

Mr Fenech 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 Mr Fenech should be characterised. The proposed action outlined in the decision notice will have no effect pending the determination of the case by the Tribunal. The Tribunal's decision will be made public on its website.



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DECISION NOTICE

To: **Richard Brian Fenech**

Individual
Reference

Number: **RBF00006**

Date: **2 January 2024**

1. ACTION

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

- (1) impose on Richard Brian Fenech (Mr Fenech) a financial penalty of £270,646 pursuant to section 66 of the Act; and
- (2) make an order, pursuant to section 56 of the Act, prohibiting Mr Fenech from performing any function in relation to any regulated activity carried on by an authorised person, exempt person, or exempt professional firm.

2. SUMMARY OF REASONS

Background

2.1. Between 3 January 2015 and 22 June 2017 (the Relevant Period), Mr Fenech was the sole director of Financial Solutions Midhurst Limited ("FSML") and was approved to perform the CF1 (Director), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting) and CF30 (Customer) controlled functions at FSML.

- 2.2. Mr Fenech was responsible for the oversight of FSML's Appointed Representative ("AR"), Heather Dunne (trading as HDIFA), who provided advice to customers to transfer out of occupational Defined Benefit Pension Schemes ("DBPS") into alternative pension arrangements. As sole director and CF10, Mr Fenech was required to take reasonable steps to ensure that FSML organised and controlled its affairs responsibly and effectively, with adequate risk management systems, in respect of ensuring that FSML's AR, HDIFA, complied with the relevant rules and requirements of the regulatory system when giving advice to customers on whether to transfer out of a DBPS.

The two-adviser advice model

- 2.3. 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 Relevant Period, 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 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.
- 2.4. 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.
- 2.5. 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 HDIFA as part of its Pension Transfer advice, were issued to the introducing

adviser to present to the customer on HDIFA's behalf, in circumstances where HDIFA had not carried out the comparison required under COBS 19.1.2R (as then in force). HDIFA did not meet the customer and did not have oversight over how the introducing adviser presented HDIFA's Pension Transfer advice to the customer or of the investment advice provided by the introducing adviser. This meant that HDIFA did not take into account the overall suitability of the destination investment in giving its advice to the customer on the suitability of the Pension Transfer, which it was required to do. HDIFA operated its deficient two-adviser advice model under the responsibility of FSML and under the oversight of Mr Fenech.

- 2.6. The Authority issued two alerts prior to the Relevant Period relevant to the two-adviser advice model operated by HDIFA. 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"*.

Mr Fenech's misconduct

Breach of Statement of Principle 1

- 2.7. During the Relevant Period, Mr Fenech failed to act with integrity, in breach of Statement of Principle 1, in carrying out his controlled functions of CF1 (Director) and CF10 (Compliance Oversight) at the principal firm, FSML, through which he had responsibility for the oversight of the business of its AR, HDIFA.
- 2.8. Mr Fenech did so by recklessly permitting HDIFA to continue to utilise its two-adviser advice model despite concerns being raised by FSML's external compliance consultant on 3 and 4 January 2015. These concerns were raised by way of communications from the compliance consultant to Ms Dunne (into which Mr Fenech was copied) drawing attention to the Authority's own published alerts regarding the use of the model, as well as highlighting the need for HDIFA to consider the overall suitability of the investment advice. Mr Fenech was therefore warned and was aware of the deficiencies in the two-adviser advice model utilised by HDIFA regarding the separate provision of investment advice by an introducer once the Pension Transfer had completed. However, Mr Fenech unreasonably disregarded the concerns raised, which he should have regarded as red flags, and took no steps to stop HDIFA from operating its deficient two-adviser advice model until, over a year later, he sent Ms Dunne a letter on 26 February 2016 in which

he raised concerns with it and stated that FSML would, with immediate effect, look at a process to review HDIFA's existing advice process. Having done so, Mr Fenech then failed to ensure that such a review was carried out and did not take any other steps to stop HDIFA from utilising its deficient two-adviser advice model. HDIFA continued to use this model until the Authority intervened in June 2017.

- 2.9. By not acting on the concerns raised by FSML's external compliance consultant or acting on the concerns he himself had raised with HDIFA, Mr Fenech was reckless as to the consequences for HDIFA's customers and unreasonably exposed them to a significant risk that their pension funds would be transferred out of their DPBS into investments which were unsuitable for them. This risk must have been obvious to Mr Fenech given his experience as a financial adviser and his senior positions as CF1 (Director) and CF10 (Compliance Oversight) at FSML, as well as from the concerns raised with HDIFA by FSML's external compliance consultant of which he was aware.
- 2.10. Mr Fenech also demonstrated a lack of integrity, in breach of Statement of Principle 1, by deliberately providing the Authority with a copy of an Appointed Representative agreement between HDIFA and FSML which he had signed and backdated to create the false impression that a written agreement had been in place since 30 August 2012, 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.

Breach of Statement of Principle 7

- 2.11. Further, in respect of his position of responsibility for the advice given and for the actions and omissions of FSML's AR, HDIFA, Mr Fenech also breached Statement of Principle 7 by failing to take reasonable steps to organise and control FSML's affairs responsibly and effectively, with adequate risk management systems, to ensure that HDIFA's Pension Transfer advice, for which he was responsible in his controlled function, complied with the relevant requirements and standards of the regulatory system. In particular, Mr Fenech failed to take reasonable steps to ensure that:
- (1) HDIFA implemented adequate checks to ensure that at the fact-finding stage of the Pension Transfer process all necessary information regarding the customer was gathered, including details of their financial situation, 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);

- (2) the Personal Recommendations made by HDIFA met the customer's information needs and were fair, clear and not misleading. The Suitability Reports issued by HDIFA used generic standardised wording, were often templated and were not sufficiently tailored to the individual customer's circumstances; and
- (3) HDIFA's Personal Recommendations explained adequately why the Pension Transfer was suitable for the customer. Some customer files also contained inaccuracies, errors and inconsistencies.

Seriousness

- 2.12. As the sole director of FSML, Mr Fenech's responsibilities included ensuring that FSML's AR, HDIFA, provided suitable Pension Transfer advice to its customers which complied with the Authority's rules and requirements. In particular, this included ensuring that HDIFA 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 Pension Transfer decisions, in respect of their valuable pension benefits, against their best interests. However, the combined effect of Mr Fenech's failings created a significant risk of unsuitable Pension Transfer advice being provided by HDIFA to its customers.
- 2.13. During the Relevant Period, HDIFA advised 354 customers on whether to transfer out of their Defined Benefit Pension Schemes. Notwithstanding the Authority's guidance, which created as a starting point a presumption of unsuitability in respect of transferring out of a Defined Benefit Pension Scheme, HDIFA advised 327 of these customers (approximately 92%) to complete a Pension Transfer. HDIFA provided this advice to its customers in its capacity as an AR of FSML, and FSML was therefore responsible as Principal for anything done, or omitted to be done, by HDIFA in carrying out the business for which FSML had accepted responsibility.
- 2.14. The total value of the transferred funds on which FSML's AR, HDIFA, gave advice during the Relevant Period was £126,353,674, with an average transfer value per customer of approximately £386,402.

