement of Principle 2, was from 29 April 2015 to 22 June 2017. The Authority considers Ms Dunne's relevant income for this period to be £317,316.

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 chooses 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.2G(8) lists factors relating to the impact of a breach committed by an individual.

6.11. Ms Dunne substantially benefitted from her breach of Statement of Principle 2 (DEPP 6.5B.2G(8)(a)).

6.12. Ms Dunne's breach of Statement of Principle 2 caused a significant risk of loss to consumers who transferred out of their Defined Benefit Pension Scheme as a result of Ms Dunne's non-compliant advice. Completed transfers had a total CETV of £126,353,674 (DEPP 6.5B.2G(8)(b)).

- 6.13. Ms Dunne's breach of Statement of Principle 2 caused inconvenience and potential distress to pension holders who switched 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. Ms Dunne's breach of Statement of Principle 2 continued throughout the Relevant Period until FSML was required by the Authority to cease all regulated activities relating to Defined Benefit Transfer business on 16 June 2017 (DEPP 6.5B.2G(9)(b)).
- 6.16. Ms Dunne is an experienced industry professional with substantial experience in Pension Transfer work, and yet she failed to comply with the relevant rules and requirements when advising customers on Pension Transfers (DEPP 6.5B.2G(9)(j)).
- 6.17. Ms Dunne failed to act with integrity, in breach of Statement of Principle 1, because she was knowingly involved in the dishonest provision of the backdated Appointed Representative agreement to the Authority by Mr Fenech to create a false impression that a written agreement had been in place between FSML and HDIFA since 30 August 2012 (DEPP 6.5B.2G(9)(e)).
- 6.18. Ms Dunne was responsible for the matters that gave rise to her breach of Statement of Principle 2 in being the person who operated the advice process and provided the advice (DEPP 6.5B.2G(9)(l)).

*Whether the breach was deliberate and/or reckless*

- 6.19. DEPP 6.5B.2G(10) and (11) list factors tending to show whether the breach was deliberate or reckless. The Authority considers that the following factors are present in this case and support its conclusion that Ms Dunne's Statement of Principle 1 breach regarding her knowing involvement in the provision of the backdated Appointed Representative agreement to the Authority by Mr Fenech was deliberate:

- a) the breach was intentional (DEPP 6.5B.2G(10)(a));
- b) the Appointed Representative agreement was backdated to reduce the risk that the Authority would discover that a signed Appointed Representative agreement between FSML and HDIFA had not been in place since 30 August 2012 (DEPP 6.5B.2G(10)(e)); and
- c) the Authority considers that Ms Dunne was influenced to commit the breach in the belief that it would be difficult to detect (DEPP 6.5B.2G(10)(f)).

*Level of Seriousness*

- 6.20. 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:
- a) The breach of Statement of Principle 2 caused a significant risk of loss to individual consumers (DEPP 6.5B.2G(12)(a)); and
  - b) Ms Dunne failed to act with integrity by virtue of her knowing involvement in the dishonest provision of the backdated Appointed Representative agreement to the Authority by Mr Fenech to create a false impression that a written agreement had been in place between HDIFA and FSML since 30 August 2012 (DEPP 6.5B.2G(12)(d)).
- 6.21. DEPP 6.5B.2G(13) lists factors likely to be considered 'level 1, 2 or 3 factors'. Of these, the Authority considers the fact that Ms Dunne's breach of Statement of Principle 2 was committed negligently to be relevant (DEPP 6.5.2G(13)(d)).
- 6.22. Taking all of these factors into account, the Authority considers the seriousness of Ms Dunne's breaches to be level 4 and so the Step 2 figure is 30% of £317,316.
- 6.23. Step 2 is therefore £95,194.

***Step 3: mitigating and aggravating factors***

- 6.24. 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.

6.25. The Authority has considered whether any of the mitigating or aggravating factors listed in DEPP 6.5B.3G, or any other such factors, apply in this case and has concluded that none applies to a material extent, such that the penalty ought to be increased or decreased.

6.26. Step 3 is therefore £95,194.

#### ***Step 4: adjustment for deterrence***

6.27. 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.

6.28. The Authority considers that the Step 3 figure of £95,194 represents a sufficient deterrent to Ms Dunne and others and has therefore not increased the penalty at Step 4.

6.29. Step 4 is therefore £95,194.

#### ***Step 5: settlement discount***

6.30. 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.

6.31. No settlement discount applies.

6.32. Step 5 is therefore £95,100 (rounded down to the nearest £100 in accordance with the Authority's usual practice).

#### ***Serious Financial Hardship***

6.33. Pursuant to DEPP 6.5D.1G, the Authority will consider reducing the amount of a penalty if an individual produces verifiable evidence that payment of the penalty



would cause them serious financial hardship. Ms Dunne has produced verifiable evidence to the Authority that payment of a penalty of £494,917 (i.e. the total of the Step 1 figure of £399,817 plus the Step 5 figure of £95,100) would cause her serious financial hardship. The Authority considers it appropriate to reduce the Step 5 figure to £0 for serious financial hardship, but does not consider it appropriate to allow Ms Dunne to retain the financial benefit that she derived directly from her breach (DEPP 6.5D.2G(7)(a)). Therefore, the Authority does not consider it appropriate to reduce the Step 1 figure of £399,817.

### ***Penalty***

- 6.34. The Authority therefore has decided to impose a total financial penalty of £399,817 on Ms Dunne for breaching Statement of Principle 2 and Statement of Principle 1.

### **Prohibition Order**

- 6.35. The Authority has had regard to the guidance in chapter 9 of EG in considering whether to impose a prohibition order on Ms Dunne. The Authority has the power to prohibit individuals under section 56 of the Act.
- 6.36. The Authority considers that it is appropriate and proportionate to prohibit Ms Dunne from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm because, for the reasons given in paragraph 5.4 above, she is not a fit and proper person to perform such functions.

## **7. REPRESENTATIONS**

- 7.1 Annex B contains a summary of the key representations made by Ms Dunne 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 into account all of the representations made by Ms Dunne whether or not set out in Annex B.

## **8. PROCEDURAL MATTERS**

- 8.1. This Notice is given to Ms Dunne under sections 57(3) and 67(4) of the Act and in accordance with section 388 of the Act.