- 2.15. 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 HDIFA 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 FSCS, subject to its limits. The FSCS has calculated that those 10 customers had total, unabated losses of £1,931,560.
- 2.16. The Authority considers Mr Fenech's breaches of Statements of Principle 1 and Statement of Principle 7 to be particularly serious for the following reasons:
- a) 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;
 - b) The decision to transfer out of a Defined Benefit Pension Scheme can affect customers, and sometimes their dependants, for the rest of their lives;
 - c) The unsuitable Pension Transfer advice resulted in significant numbers of customers risking their retirement income by transferring out of their Defined Benefit Pension Scheme 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;
 - d) Mr Fenech directly benefitted financially from the breaches;
 - e) Mr Fenech was an experienced industry professional holding senior management functions at FSML. He had responsibility for overseeing compliance by FSML's AR, HDIFA, with regulatory rules and requirements and accordingly had responsibility for the unsuitable advice provided by HDIFA to its customers;
 - f) Mr Fenech was made aware of the deficiencies in the two-adviser advice model utilised by HDIFA by FSML's external compliance consultant, but he recklessly permitted HDIFA to continue to utilise the deficient two-adviser advice model with no implementation of material changes in approach by either FSML or HDIFA; and
 - g) Mr Fenech acted dishonestly in deliberately providing the Authority with the backdated AR agreement to create a false impression that a written

agreement had been in place between HDIFA and FSML since 30 August 2012.

Sanction

- 2.17. The Authority has decided to impose on Mr Fenech a financial penalty of £270,646 pursuant to section 66 of the Act in respect of his breaches of Statement of Principle 1 and Statement of Principle 7.
- 2.18. The Authority has concluded that Mr Fenech demonstrated a lack of integrity by recklessly permitting HDIFA to continue to operate the two-adviser advice model against customers' best interests, despite being aware of the concerns raised by FSML's external compliance consultant regarding deficiencies in that model, and that he acted dishonestly and without integrity by preparing, signing and providing the Authority with the backdated AR agreement. Accordingly, the Authority has concluded that Mr Fenech lacks fitness and propriety. The Authority also considers Mr Fenech's failure to take reasonable steps to ensure that the business of FSML, which included responsibility for the business of HDIFA, complied with the relevant requirements and standards of the regulatory system supports its conclusion that he lacks fitness and propriety. The Authority therefore considers Mr Fenech 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 those terms against Mr Fenech.

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 Authority's 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.

"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 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.

"IFA" means independent financial adviser.

"Ms Dunne" means Heather Dunne.

"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 3 January 2015 to 22 June 2017.

“Statements of Principle” or “APER” mean 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 Mr Fenech dated 6 March 2023.

4. FACTS AND MATTERS

Background

- 4.1. Throughout the Relevant Period, Mr Fenech was approved by the Authority to perform the CF1 (Director), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting) and CF30 (Customer) controlled functions at FSML. Mr Fenech was the sole director and shareholder at FSML and was not a qualified Pension Transfer Specialist.
- 4.2. Although Mr Fenech was not a Pension Transfer Specialist, as CF1 and CF10 at FSML he was responsible for ensuring that FSML, and its Appointed Representative, HDIFA, complied with the Authority’s rules and regulatory requirements applicable to its Pension Transfer business.

- 4.3. FSML was an independent financial adviser firm based in West Sussex. It was authorised by the Authority on 9 February 2007 and throughout the Relevant Period had permissions to carry on regulated activities including advising on Pension Transfers and Pension Opt-Outs, advising on investments and arranging (bringing about) deals in investments. Liquidators were appointed on 17 September 2019 and FSML was dissolved following the liquidation on 4 August 2023.
- 4.4. Between 31 August 2012 and 2 July 2018, Heather Dunne (operating as a sole-trader firm), trading as HDIFA, was registered as an Appointed Representative of FSML. Ms Dunne was a qualified Pension Transfer Specialist who provided Pension Transfer advice to customers through her sole-trader firm, HDIFA.

FSML's Pension Transfer advice business and Mr Fenech's role

- 4.5. FSML was granted permission by the Authority to undertake advice on Pension Transfers and Pension Opt-Outs on 18 November 2010. FSML subsequently engaged the services of external Pension Transfer Specialists to provide Pension Transfer advice as part of the broad financial planning services the firm offered to its customers. Ms Dunne was one of the Pension Transfer Specialists that FSML engaged in 2010.
- 4.6. On 31 August 2012, the application to add Heather Dunne trading as HDIFA as an AR of FSML was approved by the Authority, thereby permitting HDIFA to provide Pension Transfer advice under the responsibility of FSML. According to Mr Fenech, he decided to make HDIFA an AR of FSML because he sensed an increased role for Pension Transfer Specialists at that time and saw an active increase in this market.
- 4.7. At an interview with the Authority, Mr Fenech stated that, at the date of HDIFA's appointment as an Appointed Representative, Ms Dunne was undertaking approximately 40 Pension Transfer advice cases per year and that during 2013 and 2014, her case volume would still have been less than 60 to 70 cases per year. Mr Fenech stated, however, that following the introduction of pension freedoms in 2015 there was a "significant" increase in HDIFA's, and therefore Ms Dunne's, business. Mr Fenech added: *"When she joined in 2012, she was writing 40 cases or so a year, working from her home with a part time assistant and a photocopier. When the FCA came to visit in 2016, she had rented offices and 20 staff. So, the nature and shape of the size of her business had changed considerably between 2012 and 2016."*

- 4.8. During the Relevant Period, HDIFA advised 354 customers on whether to transfer funds out of their Defined Benefit Pension Schemes into alternative arrangements. Approximately 92% of those customers were advised to complete a Pension Transfer out of their Ceding Arrangement.
- 4.9. In 2017, the Authority carried out a review of FSML's approach to Defined Benefit Pension Transfer advice, focussing in particular on the advice provided by its AR, HDIFA. The Authority undertook this review after monitoring the market for advice on Defined Benefit Pension Transfers and identifying firms which had increased volumes of transfers. As part of its review, the Authority visited the offices of HDIFA on 15 June 2017.
- 4.10. 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

- 4.11. 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.
- 4.12. 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.
- 4.13. 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 Principals do not attempt to abdicate responsibility for unsuitable advice given by their Appointed Representatives.

- 4.14. Transfer out of a Defined Benefit Pension Scheme 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.
- 4.15. 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.
- 4.16. 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 under the responsibility of FSML and Mr Fenech

- 4.17. 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.

- 4.18. 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 HDIFA's Pension Transfer advice to the customer.
- 4.19. 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.
- 4.20. 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

- 4.21. 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.
- 4.22. 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.
- 4.23. 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.

- 4.24. As the Principal firm, FSML generated an income from its AR, HDIFA, by charging it a fixed percentage of HDIFA's gross revenue which was agreed between FSML and HDIFA on an annual basis. According to Mr Fenech, the percentage ranged from 12% to 15% and was paid to FSML by way of monthly instalments. However, FSML and HDIFA would also reconcile their figures at the end of their trading years to see if any further payments were due to FSML to cover any additional costs to FSML of managing an Appointed Representative.

HDIFA's operation of the two-adviser advice model

- 4.25. HDIFA operated a two-adviser advice model (see paragraphs 2.3 to 2.4 above), which meant that it provided the Pension Transfer advice whilst another firm, acting as an introducer, gave the separate investment advice. The two-adviser advice model operated by HDIFA was deficient as, when giving its advice to the customer on the suitability of the Pension Transfer, HDIFA did not consider the overall suitability of the proposed new investment.

Concerns raised with HDIFA's operation of the two-adviser advice model

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

- 4.26. 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 an external compliance consultant in January 2015

- 4.27. On 3 and 4 January 2015, Mr Fenech was copied into email correspondence between Ms Dunne and an external compliance consultant, who was employed by FSML at the time to provide compliance advice to FSML in respect of the business carried on by its AR, HDIFA, 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 HDIFA's two-adviser advice model did not meet regulatory requirements.

- 4.28. 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 to the 2013 and 2014 alerts.
- 4.29. 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.*"
- 4.30. 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.
- 4.31. As the sole director of HDIFA's Principal, FSML, it was incumbent on Mr Fenech to maintain oversight of HDIFA's business and to ensure that it was conducting the business, for which he had assumed responsibility, in compliance with regulatory standards and requirements. This included the two-adviser advice model utilised by HDIFA. However, despite having already reached his own conclusion in December 2014 on the risks arising from HDIFA's business model (see paragraph 4.38 below), Mr Fenech unreasonably disregarded the external compliance consultant's concerns. He did not follow-up these concerns, which he should have regarded as red flags, with either Ms Dunne, the compliance consultant or the Authority, and did not take any steps to stop HDIFA from operating its deficient two-adviser model until, over a year later (in February 2016), he wrote to Ms Dunne about this (see below). Given his experience as a financial adviser and his senior position at FSML, he must have been aware that allowing HDIFA to continue

to operate its deficient two-adviser model would give rise to the risks that customers would be given unsuitable advice and would transfer their pensions into investments which were unsuitable for them.

February 2016 letter from Mr Fenech to Ms Dunne

- 4.32. Just over a year after FSML's compliance consultant raised concerns regarding the two-adviser advice model, Mr Fenech wrote to HDIFA, 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 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 Mr Fenech 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".

- 4.33. 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."

- 4.34. This correspondence between Mr Fenech and Ms Dunne, and the earlier email correspondence between Ms Dunne and the external compliance consultant (into which Mr Fenech was copied), show that, during the Relevant Period, Mr Fenech was aware of the level of risk posed by HDIFA's business model in respect of providing investment advice to customers. Mr Fenech was aware of Ms Dunne's

attitude to that risk and he believed further compliance reviews and monitoring of HDIFA was necessary.

- 4.35. However, despite the concerns raised by FSML's compliance consultant, and despite telling Ms Dunne that FSML would review HDIFA's two-adviser advice model, Mr Fenech did not ultimately impose on HDIFA the enhanced monitoring and compliance reviews he understood to be necessary, as specified in the correspondence with Ms Dunne. Further, he did not conduct any file reviews and did not carry out any compliance visits until after the Authority's review of FSML's business in January 2017. As a consequence, he unreasonably allowed HDIFA to continue to operate a deficient two-adviser advice model and to provide unsuitable Pension Transfer advice to customers under the responsibility and oversight of FSML, without any material change in approach.

Mr Fenech's Responsibilities as FSML's Compliance Officer and Director

- 4.36. Given the high volume of Pension Transfer advice business undertaken by HDIFA, it was important that FSML took appropriate steps to verify the suitability and the quality of the Pension Transfer advice being provided to customers and to ensure that advice was provided in accordance with regulatory rules and requirements. This included establishing and maintaining adequate risk management systems and policies and procedures that were sufficient to ensure compliance with the rules and requirements of the regulatory system, including, in particular, compliance with the relevant Pension Transfer rules in COBS.
- 4.37. As Principal of FSML and the sole CF1 (Director), and also in his capacity as FSML's CF10 (Compliance Oversight), Mr Fenech had responsibility for FSML's oversight of HDIFA's compliance with the Authority's rules. He therefore played a central role in ensuring that the business of FSML and the business of HDIFA complied with the relevant requirements and standards of the regulatory system.

Mr Fenech's failure to ensure FSML's effective oversight of HDIFA

- 4.38. By a letter to Ms Dunne dated 11 December 2014, less than one month before the start of the Relevant Period, Mr Fenech stated that he continued:

"to be 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."

- 4.39. 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, competence assessments on an annual basis and further supervision. However, during the Relevant Period, Mr Fenech failed to take any corrective action in respect of HDIFA's business model and only commissioned a single compliance review, and then failed to act on the concerns identified by the external compliance consultant following that review (see paragraphs 4.27 to 4.31 above).
- 4.40. Mr Fenech stated in interview that his oversight of HDIFA "*would be fairly fluid, ongoing, dealing with different points at different times and facilitated through data that I would have, which was always shared with me, meetings, phone calls, emails etc*".
- 4.41. Mr Fenech also stated in interview that FSML ensured Ms Dunne complied with the Authority's rules on providing advice for DB Pension Transfers, by relying on, and taking at face value, Ms Dunne's employment history and experience in the financial services industry as a PTS.
- 4.42. In the view of the Authority, Mr Fenech took a hands-off approach when it came to FSML's oversight of HDIFA, appearing instead to rely on his perception of Ms Dunne's experience and expertise. Although he engaged the services of an external compliance consultant to provide *ad hoc* advice, this did not absolve him from overall responsibility for FSML's oversight of the business of HDIFA.

Lack of regular compliance audits or suitability reviews during the Relevant Period

- 4.43. Mr Fenech failed to ensure that FSML undertook regular compliance audits or suitability reviews in relation to the Defined Benefit Pension Transfer advice provided by HDIFA during the Relevant Period.
- 4.44. When asked by the Authority to explain the lack of a compliance audit, Mr Fenech explained in interview that part of the reason was that, given his knowledge of HDIFA's systems and processes, he was confident HDIFA was operating in accordance with "*good regulatory principles*".
- 4.45. Mr Fenech also accepted at interview, however, that FSML did not undertake any suitability reviews of HDIFA's Pension Transfer advice files because he was not a Pension Transfer Specialist. Although he claimed that file reviews were undertaken by FSML's external compliance consultant, the only completed file

reviews seen by the Authority were those commissioned by FSML after the Authority's review of FSML's business in January 2017.

- 4.46. Following the Authority's review and request for a sample of HDIFA's files, FSML separately engaged external compliance consultants in January 2017 to undertake file reviews in respect of the same sample of HDIFA's files provided to the Authority. At interview Mr Fenech explained to the Authority that he commissioned the reviews because he wanted to undertake a review of the same files requested by the Authority.
- 4.47. The external compliance consultants were asked to review four Defined Benefit Pension Transfer advice files on which Ms Dunne had advised. The resulting report dated May 2017 identified numerous failings in the advice process utilised by Ms Dunne. These failings included the following:
- a) Generic customer objectives were included in Suitability Reports such as 'client wants improved death benefits and flexibility' without specifying why these particular objectives were important to the customer;
 - b) Lack of control over the advice process by not being involved in completion of the fact find document, profile questionnaire or objective setting and therefore being unable to check the customer's understanding of key concepts; and
 - c) The introducer was presenting the initial report to the customer when they were not necessarily qualified or competent to explain the often complex issues around Defined Benefit Pension Schemes. Given that HDIFA was not presenting the initial advice to the customer it was assessed that the Appointed Representative could not be sure that the message had been communicated to the customer in a balanced way and that they had not been unduly influenced at that point.
- 4.48. At interview Mr Fenech stated to the Authority that, with regard to the file review, he was "*pleased with it. Yes I was pleased we had a file review at that stage*". However, despite Mr Fenech's satisfaction that a file review had eventually been carried out, the report revealed fundamental failings in respect of HDIFA's advice process. He also said at interview that because the report was received two weeks before the Authority's visit to the firm when regulatory permissions were suspended, he was unable to action the findings.