8.2. The following statutory rights are important.

### **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/who-we-are/committees/regulatory-decisions-committee>

### **The Tribunal**

8.4. Ms Dunne 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, Ms Dunne has 28 days from the date on which this Notice is given to her 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: The 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). 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>

8.5. A copy of the reference notice (Form FTC3) must also be sent to the Authority at the same time as filing a reference with the Tribunal. A copy of the reference notice should be sent to Kingsley Moore at the Financial Conduct Authority, 12 Endeavour Square, London, E20 1JN.

8.6. 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**

- 8.7. Section 394 of the Act applies to this Notice.
- 8.8. The person to whom this Notice is given has the right to access:
- (a) the material upon which the Authority has relied in deciding to give this Notice; and
  - (b) the secondary material which, in the opinion of the Authority, might undermine that decision.

### **Confidentiality and publicity**

- 8.9. 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.
- 8.10. 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**

- 8.11. For more information concerning this matter generally, contact Jonathan Smart at the Authority (direct line: 020 7066 9312/email: Jonathan.Smart@fca.org.uk).

**Elizabeth France**

**Deputy Chair, Regulatory Decisions Committee**

**RELEVANT STATUTORY AND REGULATORY PROVISIONS**

**The Financial Services and Markets Act 2000 (“the Act”)**

The Authority’s operational objectives

1. The Authority’s operational objectives are set out in section 1B (3) of the Act and include securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system.

Section 56 of the Act

2. Section 56 of the 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, a person who is an exempt person in relation to that activity 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

Section 66A of the Act

3. Under section 66A of the Act, 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, including the imposition of a penalty of such amount as it considers appropriate.
4. Under section 66A of the Act a person is guilty of misconduct if, inter alia, he at any time failed to comply with rules made by the Authority under section 64A of the 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.

## **RELEVANT REGULATORY PROVISIONS**

### **The Authority's Handbook of Rules and Guidance**

5. In exercising its powers to impose a financial penalty, the Authority must have regard to the relevant regulatory provisions in the Authority's Handbook of rules and guidance (the "Handbook"). The main provisions that the Authority considers relevant are set out below.

### **Statements of Principle and Code of Practice for Approved Persons ("APER")**

6. The part of the Handbook known as APER sets out the Statements of Principle issued under section 64A of the Act as they relate to approved persons and descriptions of conduct which, in the opinion of the Authority, do not comply with a Statement of Principle.
7. APER further describes factors which, in the opinion of the Authority, are to be taken into account in determining whether or not an approved person's conduct complies with particular Statements of Principle.
8. Statement of Principle 1 states that:  
  
*"An approved person must act with integrity in carrying out his accountable functions".*
9. Statement of Principle 2 states that:  
  
*"An approved person must act with due skill, care and diligence in carrying out his accountable functions". (SUP 10A and SUP 10C.3 provide that accountable functions include controlled functions.)*
10. APER 3.1.7AG states that Statements of Principle 1 to 4 apply to all approved persons.
11. APER 4.1 describes the conduct which in the opinion of the Authority does not comply with Statement of Principle 1.
12. APER 4.1.3G provides that deliberately misleading (or attempting to mislead) by act or omission:  
  
"[...] (3) the FCA or the PRA;"

falls within APER 4.1.2G.

13. APER 4.1.4G provides behaviour of the type referred to in APER 4.1.3G includes, but is not limited to, deliberately:  
  
“(1) falsifying documents;[...]  
  
[...]  
  
(11) providing false or inaccurate information to the FCA or the PRA; [...]
14. APER 4.2 describes the conduct which in the opinion of the Authority does not comply with Statement of Principle 2.
15. APER 4.2.2G provides that in the opinion of the FCA, conduct of the type described in APER 4.2.3G, APER 4.2.5G, APER 4.2.6G, APER 4.2.8G, APER 4.2.10G, APER 4.2.11G or APER 4.2.14G does not comply with Statement of Principle 2.
16. APER 4.2.3G provides failing to inform:  
  
(1) a customer;[...]  
  
of material information in circumstances where they were aware, or ought to have been aware, of such information, and of the fact that they should provide it, falls within APER 4.2.2G.
17. APER 4.2.4G provides behaviour of the type referred to in APER 4.2.3 G includes, but is not limited to:  
  
(1) failing to explain the risks of an investment to a customer;  
  
(2) failing to disclose to a customer details of the charges or surrender penalties of investment products;[...]
18. APER 4.2.5G provides recommending an investment to a customer, or carrying out a discretionary transaction for a customer, where the approved person does not have reasonable grounds to believe that it is suitable for that customer, falls within APER 4.2.2 G.
19. APER 4.2.14G provides failing to pay due regard to the interests of a customer, without good reason, falls within APER 4.2.2 G.

## **Conduct of Business Sourcebook ("COBS")**

20. 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 customers.

### *The client's best interest rule*

21. COBS 2.1.1R:
- (1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

### *Communication is fair, clear and not misleading*

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

### *Assessing suitability: the obligations*

23. COBS 9.2.1R:
- (1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client; and
- (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.

24. COBS 9.2.2R:
- (1) 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) 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.
- (3) 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.

25. COBS 9.2.3 R:

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.

*Insufficient information*



26. COBS 9.2.6R:

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.

*Suitability reports*

27. During the Relevant Period COBS 9.4 set out the following rules and guidance concerning Suitability reports.

28. COBS 9.4.1 R:

A firm must provide a suitability report to a retail client if the firm makes a personal recommendation to the client and the client:

[...]

- (2) buys, sells, surrenders, converts or cancels rights under, or suspends contributions to, a personal pension scheme or a stakeholder pension scheme; or
- (3) elects to make income withdrawals or purchase a short-term annuity; or
- (4) enters into a pension transfer or pension opt-out

29. COBS 9.4.7R:

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.

30. COBS 9.4.8 G:

A firm should give the client such details as are appropriate according to the complexity of the transaction.

*Pension transfers, conversions, and opt-outs*

31. COBS 19.1 applies, with some exclusions, to a firm that gives advice or a personal recommendation about a pension transfer, a pension conversion or a pension opt-out. The following provisions of COBS 19.1 are set out as they applied during the Relevant Period.

32. COBS 19.1.2R:

A firm must:

- (1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme , before it advises a retail client to transfer out of a defined benefits pension scheme;
- (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.