Background to the Authority's review of HDIFA's Pension Transfer advice

- 4.49. 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 FSML's Appointed Representative, HDIFA, on 15 June 2017 and reviewed a sample of eight of HDIFA's advice files from the Relevant Period, of which seven were assessed to contain unsuitable advice. Having reviewed the processes adopted by HDIFA in respect of this workstream, the Authority identified concerns including the following:
- a) Assessing a customer's Attitude to Risk in isolation from their long-term aims and investment objectives;
 - b) 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
 - c) 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 HDIFA's Pension Transfer advice

- 4.50. 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:
- a) 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 HDIFA's advice was suitable (see "*Information collection failures*" below);
 - b) HDIFA gave unsuitable Pension Transfer advice in 100% of those cases it was able to assess for suitability (see "*Unsuitable Pension Transfer Advice*" below); and

- c) HDIFA failed to provide the required disclosure to the customer in 100% of cases (see "*Poor Quality Communication with Customers*") below.

Information collection failures

- 4.51. 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. As HDIFA's Principal, it was FSML, under the oversight of Mr Fenech, that was responsible for ensuring that these steps were taken.
- 4.52. 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 HDIFA 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

- 4.53. 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.
- 4.54. 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.

- 4.55. 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, HDIFA was not in a position to assess how reliant the customer would be on the income from the Proposed Arrangement in retirement.
- 4.56. 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 HDIFA 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, HDIFA 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.
- 4.57. HDIFA 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 HDIFA 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

- 4.58. 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, HDIFA was unable to assess the extent to which the customer was reliant on income from their Defined Benefit Pension during retirement.

- 4.59. 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, HDIFA was not in a position to determine the level of reliance on the DBPS or to evaluate whether these potential resources could be used to achieve specific customer objectives.

Unsuitable Pension Transfer advice

- 4.60. The overarching suitability requirement, as set out in 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.
- 4.61. 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.
- 4.62. 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 HDIFA'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

- 4.63. 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 the 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.

- 4.64. HDIFA'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 HDIFA 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.
- 4.65. Customer D, for example, was 60 and married at the time that they received advice from HDIFA. 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:
- a) 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).
 - b) HDIFA 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.
 - c) 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

- 4.66. HDIFA 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, HDIFA 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 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.
- 4.67. 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)).
- 4.68. 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'.
- 4.69. 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 specific 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.
- 4.70. Further, the customer indicated in the pension review questionnaire that they would prefer death benefits in the form of a lump sum, however, HDIFA did not explore the option of providing 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

- 4.71. 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.
- 4.72. 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:
- a) 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 income needs during retirement;
 - b) HDIFA recommended transferring out of the Ceding Arrangement when there was strong reliance on the income payable from the Defined Benefit Pension Scheme;
 - c) no sustainability assessment was completed showing how the customer’s lifestyle could be affected by transferring, or how crystallising some of the benefits in an unplanned way might impact the funds over time. HDIFA therefore did not demonstrate that the customer could bear the risk of a Pension Transfer; and
 - d) 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

- 4.73. 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. As Principal, FSML failed to ensure that HDIFA, as its Appointed Representative, complied with the rules in COBS 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 4.74 to 4.77 below.

Suitability Report Failings

- 4.74. 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 used by HDIFA and 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.
- 4.75. HDIFA was then obliged to provide each of its Pension Transfer advice customers with a Suitability Report. The Suitability Report was prepared for HDIFA by HDC Limited. HDIFA was obliged to set out in the report, as a minimum, the customer's demands and needs; why it 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 the adviser's Personal Recommendation and the reasons supporting it. As HDIFA was FSML's Appointed Representative, it was Mr Fenech's responsibility to oversee and ensure HDIFA's compliance with these obligations.
- 4.76. 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.

- 4.77. The effect of these failings was exacerbated where the Suitability Report did not engage in a meaningful assessment of the alternatives to transfer, or explain why 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 HDIFA failed to explain why the recommendation was suitable (COBS 9.4.7R(2)).

Provision of a backdated Appointed Representative agreement to the Authority

- 4.78. 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.
- 4.79. 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 and several months after the Authority's initial review of FSML's business in January 2017.
- 4.80. 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 he had sent to her, 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:

"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."

- 4.81. Mr Fenech made the changes to the agreement that were suggested by Ms Dunne. At interview he said that he made the changes due to the pressure he was under at the time in having to send an agreement to the Authority. Mr Fenech stated that he panicked and made a poor judgement.
- 4.82. Mr Fenech subsequently clarified the position almost a year later when, on 22 May 2018, in response to a further information request from the Authority, he again provided the Authority with a copy of the Appointed Representative agreement, but this time stated: *"Please find enclosed a copy of the Appointed Representative agreement confirming the terms of the contract between Financial Solutions Midhurst Limited ("FSML") and HDIFA since 30.08.12 which was signed on 20.06.17 and provided to FCA Supervision on 22.06.17."* The Authority considers that the email exchange between Mr Fenech and Ms Dunne (referred to at paragraph 4.80) shows that the agreement was actually signed on 22 June 2017.
- 4.83. The lack of any contemporaneous written Appointed Representative agreement between FSML and HDIFA during the Relevant Period is indicative of Mr Fenech's lack of monitoring and deficiencies in his oversight of HDIFA. Without such a written agreement in place there were no clear terms of reference by which Mr Fenech and FSML could regulate and monitor the relationship and to benchmark the expectations and standards required of HDIFA as FSML's Appointed Representative.
- 4.84. Mr Fenech's actions in amending and supplying to the Authority the backdated Appointed Representative agreement in the ways set out above, were a clear attempt 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. The backdating, of itself, demonstrates his awareness of the seriousness of the failure to have in place an agreement since that date, as well as demonstrating a lack of integrity in deliberately attempting to mislead the Authority during the course of its supervisory enquiries.

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Benefit derived by Mr Fenech

- 4.85. During the Relevant Period, FSML generated £1,277,238 in revenue. £197,420 of this was derived from FSML's position as Principal to HDIFA.
- 4.86. During the Relevant Period, Mr Fenech received £455,446 by way of dividends and drawings from FSML.

5. FAILINGS

- 5.1. The regulatory provisions relevant to this Notice are referred to in Annex A.
- 5.2. Mr Fenech breached Statement of Principle 1 during the Relevant Period by failing to act with integrity in carrying out his controlled functions for the reasons set out below. Mr Fenech:
- a) recklessly permitted HDIFA to continue utilising its deficient two-adviser advice model under the responsibility of FSML. Mr Fenech was aware of the concerns raised by FSML's external compliance consultant in January 2015, and should have regarded them as red flags, as they indicated that the model was deficient because HDIFA's Pension Transfer advice failed to take into account the onward investment of customers' funds when assessing the overall suitability of the transfer. However, Mr Fenech unreasonably disregarded the concerns raised and, for over a year, took no steps to stop HDIFA from utilising its deficient two-adviser advice model. Further, even after Mr Fenech raised his own concerns with the model directly with Ms Dunne in February 2016, and stated that FSML would, with immediate effect, look at a process to review HDIFA's existing advice process, he failed to ensure that such a review was carried out and did not take any other steps to stop HDIFA from utilising the model. Mr Fenech thereby unreasonably exposed HDIFA's customers to a significant risk that their pension funds would be transferred out of their DBPS into investments which were unsuitable for them. This risk must have been obvious to Mr Fenech in light of his extensive experience as a financial adviser and his senior positions as CF10 (Compliance Oversight) and CF1 (Director) at FSML, as well as from the concerns raised with HDIFA by FSML's external compliance consultant of which he was aware; and
 - b) acted dishonestly by deliberately providing the Authority with a copy of the Appointed Representative agreement between FSML and HDIFA which he

had backdated to create the impression that the agreement had been in place since 30 August 2012, whereas it was only agreed and signed on 22 June 2017 in response to the Authority's request for a copy of the agreement.