33. COBS 19.1.3G:

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

34. COBS 19.1.6G:

When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme 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 then 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.

35. COBS 19.1.7G:

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.

36. COBS 19.1.7AG:

When giving a personal recommendation about a pension transfer or pension conversion, a firm should clearly inform the retail client about the loss of the safeguarded benefits and the consequent transfer of risk from the defined benefits pension scheme or other scheme with safeguarded benefits to the retail client, including:

- (1) the extent to which benefits may fall short of replicating those in the defined benefits pension scheme or other scheme with safeguarded benefits;
- (2) the uncertainty of the level of benefit that can be obtained from the purchase of a future annuity and the prior investment risk to which the retail client is exposed until an annuity is purchased with the proceeds of the proposed personal pension scheme or stakeholder pension scheme; and
- (3) the potential lack of availability of annuity types (for instance, annuity increases linked to different indices) to replicate the benefits being given up in the defined benefits pension scheme.

37. COBS 19.1.8G:

When a firm prepares a suitability report it should include:

- (1) a summary of the advantages and disadvantages of its personal recommendation;
- (2) an analysis of the financial implications (if the recommendation is to opt-out); and
- (3) a summary of any other material information.

### **Supervision Manual ("SUP")**

38. SUP 12.5.5(R) (1) (as in force throughout the Relevant Period) states that a firm must ensure that its written contract with each of its appointed representatives complies with the requirements prescribed in Regulation 3 of the AR Regulations (as summarised in SUP 12.5.2G).

### **Fit and Proper test for Employees and Senior Personnel ("FIT")**

39. Guidance on the question whether an individual is a fit and proper person is given in the part of the Handbook called the Fit and Proper Test for Employees and Senior Personnel (FIT). 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 to perform a particular controlled function. The most important considerations will be the person's:
  - (1) honesty, integrity and reputation;
  - (2) competence and capability; and
  - (3) financial soundness.

### **Enforcement Guide ("EG")**

40. The Authority's policy for exercising its power to make a prohibition order is set out in Chapter 9 of EG.
41. EG 9.2.2 states that the Authority has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the Authority may seek to prohibit an individual from performing any class of function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities. The Authority may also make an order

prohibiting an individual from being employed by a particular firm, type of firm or any firm.

42. EG 9.2.3 states that the scope of the prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally. At EG 9.3.5(4) the Authority gives a serious lack of competence as an example of the type of behaviour which has previously resulted in the Authority deciding to issue a prohibition order.

43. EG sets out the Authority's approach to taking disciplinary action. 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>

#### **Decision Procedures and Penalties Manual ("DEPP")**

44. Chapter 6 of 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>

**REPRESENTATIONS**

1. A summary of the key representations made by Ms Dunne, and the Authority's conclusions in respect of them (in **bold**), is set out below.

The two-adviser advice model

2. Ms Dunne disputes the allegation that she operated a deficient two-adviser advice model. The requirement to take into account the onward investment when providing Pension Transfer advice was not in place during the Relevant Period. The Authority is now seeking to retrospectively apply these rules, which were only finalised in 2018, to Ms Dunne for the Pension Transfers undertaken between 2015 and 2017. The Authority seeks to rely on its 2013 and 2014 published alerts to assert that, as early as 2013, the Authority required any advice given on Pension Transfers to consider the suitability of the onward investment contemplated by the customer. However, the 2013 alert was clearly aimed at Pension Transfers made into unregulated products via self-invested personal pensions ('SIPPs'). This was to address a concern held by the Authority that Unregulated Collective Investment Scheme ('UCIS') investments were on the rise and to address general concerns with the suitability of those investments for retail customers. The 2014 alert also makes it clear that the Authority was concerned about switches to SIPPs and the risks that UCIS posed to retail customers.
3. It was Ms Dunne's understanding, as is clear from HDIFA's business register, that the end investments were routinely placed on the advice of the investment adviser into mainstream provider-based products, all of which were regulated by the Authority, not into UCIS type investments to which the SIPP alerts of 2013 and 2014 apply. It is also Ms Dunne's view that the notion that Pension Transfer advisers should consider the overall investment strategy of the customer in all circumstances (as opposed to the limited context of investment into UCIS) was introduced in 2017 by way of an alert issued in January 2017. The issue was then considered further by the Authority in its June 2017 Consultation Paper (CP17/16). Had it already been a clear, undisputed requirement for PTSs to consider the investments being recommended, the Authority would not have needed to consult on this topic. At best, this demonstrates that the position previously was unclear.
4. Ms Dunne proactively sought out guidance from the Authority and had regular conversations with experienced staff at the Authority about her business model. Ms Dunne genuinely believed that she had received verbal confirmation from the Authority that the 2013 and 2014 alerts did not apply to her business model. She understood from these interactions that her business model was sound. She was upfront in her queries to the Authority about the fact that her business model operated on the basis that investment advice and Pension Transfer advice could be provided separately and after funds had been placed into cash following transfer. Therefore, from the responses she received, it was her genuine belief that the onward investment advice could be separated from the Pension Transfer advice as long as the firms in question were regulated, and the customer was made aware of the arrangement.
5. Ms Dunne reached the conclusion that her business model was appropriate after long, in depth consideration of what was best for her customers and the regulatory

guidance. She recognised that others interpreted the Authority's guidance differently, but that does not mean she was wrong, especially given the conversations she had had with the Authority.