5.3. Mr Fenech also breached Statement of Principle 7 during the Relevant Period by failing to take reasonable steps to ensure that the business of FSML, which included responsibility for the business of HDIFA, complied with the relevant requirements and standards of the regulatory system. This included failing to take reasonable steps to ensure that FSML organised and controlled its affairs responsibly and effectively, with adequate risk management systems, in accordance with Principle 3 of the Authority's Principles for Businesses, to ensure adequate oversight and monitoring of HDIFA's compliance with the relevant requirements and standards of the regulatory system. In particular, Mr Fenech failed to take reasonable steps to ensure that:

- a) FSML's Appointed Representative, HDIFA, implemented adequate checks to ensure that at the fact-finding stage of the Pension Transfer process HDIFA gathered all necessary information regarding the customer, including details of their financial situation, specific retirement objectives, and Attitude to Risk;
- b) HDIFA's Personal Recommendations met the customer's information needs and were fair, clear and not misleading; and
- c) HDIFA's Personal Recommendations explained adequately why the Pension Transfer was suitable for the customer.

5.4. In light of the matters set out at paragraphs 5.2 and 5.3 above, the Authority considers that Mr Fenech 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.

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. Mr Fenech derived direct financial benefit from the fees generated by the non-compliant Pension Transfer advice process operated by HDIFA during the Relevant Period. FSML generated revenue of £1,277,238 in the Relevant Period; £197,120 of this was derived from FSML's position as Principal to HDIFA (a ratio of 15.43%).
- 6.4. Mr Fenech received a benefit of £455,446 from FSML during the Relevant Period by way of dividends and drawings. The Authority considers that 15.43% (£70,275) of this is attributable to Mr Fenech's misconduct in relation to HDIFA's non-compliant Pension Transfer advice process during the Relevant Period.
- 6.5. The Authority has charged interest on Mr Fenech's benefit (£70,275) at 4% per year from the end of the Relevant Period to the date of this Notice, amounting to £18,271.
- 6.6. Step 1 is therefore £88,546.

Step 2: the seriousness of the breach

- 6.7. 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.
- 6.8. The period of Mr Fenech's breach, consisting of his reckless breach of Statement of Principle 1, his dishonest breach of Statement of Principle 1 and his breach of Statement of Principle 7, was from 3 January 2015 to 22 June 2017. The Authority considers Mr Fenech's relevant income for this period to be £455,446.
- 6.9. 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%

- 6.10. 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

- 6.11. DEPP 6.5B.2G(8) lists factors relating to the impact of a breach committed by an individual.
- 6.12. Mr Fenech benefitted financially from his reckless breach of Statement of Principle 1 and his breach of Statement of Principle 7 (DEPP 6.5B.2G(8)(a)).
- 6.13. Mr Fenech's reckless breach of Statement of Principle 1 and his breach of Statement of Principle 7 caused a significant risk of loss to consumers who transferred out of their Defined Benefit Pension Scheme as a result of the non-compliant advice provided by FSML's Appointed Representative, HDIFA. Completed transfers had a total CETV of £126,353,674 (DEPP 6.5B.2G(8)(b)).
- 6.14. Mr Fenech's reckless breach of Statement of Principle 1 and his breach of Statement of Principle 7 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

- 6.15. DEPP 6.5B.2G(9) lists factors relating to the nature of a breach committed by an individual.
- 6.16. Mr Fenech's reckless breach of Statement of Principle 1 and his breach of Statement of Principle 7 continued throughout the Relevant Period until FSML was required by the Authority to cease all regulated activities relating to Defined Benefit Pension Transfer business on 16 June 2017 (DEPP 6.5B.2G(9)(b)).
- 6.17. Mr Fenech is an experienced industry professional having worked in financial services since 1989, including as an IFA, a Compliance Officer and founder of FSML. He held senior management functions at FSML ((DEPP 6.5B.2G(9)(j) and (k)). As the Director and Compliance Officer at FSML, with responsibility for designing and implementing the compliance process, he had significant responsibility for the non-compliant advice given by FSML's Appointed Representative, HDIFA ((DEPP 6.5B.2G(9)(l)).
- 6.18. Mr Fenech acted dishonestly and with a lack of integrity in deliberately providing a backdated Appointed Representative Agreement to the Authority and acted recklessly throughout the Relevant Period by unreasonably permitting HDIFA to continue to operate its deficient two-adviser model despite being aware of concerns that it was non-compliant (DEPP 6.5B.2G(9)(e)).

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 Mr Fenech's breach of Statement of Principle 1 in respect of his provision of the backdated Appointed Representative agreement to the Authority was deliberate:
- a) the breach was intentional (DEPP 6.5B.2G(10)(a));
 - b) Mr Fenech provided the Authority with a backdated Appointed Representative agreement 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 Mr Fenech was influenced to commit the breach in the belief that it would be difficult to detect (DEPP 6.5B.2G(10)(f)).

6.20. The Authority also considers that Mr Fenech acted recklessly in breach of Statement of Principle 1 because he unreasonably permitted HDIFA to continue to operate its two-adviser advice model when he was aware of the risk that it was non-compliant (DEPP 6.5B.2G(11)(a)).

Level of Seriousness

6.21. 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 reckless breach of Statement of Principle 1 and the breach of Statement of Principle 7 caused a significant risk of loss to individual consumers (DEPP 6.5B.2G(12)(a));

b) Mr Fenech acted dishonestly and with a lack of integrity in deliberately providing the backdated Appointed Representative agreement to the Authority (DEPP 6.5B.2G(12)(d)); and

c) Mr Fenech acted recklessly by unreasonably permitting HDIFA to continue to operate its two-adviser advice model despite the concerns raised by FSML's external compliance consultant that it was non-compliant (DEPP 6.5B.2G(12)(g)).

6.22. 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 Mr Fenech's breach of Statement of Principle 7 was committed negligently to be relevant (DEPP 6.5.2G(13)(d)).

6.23. Taking all of these factors into account, the Authority considers the seriousness of Mr Fenech's breach to be level 5 and so the Step 2 figure is 40% of £455,446.

6.24. Step 2 is therefore £182,178.

Step 3: mitigating and aggravating factors

6.25. 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.

- 6.26. 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.
- 6.27. Step 3 is therefore £182,178.

Step 4: adjustment for deterrence

- 6.28. Pursuant to DEPP 6.5B.4G, if the Authority considers the figure arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches, then the Authority may increase the penalty.
- 6.29. The Authority considers that the Step 3 figure of £182,178 represents a sufficient deterrent to Mr Fenech and others and has therefore not increased the penalty at Step 4.
- 6.30. Step 4 is therefore £182,178.

Step 5: settlement discount

- 6.31. Pursuant to DEPP 6.5B.5G, if the Authority and the individual on whom a penalty is to be imposed agree the amount of the financial penalty and other terms, DEPP 6.7 provides that the amount of the financial penalty which might otherwise have been payable will be reduced to reflect the stage at which the Authority and the individual reached agreement. The settlement discount does not apply to the disgorgement of any benefit calculated at Step 1.
- 6.32. No settlement discount applies.
- 6.33. Step 5 is therefore £182,178. This is to be rounded down to £182,100 in accordance with the Authority's usual practice.

Penalty

- 6.34. The Authority therefore has decided to impose a total financial penalty of £270,646 (the Step 1 and Step 5 figures added together) on Mr Fenech for breaching Statement of Principle 1 and Statement of Principle 7.

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 Mr Fenech. 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 Mr Fenech 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, he 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 Mr Fenech 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 Mr Fenech whether or not set out in Annex B.

8. PROCEDURAL MATTERS

- 8.1. This Notice is given to Mr Fenech 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. Mr Fenech has the right to refer the matter to which this Notice relates to the Tribunal. Under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Mr Fenech has 28 days from the date on which this Notice is given to him to refer the matter to the Tribunal. 28 days from the date on which this Notice is given to him to refer the matter to the Tribunal. A reference to the Tribunal is made by way of a signed reference notice (Form FTC3) filed with a copy of this Notice. The Tribunal's contact details are: 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". (SUP 10A and SUP 10C.3 provide that accountable functions include controlled functions.)
9. Statement of Principle 7 states that:

"an approved person performing an accountable higher management function must take reasonable steps to ensure that the business of the firm for which they are responsible in their accountable function complies with the relevant requirements and standards of the regulatory system."
10. 'Accountable higher management functions' includes any accountable function that is an Authority controlled function that is a significant influence function. Significant influence functions include the following controlled functions: CF1 (Director), CF3 (Chief Executive), CF10 (Compliance Oversight) and CF11 (Money Laundering Reporting).
11. APER 3.3.1G states that in determining whether or not the conduct of an approved person performing an accountable higher management function complies with

Statements of Principle 5 to 7, the following are factors which, in the opinion of the Authority, are to be taken into account:

- (1) whether he exercised reasonable care when considering the information available to him;
- (2) whether he reached a reasonable conclusion which he acted on;
- (3) the nature, scale and complexity of the [APER employer's] (in place from 7 December 2020, previously "the firm's") business;
- (4) their role and responsibility as an approved person performing an accountable [significant-influence (in place until 6 March 2016)] or [higher management (in place from 7 March 2016)] function; and
- (5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.

12. APER 4.1 describes the conduct which in the opinion of the Authority does not comply with Statement of Principle 1.

13. APER 4.1.2G provides that in the opinion of the Authority, conduct of the type described in APER 4.1.3G and 4.1.4G does not comply with Statement of Principle 1.

14. APER 4.1.3G provides that deliberately misleading (or attempting to mislead) by act or omission:

[...] (3) the Authority or the PRA;

falls within APER 4.1.2G.

15. 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 Authority or the PRA;

Conduct of Business Sourcebook ("COBS")

16. 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 by HDIFA.

The client's best interest rule

17. 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

18. 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

19. 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.

20. 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.

21. 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.

22. COBS 9.2.4 R:

A firm must not encourage a client not to provide information for the purposes of its assessment of suitability.

23. COBS 9.2.5 R:

A firm is entitled to rely on the information provided by its clients unless it is aware that the information is manifestly out of date, inaccurate or incomplete.

Insufficient information

24. 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

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

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

26. 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.

27. 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

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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")

35. SUP 12.4.2R(3) (as in force during the Relevant Period) states that before a firm appoints a person as an appointed representative and on a continuing basis, that it has adequate controls over the person's regulated activities for which the firm has responsibility and resources to monitor and enforce compliance by the person with the relevant requirements applying to the regulated activities for which the firm is responsible and with which the person is required to comply under its contract with the firm.

36. SUP 12.5.5R (1) (also as in force during the Relevant Period) requires a firm to ensure that its written contract with each of its ARs complies with the requirements prescribed in regulation 3 of the AR Regulations.

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

37. 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”)

38. The Authority’s policy for exercising its power to make a prohibition order is set out in Chapter 9 of EG.
39. 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.
40. 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.
41. 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”)

42. 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 Mr Fenech, and the Authority's conclusions in respect of them (in **bold**), is set out below.

Oversight and monitoring of HDIFA

2. Mr Fenech does not accept the Authority's assertion that, in relation to his oversight of FSML's AR, HDIFA, he failed to take reasonable steps to ensure that FSML organised and controlled its affairs responsibly and effectively, in breach of Statement of Principle 7.
3. The Authority's narrow view of Mr Fenech's oversight of HDIFA lacks proper context. Mr Fenech accepts that in his capacity as CF1 and CF10 at FSML he had responsibility for the oversight of its AR's compliance with the Authority's rules. However, it is neither reasonable nor proportionate to require Mr Fenech to have reviewed every piece of advice provided by HDIFA or to have reviewed its files with the skill and experience of a PTS. Mr Fenech is not a qualified PTS and the Authority's rules did not require him to be so qualified in order for him to supervise HDIFA as FSML's AR. To assist him in providing adequate supervision of HDIFA in this regard, Mr Fenech appointed various compliance consultants prior to and throughout the Relevant Period.
4. The fact that Mr Fenech took Ms Dunne's experience into account when determining how much supervision HDIFA needed does not indicate a "hands-off approach". Experience and a solid reputation, particularly in relation to the work an AR will focus on, are highly relevant when establishing an appropriate level of supervision for that AR. When determining the level of resources required to supervise the activities of HDIFA, Mr Fenech was entitled to take into account that Ms Dunne came with good credentials as she had over 27 years of experience as a PTS and had already been authorised/approved by the Authority in excess of 40 times by the time HDIFA became an AR of FSML. Mr Fenech considers that it is unrealistic to say that his reliance on Ms Dunne's experience was misplaced.
5. **The Authority agrees that Mr Fenech was not required to review every piece of advice provided by HDIFA. However, as the sole director and CF10 of FSML, he was required to establish and maintain adequate risk management systems and policies and procedures sufficient for FSML to ensure adequate oversight and monitoring of HDIFA's compliance with the rules and requirements of the regulatory system, including compliance with the relevant Pension Transfer and suitability rules in COBS. As an individual with considerable experience in financial services, Mr Fenech must have been aware of this requirement, but he failed to take reasonable steps to comply with it. In particular, he failed to factor into FSML's systems and controls the risks to customers associated with decisions to transfer out of a DBPS.**
6. **Whilst it was acceptable for Mr Fenech to engage compliance consultants to assist him in providing adequate supervision of HDIFA, Mr Fenech, as sole director and CF10 of FSML, retained overall responsibility for the oversight of HDIFA. In any event, compliance consultants do not appear to have carried out file reviews throughout the Relevant Period, as asserted by Mr Fenech, as the only completed file reviews seen by the**

Authority are those that were commissioned by FSML after the Authority's review of its business in January 2017. When asked by the Authority to explain the lack of a compliance audit, Mr Fenech stated that this was partly because, given his knowledge of HDIFA's systems and processes, he was confident HDIFA was operating in accordance with "good regulatory principles".