6. Ms Dunne's belief that her business model was compliant is reflected in her exchange of emails with FSML's external compliance consultant in January 2015 regarding concerns they had raised about her two-adviser advice model. She responded to the external compliance consultant and highlighted that she had discussed her business model with individuals at the Authority and that they had confirmed to Ms Dunne that it was permissible for her to give the Pension Transfer advice and for another adviser to give the onward investment advice. Following this response, she heard nothing further from the external compliance consultant. Accordingly, based upon the information available to her at the time, Ms Dunne did not consider her business model posed any risk to her clients and therefore it was reasonable for her to continue to operate her two-adviser advice model in the same way as before as she clearly believed that it was within the rules.
7. After receiving Mr Fenech's letter in February 2016, in which Mr Fenech raised concerns about her two-adviser advice model, Ms Dunne had a conversation with the Authority and then sent an email to the Authority on 30 March 2016 stating her understanding of the rules at that time. In that email she stated: "*In my conversation today I was advised again that the investment advice can be separate to the transfer advice if the two firms are formally authorised and the position is clear to the consumer. They are and it is. Please can you confirm in writing for the record that this is the case. ...*" She received no response to this email and therefore, based upon this and her previous interactions with the Authority, Ms Dunne believed that her two-adviser advice model was within the Authority's rules, and so it was again reasonable for her to continue to utilise it.
8. **The Authority considers that Ms Dunne did operate a deficient two-adviser advice model. As explained in paragraph 2.4 of this Notice, although a two-adviser advice model was permissible during the period when HDIFA was an AR of FSML, the Pension Transfer adviser still needed to take into account the overall investment strategy the customer was contemplating and also needed to carry out a comparison between the benefits likely (on reasonable assumptions) to be paid under the DBPS with the benefits afforded by the Proposed Arrangement, before advising a customer to transfer out of a DBPS (as required by COBS 19.1.2R (as then in force)).**
9. **Ms Dunne was required to gather sufficient information on the Proposed Arrangement to enable her to carry out the necessary TVAS in accordance with COBS 19.1.2R(1) (as then in force). She did not do this because of the way her advice model worked, with investment advice being given once the transfer had been completed and the funds from the DBPS had been placed in cash.**
10. **The suitability requirement set out in COBS 9.2.1R (as then in force) extended to the Proposed Arrangement into which the firm has recommended the customer should transfer their pension funds. Just as the adviser must ensure that the customer can bear the transfer risk, so they must ensure that there is a reasonable basis for believing that the customer can bear the risks associated with the Proposed Arrangement.**

11. **The Authority considers that if the investment advice was carried out by a separate adviser post transfer, then the Pension Transfer adviser could not factor in the investment strategy contained in the investment advice and compare it with the DBPS benefits. Furthermore, the Pension Transfer adviser could not factor in the investment advice into their Pension Transfer advice to ensure the suitability of the transaction as a whole. If the destination investment is not suitable, then the Pension Transfer is not suitable for the customer.**
12. **The Authority's 2013 and 2014 alerts simply brought attention to requirements that were already in force. The requirement to carry out the TVAS comparison and to take into account the destination investment did not change throughout the period that HDIFA was an AR of FSML. These alerts made it clear that the adviser always needed to take into account the receiving scheme in order to assess the suitability of a Pension Transfer, not just in relation to unregulated investments in SIPPs, but generally. The January 2017 alert did not introduce the "*notion that Pension Transfer advisers should consider the overall investment strategy of the customer in all circumstances*". The January 2017 alert referenced the provisions of COBS 19.1.2R(1) which were in force from January 2007 and throughout the Relevant Period and which applied to Defined Benefit Pension Transfers regardless of whether or not the funds were transferred into investments held in a SIPP.**
13. **The Authority acknowledges that Ms Dunne had a number of interactions with Authority staff in respect of her business model, including after the 2013 alert had been issued and after FSML raised concerns in February 2016. As a result of these interactions, by July 2015 the Authority had information from which it could infer that Ms Dunne operated a deficient two-adviser advice model. However, notwithstanding this, the Authority has not seen any evidence that Ms Dunne was told by anyone at the Authority that her operation of her two-adviser advice model was compliant with the Authority's rules. Further, it was not the Authority's role to provide such confirmation. Rather, it was for Ms Dunne to reach her own considered view on whether her two-adviser advice model was compliant with the relevant regulatory requirements. The Authority considers that, as an experienced PTS, and given the clear wording of the relevant COBS provisions and the 2013 and 2014 alerts, and also taking into account the concerns raised by FSML's external compliance consultant, Ms Dunne should have realised that her two-adviser advice model was deficient. The Authority has therefore concluded that Ms Dunne's lack of understanding and continued use of her two-adviser advice model in these circumstances demonstrates a lack of competence and capability to perform the role of a Pension Transfer adviser.**

File reviews and use of the DBAAT tool

14. Ms Dunne disagrees with the results of the Authority's file reviews, carried out in 2019-2020. Having carried out her own review, Ms Dunne considers that there were no material breaches of the relevant rules in place during the Relevant Period in respect of her files, and that the conclusion that she failed to act with due skill, care and diligence is not supported by the evidence.



15. The reviews were inherently flawed as they were based on the retrospective application of rules and guidance which were not in place at the time Ms Dunne undertook her work. The Authority confirmed in January 2021 that the files from the 2019-2020 file review were tested using the DBAAT, which the Authority only published in January 2021. The failings identified by the external reviewer, including failings relating to the requirements to consider the income requirement of a customer in retirement and the level of a customer's state pension entitlement, were consistent because they relate to rules introduced after the Relevant Period ended. The requirements to consider these aspects came into effect after the end of the Relevant Period following the publication of the Authority's policy statement PS18/6 on 26 March 2018. Consequently, the DBAAT results are inherently unreliable and cannot reasonably be relied on by the Authority.
16. Ms Dunne was not, until after she had made written representations on the Warning Notice, informed of the basis on which the 17 HDIFA files selected for review by the Authority were deemed to be a statistically representative sample from which to extrapolate numbers to conclude the extent of her alleged file failings. The sample appears to be skewed and based on statistical outliers, with the inevitable consequence that the results are not a fair reflection of the advice given. The Authority also repeatedly failed to provide adequate disclosure of material relating to its sampling approach.
17. On 16 October 2020, the Authority imposed an information requirement on Ms Dunne requiring her to provide feedback on the findings of the files assessed by the external reviewers. Ms Dunne reviewed each file in detail and responded in December 2020. She has received no substantive response from the Authority to her comments arising from her review. Her comments were not provided to the RDC to consider before it decided to issue the Warning Notice. There is also no evidence that, despite the centrality of these file reviews to the allegations against Ms Dunne, the external file reviewers, who conducted the review on behalf of the Authority, considered Ms Dunne's comments. Further, Ms Dunne has requested that the Authority provide details of the identities and qualifications of the individuals who conducted the file reviews on behalf of the external reviewer, as well as the conflict checks carried out, and the Authority has not responded fully to this request, thereby denying Ms Dunne due process.
18. Following receipt of copies of the DBAAT reviews from the Authority's Enforcement team in January 2023, Ms Dunne conducted her own review of the files reviewed by the external reviewer. She has observed that, amongst other things, in all of the cases, the reviewers only examined 20 to 30 of the over 200 documents in the file and dismissed the other documents as not being relevant. This raises the question as to how the reviewers could conclude that information was missing when they ignored over 80% of the file. Ms Dunne also notes that in seven cases, the Authority's external reviewer concluded that the advice was suitable. Therefore, 39% of the cases, based on more stringent rules introduced after the time that the advice was given, were confirmed as suitable.
19. Ms Dunne's review of the files, applying the rules actually in place at the time, reveals that the essential facts about the customers in relation to their investment and retirement objectives, Attitude to Risk and knowledge and experience of investments were ascertained in all cases. When considering the rules in place at the time, Ms Dunne found that all of the files were 100% compliant with respect to

the information on the financial situation of each customer and consideration of retirement expenditure.