7. **It was not sufficient or appropriate for Mr Fenech to rely on the experience and reputation of Ms Dunne in determining FSML's appropriate level of supervision for HDIFA. The Authority acknowledges that Ms Dunne was an experienced PTS, but Mr Fenech was still required to take reasonable steps to oversee and monitor her work to ensure it was compliant with regulatory rules and requirements, but he failed to do this.**

Customer files

8. The Authority has accepted that the advice provided was suitable in some of the customer files that it reviewed. The structural issues criticised by the Authority (such as the use of templates) do not necessarily or inevitably lead to inappropriate or unsuitable advice being given.
9. Even if the Authority's criticism is justified in relation to the few customer files and suitability assessments that it reviewed, it is not accepted that the sample size permits a proper, fair or reliable extrapolation across all customer files and all advice given during the Relevant Period. Such a small sample is not indicative of the standard of all the advice provided to customers by HDIFA during the Relevant Period.
10. Mr Fenech considered that HDIFA had a comprehensive customer information collection process in place during the Relevant Period. This entailed HDIFA having its own bespoke case management system through which every piece of correspondence was tracked and handled by a team of trained employees from HDC Limited directly overseen by Ms Dunne. These employees would liaise closely with the IFAs who referred the pensions work to ensure that all customer information was collected for the purposes of completing TVAS and other fact-finding requirements in accordance with COBS 19.1.3R and COBS 19.1.4R.
11. HDIFA's advice therefore depended on the extensive information being provided by the IFA firm in question, as HDIFA did not have any direct contact with customers. The advice process was a collaborative approach between two professional disciplines – IFA and PTS – just as still operates today in some parts of the sector.
12. As work was being referred to HDIFA by different IFA firms, the detail of customer information and the numerous differing data points provided to HDIFA varied. For this reason, it was not straightforward for HDIFA to achieve consistency across the information supplied from different IFAs. However, it is not accepted or proven that the customer information obtained was inadequate or insufficient. Once customer information had been provided, Ms Dunne would engage in further discussions with the adviser to produce a customer focused TVAS, and subsequently a Suitability Report would be prepared by HDIFA.
13. During the Relevant Period, Mr Fenech did not have concerns about the customer information being collected by HDIFA or about the Suitability Reports. He was confident that the customer information collection process was sufficient to provide an appropriate Pension Transfer service. Even if certain pieces of customer information were not totally clear or slightly ambiguous, Mr Fenech had good cause

to consider that HDIFA was providing suitable advice, given Ms Dunne's significant experience and expertise in the area of Pension Transfers.

14. If Mr Fenech had any questions in relation to any of the information contained in the customer files which were randomly selected for review, he would have direct conversations with Ms Dunne about them. Fact-finding documents on customers were fluid, and their contents were continuously improved. In particular, in 2015, Suitability Reports were being revised by HDIFA under Mr Fenech's supervision resulting in a significant change to their style and content in early 2016 to make them more customer-friendly and to ensure compliance with COBS 4.2.1R.
15. **The results of the Authority's review of the 17 customer files which were assessed for suitability were as follows: a) HDIFA failed to collect the necessary information to give Pension Transfer advice in all 17 files reviewed; b) in 12 of the 17 files, the absence of information was so significant that the Authority was unable to assess whether the advice was suitable; and c) of the remaining five files where there was sufficient information to assess suitability, HDIFA failed to provide suitable Pension Transfer advice in all five of those files.**
16. **All 17 files were therefore considered to be non-compliant with the Authority's COBS rules because HDIFA either failed to obtain the information necessary to advise the customer or the advice provided to the customer was unsuitable, and in none of the files reviewed was the advice given considered suitable.**
17. **The Authority's approach to file sampling was based on advice received from a professional statistician, who approved the sample as providing a reliable statistical base for the customer population as a whole. The Authority therefore considers it can be reasonably inferred from the prevalence of failures within the sample of customer files reviewed that HDIFA failed to act with due skill, care and diligence in giving Pension Transfer advice for a significant proportion of the customers it advised during the Relevant Period. As a result, the Authority concludes that Mr Fenech failed to take reasonable steps to ensure that HDIFA complied with the rules and requirements of the regulatory system when giving Defined Benefit Pension Transfer advice.**
18. **The Authority does not agree with Mr Fenech's assertion that HDIFA's customer information collection process was sufficient to provide appropriate Pension Transfer advice. HDIFA's information collection failings were pervasive and amounted to significantly more than 'certain pieces of information' being 'not totally clear or slightly ambiguous'. Key failings included a failure to gather details of income and expenditure in retirement and state pension entitlements, with the consequence that HDIFA was unable to assess the extent to which the customer was reliant on income from their Defined Benefit Pension during retirement. 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. The Authority therefore concludes that Mr Fenech failed to implement adequate checks to ensure that at the fact-finding stage HDIFA gathered all necessary information regarding the customer, including details of their financial situation and investment and retirement objectives. As HDIFA did not have any direct contact with the customers, the Authority considers that this demonstrates that it was overly reliant on the introducing advisers**

addressing a number of areas which the Authority considers were HDIFA's responsibility.

19. **The Authority has not seen evidence of the review of the Suitability Reports that Mr Fenech states was carried out in 2015. In any event, any review carried out, and any changes to the style and content of the Suitability Reports made in early 2016 as a result, failed to ensure HDIFA's compliance with regulatory requirements as in most of HDIFA's files reviewed by the Authority the Suitability Reports were issued at a later date.**

The two-adviser advice model

20. It is not accepted that during the Relevant Period the settled regulatory position was that the two-adviser advice model was automatically deficient. During the Relevant Period, Mr Fenech believed that the relevant regulatory requirements could be met by HDIFA's two-adviser advice model, operating under his supervision.
21. In respect of the Authority's allegation that HDIFA's advice model was deficient in that, when providing Pension Transfer advice to the customer, HDIFA did not consider the investment advice as this was provided by the IFA, Mr Fenech was able to take considerable comfort from the reputation and regulated profile of the IFAs referring their clients to HDIFA. He had no reason to believe that over-invasive supervision would be necessary where long-established reputable and regulated IFAs were advising on the end destination of funds, in collaboration with Ms Dunne as a specialist in her field.
22. **It is not the view of the Authority, and represents a misunderstanding of the Authority's position, that a two-adviser advice model was automatically deficient. However, although it was permissible for two advisers to provide advice in this way, from 1 November 2007 and throughout the Relevant Period, COBS 19.1.2R required an adviser 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, and so an adviser needed to take into account the overall investment strategy the customer was contemplating. The two-adviser advice model that Ms Dunne operated was deficient because she did not take into account the investment advice which was provided post transfer. Mr Fenech was responsible for this deficiency in his capacity as sole director and CF10 of FSML, HDIFA's Principal.**
23. **Mr Fenech was therefore misguided in taking "considerable comfort from the reputation and regulated profile of the IFAs referring their clients to HDIFA". The investment advice was provided after the Pension Transfer was completed and the funds were held in cash, but by this point the position for the customer was irrevocable with respect to their DBPS. This approach was flawed and not in accordance with the regulatory requirements in force at the time.**

Recklessness – disregarding concerns raised with HDIFA’s operation of the two-adviser advice model