20. In respect of information on the Ceding Arrangements, the external reviewer found that the details of the arrangements had been ascertained in all but one case. In that particular case, Ms Dunne tried to obtain up to date funding information from the Ceding Scheme, but it was not possible as at that time the scheme actuarial position was under review and the scheme administrators declined to provide more comprehensive information about the previous results when requested. Ms Dunne does not understand what more she could have been expected to do in those circumstances.
21. **The Authority considers that its file reviews were carried out properly and fairly, that the results can reasonably be relied on and that they support the conclusion that Ms Dunne acted with a lack of due skill, care and diligence in providing Pension Transfer advice, in breach of Statement of Principle 2.**
22. **Ms Dunne's submission that the reviews were based on the retrospective application of rules and guidance which were not in place at the time she undertook her work is incorrect. The DBAAT used to assess Ms Dunne's files did not include the rules introduced after the end of the Relevant Period. When the DBAAT (used to assess Pension Transfer advice given before October 2020) was published on 15 January 2021, the Authority also published information which included a statement that "An updated tool that incorporates rule changes that came into force on 1 October 2020 will be published in the coming months." The Authority did not use this "updated tool" and instead the DBAAT used by the Authority to assess HDIFA's advice given during the Relevant Period assessed those files only against the relevant COBS rules in force at that time.**
23. **During the Relevant Period, COBS 9.2.1R(2)(b) stated that to be able to take reasonable steps to ensure the suitability of the Pension Transfer advice to its customers, a firm must first obtain the necessary information regarding the customer's (a) investment knowledge and experience relevant to the Pension Transfer; (b) financial situation; and (c) investment objectives. In addition, COBS 9.2.2R(3) (as in force during the Relevant Period), provided that information about a customer's financial situation, including the source and extent of their regular income, their assets and current expenditure, is key to assessing whether or not the customer is able to financially bear any related investment risks consistent with their investment objectives, and therefore the extent of their reliance on the income provided by their Defined Benefit Pension during retirement.**
24. **Given that the primary purpose of a pension is to provide income during retirement, it was incumbent on Ms Dunne to obtain details of any other pension entitlements, including state pensions, of her customers as well as to consider how these could meet the customer's income requirements throughout retirement. This cannot be accurately considered without reference to the customer's expenditure.**

25. **As set out at paragraph 4.43 of this Notice, the Authority found that Ms Dunne failed to discuss and obtain details of the customer's anticipated income needs and expenditure in retirement. The Authority found that the fact find form used requested this information where retirement was planned within 12 months but otherwise this was not addressed. Consequently, Ms Dunne was unable to assess the extent to which the customer was reliant on their Defined Benefit Pension during retirement, in breach of the relevant COBS rules.**
26. **Accordingly, the Authority does not accept Ms Dunne's contention that, when tested against the relevant rules in place at the time she gave the Pension Transfer advice, all of her files were compliant.**
27. **The Authority's approach to the sampling of files was based on advice, which was received from a professional statistician, who approved the sample as providing a reliable statistical base for the customer population as a whole. The statistician advised that the 95% confidence interval in relation to the Authority's review of 17 files as being non-compliant is 82% to 100%. Therefore, the Authority can infer, with 95% confidence, that the percentage of non-compliant Defined Benefit Pension Transfer advice across the whole population of HDIFA's files is within the range 82% to 100%. It is standard practice to use 95% confidence intervals. The Authority acknowledges that certain documents relating to the advice provided by the statistician should have been disclosed earlier, but as far as it is aware, all relevant documents in relation to the sampling analysis have now been disclosed, and Ms Dunne has had the opportunity to review them and make representations in relation to them.**
28. **The Authority has provided Ms Dunne with the details of the experience and qualifications of the individuals who conducted the file assessments for the external reviewer; it does not consider that the identities of these individuals are required to be disclosed and does not agree with Ms Dunne's claim that she is prejudiced by not knowing their identities. The Authority also confirmed to Ms Dunne that the external reviewer carried out conflict of interest checks on those individuals prior to them reviewing Ms Dunne's files, and that those checks found no cause for concern in relation to this issue.**
29. **Ms Dunne's responses to the external reviewer's file review were not provided by the Enforcement team to the RDC to consider when recommending that the RDC issue the Warning Notice, because it was not relying on Ms Dunne's responses, and did not consider her responses to be undermining to its recommendation. In any event, the RDC has now been provided with Ms Dunne's responses and has taken them into account. These responses do not alter its view that the review of the files support the conclusion that Ms Dunne failed to act with due skill, care and diligence when providing Pension Transfer advice.**
30. **The Authority also provided Ms Dunne's comments on those files to the external reviewer and asked for its views on the points raised by Ms Dunne. Ms Dunne's comments did not change the external reviewer's assessment in respect of those files which had previously been assessed as 'unsuitable'. In relation to the remainder of the files that had been**

**assessed as 'Not compliant – Unclear', the comments provided by Ms Dunne on those reviews were considered by the Authority's Enforcement team. As Ms Dunne had not provided any additional contemporaneous material which would rectify the information gathering failings identified in the file review, it was reasonable for the Authority's Enforcement team to conclude that a further review by the external reviewer was not necessary.**

The backdated AR agreement

31. The facts underlying the Authority's allegation that Ms Dunne breached Statement of Principle 1 through her involvement in the provision of a backdated AR agreement to the Authority do not meet the necessary evidential burden in support of an allegation that she acted with a lack of integrity.
32. The Authority's request for a copy of the AR agreement in place between FSML and HDIFA was made to FSML, not Ms Dunne. Had she been asked to provide a copy of such an AR agreement, she would not have been able to as there was no executed written AR agreement in place in 2012. All of the relevant regulatory requirements and provisions in relation to the appointment process and ongoing oversight of ARs are incumbent upon the Principal firm and do not apply to the AR. It is therefore solely the responsibility of the Principal firm (in this case FSML) to ensure that it has a written AR agreement in place between it and its ARs, to record and discharge the matters for which it has responsibility.
33. Ms Dunne had no input, influence, or control over FSML in what it represented to the Authority in providing the AR agreement. She did not see the Authority's request and was not aware of the fact that FSML had been required to provide a copy of the AR agreement, although she was aware that FSML intended to provide the backdated AR agreement to the Authority.
34. When presented with the June 2017 agreement, Ms Dunne was reluctant to simply sign it as it was not accurate, so she raised her concerns with FSML in an email exchange on 22 June 2017 (see paragraph 4.65 of this Notice). The Authority relies on a single sentence in that email exchange as its sole evidence that she acted with a lack of integrity, drawing the most adverse inference possible in respect of that sentence and ignoring lots of other evidence which contradicts that inference. That sentence said: *"I think it's worth correcting at least the first two points, because those make it abundantly clear it's a document produced after the event, which is the last thing you want to do."*
35. With the benefit of hindsight, Ms Dunne would have worded her email to FSML differently. However, she did not intend to deceive the Authority and there was no motivation for her to do so, particularly as the requirement to have a written contractual agreement in place was FSML's, not hers. It was never her intent to mislead the Authority as to the key contractual terms between her and FSML in her time as an AR of FSML. Clearly there was an agreement and the parties continued for several years on the basis that there was such an agreement in place, even if it was not written. Ms Dunne is confident that the document signed by her in June 2017 contained key contractual arrangements that had been in place since 2012.
36. Ms Dunne could not control the approach being taken by FSML in relation to the AR agreement, as Mr Fenech was imposing the terms of the AR agreement on her (the

agent) in his role as HDIFA's Principal. However, Ms Dunne was trying to ensure that a document was produced which accurately reflected what was broadly agreed between the parties at inception. Ms Dunne's reference in the email exchange to *"that's the last thing you want to do"* does not denote a lack of integrity, but rather was designed to point out to FSML that as the document was being created retrospectively, it should be drafted consistently with what the position would have been at the time had it in fact been drafted and signed in 2012.

37. In the same email exchange, Ms Dunne noted other inaccuracies in the document and stated: *"the rest is the sort of stuff I would normally pick up and so would make it unlikely I would sign it all, but that is probably less of a concern, except it speaks to my nature and that feeds into my integrity and position. If you are okay to send me a Word version, I am quite happy to amend it and sign and return it."* This supports the notion that she was concerned about not compromising her principles and wanted to make changes as a result. This demonstrates a conscientious approach and a desire to ensure that the document was historically accurate.
38. Ms Dunne is not proud of the fact that she signed the backdated AR agreement. Ms Dunne accepts that she should have pushed back on FSML more and that she should not have signed it. However, she was under duress and extreme pressure from FSML to sign the AR agreement as presented to her.
39. Ms Dunne's action in this regard is clearly an outlier when having regard to her years of open interaction and co-operation with the Authority in respect of dealing with queries about her business and her business model. Any negative inferences drawn from her decision to sign the backdated AR agreement when asked to do so by FSML need to be weighed against her previous pattern of co-operation and openness with the Authority. Ms Dunne has also provided character references which support her submission that she is not a person who lacks integrity.
40. **The Authority acknowledges that the responsibility for producing the AR agreement and providing it to the Authority was primarily the obligation and responsibility of FSML and Mr Fenech. The Authority also acknowledges that it was Mr Fenech, not Ms Dunne, who provided the backdated AR agreement to the Authority and, in doing so, misled the Authority into believing that there was a formal and signed AR agreement between FSML and HDIFA in place since 30 August 2012.**
41. **The Authority has also taken into consideration Ms Dunne's previous proactive interactions with the Authority over a number of years regarding her business model, which indicate that she was normally open and transparent with the Authority. It appears that her behaviour on this occasion was out of character.**
42. **Nevertheless, the Authority considers that the evidence, in particular Ms Dunne's email to Mr Fenech on 22 June 2017, supports its conclusion that Ms Dunne acted with a lack of integrity in breach of Statement of Principle 1 through her knowing involvement in the dishonest provision of the backdated AR agreement to the Authority by Mr Fenech. As she has admitted, Ms Dunne signed the AR agreement despite being aware that Mr Fenech intended to provide it to the Authority as a document purported to have been signed on 30 August 2012. The document was dated 30 August**

**2012 and her email to Mr Fenech on 22 June 2017 indicates she was aware that FSML's motive behind the backdating was to conceal the fact that a written AR agreement had not been in place since the date HDIFA had been appointed as an AR of FSML on 30 August 2012. The Authority considers that, being aware of this, she proposed corrections which would create the impression that it was a contemporaneous document. These corrections were accepted by Mr Fenech and so the Authority considers it is not correct for Ms Dunne to say she had "no input, influence, or control over FSML in what it represented to the Authority in providing the AR agreement".**

43. **The Authority recognises that Ms Dunne has accepted that she should not have signed the AR agreement. However, the Authority does not consider that this recognition affects its conclusion that, in signing it in circumstances where she was aware of Mr Fenech's intention to mislead the Authority, even if it was the case that she felt under pressure to do so, she acted with a lack of integrity. Similarly, the Authority has noted Ms Dunne's character references, most of which are anonymised, and considers that they also do not affect its conclusion, based on the facts and matters described in paragraphs 4.63 to 4.66 of this Notice, that, in relation to this matter, she acted deliberately and with a lack of integrity.**

#### Limitation

44. The Authority has accepted that it is time-barred from imposing a financial penalty with regard to Ms Dunne's alleged operation of a deficient two-adviser advice model. However, the Authority's position is that the limitation period in relation to Ms Dunne's alleged breach of Statement of Principle 2 ended on 8 March 2023, and so it considers it is not time-barred from imposing a financial penalty in respect of that alleged breach because the Warning Notice was issued on 6 March 2023. Ms Dunne does not agree with the Authority's limitation analysis in respect of her alleged breach of Statement of Principle 2.
45. The Authority was first put on notice of Ms Dunne's business model in June 2011 when she emailed the Authority's Contact Centre and stated that she considered HDIFA to be *"responsible purely for the advice as to whether a transfer is suitable"* and that the introducer agreements and template letters to clients she supplied to the Authority with that email *"[...]explains that their usual adviser will be responsible for the recommendation of the most suitable vehicle and ongoing advice."*
46. There is no substantive difference between Ms Dunne's alleged breach of Statement of Principle 2 and the alleged misconduct which the Authority concedes is time-barred. They are both part of the same alleged misconduct of which the Authority could reasonably have been aware as far back as 2011. No explanation has been offered by the Authority to support its assertion that the alleged breach of Statement of Principle 2 is a very different act of misconduct to the failure to take into account the suitability of the investment advice, beyond its view that *"knowledge of one does not imply knowledge of the other"*. The Authority had sufficient information available to it to have reasonably inferred that there may have been certain issues with Ms Dunne's approach when advising her customers on their proposed pension transfers. It now unfairly seeks to make artificial distinctions between these aspects of misconduct.

47. It is also evident that the Authority has misunderstood the test of knowledge of the 'particular misconduct', as applied in *Jeffery*<sup>1</sup> and in *Burns*<sup>2</sup>. The Authority had sufficient information to make further enquiries into Ms Dunne's business model prior to 8 March 2017 and, had it made these enquiries, it would have been able to consider the approach taken to her files and identify that Ms Dunne had breached Statement of Principle 2.
48. **The Authority accepts that it is time-barred from imposing a financial penalty on Ms Dunne in respect of her operation of a deficient two-adviser advice model. However, the fact that this misconduct is time-barred does not prevent the Authority from taking it into account when considering Ms Dunne's fitness and propriety and deciding whether or not it is appropriate to impose a prohibition order on Ms Dunne.**
49. **The Authority could not have known of, or reasonably inferred, any misconduct on the part of Ms Dunne from the email communication sent by Ms Dunne to the Authority in June 2011. What was conveyed in that June 2011 email was that she was operating a two-adviser advice model, which was permissible if carried on in a compliant manner. The Authority could not have known or inferred from that June 2011 email that Ms Dunne was not acting with due skill, care and diligence in providing Pension Transfer advice. This was identified during the Authority's 2019-2020 file review (see below).**
50. **The Authority's file reviews carried out in 2019-2020 revealed wide-ranging failures in Ms Dunne's customer files in respect of: (i) her not gathering necessary information at the fact-finding stage; (ii) not ensuring that Personal Recommendations were communicated in a way that was clear, fair and not misleading; (iii) not ensuring that the Personal Recommendations explained adequately why the Pension Transfer was suitable for the customer; and (iv) failing to consider adequately the customer's financial situation and retirement needs when assessing whether it was suitable for the customer to transfer out of their DBPS. These failings constitute different misconduct to operating a deficient two-adviser advice model, which relates specifically to Ms Dunne's failure to take into account the introducer's investment advice when giving Pension Transfer advice.**
51. **The Authority considers that it became aware of the misconduct which constitutes Ms Dunne's breach of Statement of Principle 2 on 8 March 2017 when its Supervision department received eight client files from Mr Fenech. The Authority could not have known of, or reasonably inferred, this misconduct at any time before that date, including in July 2015 (which the Authority considers is the trigger date for the limitation period in respect of the deficient two-adviser advice model).**

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<sup>1</sup> [Andrew Jeffery v The FCA \[2013\] FS/2010/0039 paragraphs 326 to 342](#)

<sup>2</sup> [Alistair Burns v The FCA \[2019\] UKUT 0019 \(TCC\) paragraphs 139 to 146](#)

## Sanctions

52. Ms Dunne does not accept that she has committed the alleged breaches and so disputes the imposition of any sanction on her. In any event, the proposed financial penalty has been calculated on an incorrect basis.
53. Ms Dunne disputes the level of the disgorgement figure cited by the Authority. The Authority has misunderstood the relevant financial information and has overstated the actual benefit she derived from the activities relating to FSML in respect of Defined Benefit Pension Transfers during the Relevant Period.
54. Ms Dunne also considers that both the disgorgement figure and the identical Step 2 relevant income figure are incorrect for several additional reasons. First, the Authority has double counted her pension contributions from HDC Ltd as income. Those contributions were paid from her net income and so should not be included. Second, the calculations pertaining to HDIFA are incorrect as they do not account for certain permitted deductions. Third, the calculation does not take into account the impact of HDIFA making a loss in the year ending 5 April 2019 and the liabilities incurred by HDC Ltd entering into liquidation.
55. Ms Dunne also objects to the Authority's application of interest on the disgorgement figure. DEPP 6.5B states that the Authority will "*ordinarily also charge interest on the benefit*" which it is seeking to disgorge. In Ms Dunne's view this is not an ordinary case. The Authority knew of Ms Dunne's business model arrangements from at least 2011 and did not engage with that information. The Authority started investigating her in 2017, but it was only in September 2021, after imposing numerous information requirements on her, and after taking a further two years following a nearly completed file review in 2019, that it communicated to her the fact that it was investigating her. A further 18 months then passed before the Warning Notice was issued. Ms Dunne has not been able to work professionally since 2018 when the Authority's investigation into FSML was made public and the Authority's actions have had a catastrophic impact on her. In the circumstances, and also considering Ms Dunne's current financial position, Ms Dunne believes that it is unjust for the Authority to apply above market interest rates to the disgorgement figure over a number of years, and that it is not appropriate for the Authority to impose any interest at all in respect of any proposed financial penalty.
56. Ms Dunne also disagrees with the proposed level of seriousness cited at Step 2 of the penalty calculation and considers that it should be no higher than level 2. There was little or no profit made as a result of her breaches and the external reviewer found that nearly half of her advice was suitable; her breaches did not have any effect on the orderliness of, or confidence in, the markets; and any failings were inadvertent. In addition, her role in the provision of the Appointed Representative agreement to the Authority should not lead to a higher level of seriousness; Ms Dunne did not backdate or provide the Appointed Representative agreement to the Authority, nor does she know what FSML represented to the Authority when FSML provided the Appointed Representative agreement.
57. At Step 3 of the penalty calculation, the penalty should be reduced on the basis that Ms Dunne's consistent cooperation with the Authority during its lengthy investigation, in circumstances where that investigation has prevented her from undertaking any regulated activities, constitutes a mitigating factor.



58. Ms Dunne considers that, as the Authority has accepted that she has provided verifiable evidence that payment of a financial penalty would cause her serious financial hardship and has reduced the Step 5 figure to £0, it would also not be appropriate to require that she pay the disgorgement element of the penalty. Ms Dunne's benefit was by way of income from her conduct of business activities, where she clearly had an honest belief relating to the operation of her business model and the quality of her advice. Ms Dunne has already suffered disgorgement of any benefit she gained due to the losses and debt incurred as a consequence of the Authority's intervention in June 2017 and the length of time it has taken for the Authority to progress its investigation.
59. Ms Dunne also challenges the decision to impose a prohibition order on her. The basis of the Authority's reasoning for stating that she is not a fit and proper person is flawed for the reasons stated above. She has also effectively been banned from the industry in any event, and has no intention of returning, in the knowledge that the Authority would be likely to refuse any future application for approval made by her.
60. **For the reasons set out in this Notice, the Authority considers that Ms Dunne breached Statement of Principle 2 and Statement of Principle 1 and that it is proportionate and appropriate to impose a financial penalty on Ms Dunne in respect of those breaches. The calculation of that penalty is set out in section 6 of this Notice.**
61. **Ms Dunne derived direct financial benefit from the fees generated by the Pension Transfer advice she provided during the Relevant Period. The Authority has calculated that Ms Dunne personally received the benefit of £317,316 by virtue of her 100% ownership of HDIFA and that this stemmed directly from her breaches. The Authority has taken into account Ms Dunne's representations on what should be excluded from the calculation of the disgorgement and relevant income figures. The Authority agrees that Ms Dunne's pension contributions should not be included in these figures, but considers that no further deductions are required as all costs incurred by HDIFA which are directly referable to Ms Dunne's misconduct have already been deducted. The Authority is satisfied, having deducted Ms Dunne's pension contributions, that both the disgorgement figure and the relevant income figure set out in its penalty calculation in this Notice are correct.**
62. **The Authority does not accept that it was investigating Ms Dunne prior to its appointment of investigators, in respect of suspected misconduct by her, on 10 September 2021. The information requirement dated 16 August 2019, which requested HDIFA's client files from Ms Dunne, was issued to her because information was being requested in respect of FSML's AR, HDIFA, following the opening of an investigation into FSML on 20 March 2018. The investigation into FSML led to the investigation being opened into Ms Dunne in 2021.**
63. **The Authority recognises that a number of years have passed since its intervention in June 2017, and that this has had a negative personal and financial impact on Ms Dunne even though she was not formally under investigation for much of this period. Nevertheless, the Authority considers that it is appropriate to apply interest on the disgorgement sum**

in accordance with its usual practice (as per DEPP 6.5B.1G). In the circumstances of this case, the Authority has deemed it appropriate to apply interest at a rate of 4% on the disgorgement figure.

64. **The Authority has had regard to relevant factors relating to the impact and nature of Ms Dunne's breaches, and whether they were committed deliberately or recklessly, in considering the seriousness of her breaches. The relevant factors are described in paragraphs 6.10 to 6.21 of this Notice and include Ms Dunne's failure to act with integrity by virtue of her knowing involvement in Mr Fenech's dishonest provision of the backdated AR agreement to the Authority, which the Authority considers to be a serious matter and likely to be considered a 'level 4 or 5 factor'. The Authority does not agree that her failings were inadvertent or that she did not benefit, or only benefited a little, from her breaches, as is evident from the size of the disgorgement figure. As stated at paragraph 6.22, taking all of the relevant factors into account, the Authority considers the seriousness of Ms Dunne's breaches to be level 4.**
65. **Although Ms Dunne has stated that her cooperation during the investigation should be considered a mitigating factor, she has not put forward any explanation or evidence as to how her cooperation went beyond that normally expected by a subject of an enforcement investigation by the Authority. The Authority has therefore decided that the financial penalty should not be decreased at Step 3.**
66. **As explained in paragraph 6.33 of this Notice, Ms Dunne has produced verifiable evidence that payment of a penalty of £494,917 would cause her serious financial hardship and so has reduced the Step 5 figure of £95,100 to £0. However, the Authority considers that, as a matter of principle, the disgorgement element of the penalty should not be reduced even if it would cause serious financial hardship to Ms Dunne. The disgorgement element of the penalty is distinct from the punitive element. The Authority considers that the principle of disgorgement (that an individual should not benefit from the breach – DEPP 6.5.2G) applies regardless of whether those funds are still available to use to pay the penalty. The Authority also considers that to allow an individual not to pay the disgorgement sum on the basis that the money has already been spent runs contrary to this principle. This approach has been endorsed by the Tribunal in the case of *Ford*<sup>3</sup>.**
67. **The Authority has considered all relevant circumstances and has had regard to the guidance contained in chapter 9 of EG, in deciding that it is appropriate to impose a prohibition order on Ms Dunne. Having regard to her failure to act with due skill, care and diligence in providing Pension Transfer advice in breach of Statement of Principle 2, and her operation of a deficient two-adviser advice model, including after she was aware of concerns that it was non-compliant, the Authority considers that Ms Dunne lacks the competence and capability to perform the role of a Pension Transfer adviser.**

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<sup>3</sup> *Stewart Owen Ford and Mark John Owen v The Financial Conduct Authority* [2018] UKUT 0358 (TCC)

68. **Further, in light of Ms Dunne's knowing involvement in Mr Fenech's dishonest provision of the backdated AR agreement to the Authority, in breach of Statement of Principle 1, the Authority considers that Ms Dunne is not a fit and proper person to perform any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.**
69. **The Authority has reached this conclusion, notwithstanding that it acknowledges the following matters which are to Ms Dunne's credit: Ms Dunne has admitted that she should not have signed the backdated AR agreement; it appears this was an out of character error of judgement; and previously she appears to have interacted with the Authority openly and transparently. However, approved persons are expected to act with honesty and integrity in all their dealings with the Authority and Ms Dunne's conduct fell below this standard.**
70. **Accordingly, in order to protect consumers, the Authority has decided to impose the prohibition order described at paragraph 1.1(2) of this Notice.**