24. The concerns to which the Authority alleges Mr Fenech failed to respond in relation to HDIFA’s operation of the two-adviser advice model are, to an extent, outside of the Relevant Period and are also only relevant to very specific types of unregulated products. The two alerts published by the Authority in 2013 and 2014 relate to the moving of pension monies into unregulated products. Mr Fenech insisted that, and reasonably relied on the fact that, all regulated and respected IFAs that were referring work to HDIFA advised on regulated products only. The fact that Ms Dunne’s two-adviser advice model involved regulated IFAs gave Mr Fenech even greater reassurance regarding the level of compliance within HDIFA’s business. Each different advice firm would also have its own internal compliance process to which all IFAs would have had to adhere in respect of the investment recommendations they made in relation to the transferred pensions. Mr Fenech was able to assess on a risk-based approach that this indicated that over intrusive supervision was not required.
25. Mr Fenech acknowledges that, in January 2015, some issues were raised with Ms Dunne by Mr Fenech’s external compliance consultant, following the issuing of a provisional decision by the FOS. However, the fact that Mr Fenech appointed compliance consultants at his own initiative is contrary to the Authority’s allegation that Mr Fenech disregarded red flags. Further, Mr Fenech did not consider Ms Dunne’s response to the external compliance consultant on these issues to be unreasonable. This is especially so in light of the fact that the alerts appeared to be referring to advice in relation to unregulated investments – a market which Ms Dunne did not operate in – and in light of the fact that Ms Dunne stated that she had discussed her business model with the Authority on numerous occasions and had received assurances that it was compliant.
26. Whilst noting that “*Transfer advice cannot be given in isolation*”, Mr Fenech instructed FSML’s external compliance consultant to work through the matter further with Ms Dunne. However, they received significant resistance from her. Despite Ms Dunne’s resistance in 2015, Mr Fenech continued to engage and involve compliance consultants and to seek to evolve the monitoring of HDIFA. During his first interview with the Authority, Mr Fenech refuted the Authority’s allegation that none of the file reviews or compliance visits were conducted, noting that Suitability Reports prepared by Ms Dunne were being reviewed in 2015, and that this resulted in a significant change to the style and content of the Suitability Reports in early 2016. This undermines the Authority’s assertion that enhanced monitoring was not in place, particularly as the output of HDIFA’s business underwent significant change under the supervision and at the insistence of Mr Fenech and FSML.
27. Mr Fenech disputes the Authority’s allegation that his further intervention in February 2016 was insufficient, and that the failure to complete a full compliance audit indicates that he acted recklessly with regard to the interests of HDIFA’s customers and that this conduct amounts to a breach of Statement of Principle 1 and therefore a lack of integrity. Ms Dunne remained consistent in her view throughout the Relevant Period that it was not HDIFA’s role to consider the overall investment strategy, as is evidenced by correspondence she had with the Authority in January 2017. Following this, and in accordance with FSML’s duties as HDIFA’s Principal, Mr Fenech proceeded to instruct file reviews and further monitor Ms Dunne’s conduct.

28. In *Wingate v Solicitors Regulation Authority*¹, Jackson LJ, in considering the meaning of integrity, cautioned against setting overly high standards². The Authority's view that a lack of integrity can be found by reason of a lack of diligence is a difficult one to make good. Any instance of alleged lack of competency or diligence in the performance of duties would not ordinarily fall to be considered as a matter of integrity and even assuming that it could, it would only arise in the most egregious of cases.
29. **Whilst the Authority's 2013 and 2014 alerts were issued outside of the Relevant Period, the concerns raised by FSML's external compliance consultant and the letter from Mr Fenech himself fell within the Relevant Period, and the allegation against Mr Fenech, as set out in paragraph 5.2(a) of this Notice, is that he acted recklessly by unreasonably disregarding the concerns raised by FSML's external compliance consultant. Mr Fenech is also incorrect in his submission that the 2013 and 2014 alerts related only to unregulated products; as is clear from their wording, they concerned Pension Transfer advice more generally.**
30. **Mr Fenech's reliance on his assumption that each IFA firm would have had its own internal compliance process does not negate his responsibility for ensuring that HDIFA complied with regulatory rules and requirements. Regardless of whether an IFA was reputable and had its own compliance process, Mr Fenech was still responsible for taking reasonable care to establish systems and controls at FSML to ensure HDIFA's regulatory compliance.**
31. **The Authority considers that the 3 and 4 January 2015 emails from FSML's external compliance consultant to Ms Dunne (into which Mr Fenech was copied) should have been regarded as red flags by Mr Fenech. The 3 January 2015 email included an attachment, containing the compliance consultant's comments on a presentation written by Ms Dunne which she was due to give to other IFAs regarding HDIFA's business model. In these comments, the compliance consultant noted that Ms Dunne could not give transfer advice in isolation and that she was required to consider the investment advice given. As a result, Mr Fenech was alerted to the risk that the two-adviser advice model operated by FSML's AR, HDIFA, did not comply with regulatory requirements.**
32. **In the 4 January 2015 email, the compliance consultant specifically referred to a provisional FOS decision in which the FOS had considered the 2013 and 2014 Authority alerts and had stated that advisers had a duty, as part and parcel of advising the customer on whether or not to transfer to a SIPP, to consider the proposed investment strategy.**
33. **By being copied into these two emails from the compliance consultant, Mr Fenech was aware of the risk of unsuitable advice being given as a consequence of HDIFA's deficient two-adviser advice model. As FSML was the Principal of HDIFA, it was not reasonable for Mr Fenech to disregard this risk and it was not sufficient for him to rely on the fact that he had appointed the compliance consultant. However, the Authority has not seen any evidence that Mr Fenech followed-up the concerns raised by the compliance consultant with them or, until the letter he sent over a year later in February 2016, with Ms Dunne. Further, it was not sufficient for Mr Fenech to rely on Ms Dunne's account of her conversations with the**

¹ [2018] EWCA Civ 366

² *Ibid* at paragraph 102.

Authority, as he was ultimately responsible for ensuring HDIFA's advice process was compliant, and there is no evidence that he had his own discussions with the Authority. Accordingly, the Authority has concluded that Mr Fenech acted recklessly in failing to respond appropriately to the concerns raised.

34. **Mr Fenech's submission that he reviewed the Suitability Reports prepared by Ms Dunne in 2015 and that this led to a significant change to the style and contents of the Suitability Reports in early 2016, does not address the issue of Mr Fenech recklessly failing to act upon the concerns raised that the two-adviser advice model operated by Ms Dunne was deficient. In addition, the Authority has seen no evidence that he carried out such a review. Further, the only completed file reviews seen by the Authority are those commissioned by FSML after the Authority's initial review in January 2017.**
35. **FSML's letter to Ms Dunne dated 26 February 2016, written by Mr Fenech, regarding her operation of her two-adviser advice model, demonstrates that Mr Fenech was himself aware of the risks of HDIFA's business model, as well as the concerns he held about these risks. In particular, Mr Fenech highlighted to Ms Dunne that he was mindful that HDIFA did not provide the ultimate investment recommendation to the end retail client and that only on completion of the Pension Transfer is the client referred back to the IFA for investment advice. Mr Fenech also stated to her that the Authority had made it absolutely clear that FSML and HDIFA had a duty of care to ensure that the ultimate investment was suitable for the client and formed part of the overall transfer advice process. The Authority considers that, in light of this awareness, Mr Fenech's inaction following the letter was unreasonable, and further demonstrates that his conduct was reckless.**
36. **With reference to *Wingate*, the Authority is of the view that recklessly permitting HDIFA to continue to utilise its deficient two-adviser advice model despite the concerns raised by FSML's external compliance consultant falls squarely within the 'broader concept' of integrity. The Authority therefore does not accept that it has applied overly high standards in taking action against Mr Fenech in this regard. Furthermore, it is the Authority's case that Mr Fenech acted recklessly, rather than merely with a lack of diligence, in this regard.**

Impact on customers

37. Whilst Mr Fenech acknowledges that there is now a regulatory presumption that a transfer out of a Defined Benefit Pension Scheme is unsuitable, that was not necessarily the case in the Relevant Period in the proper context of HDIFA's business. During the Relevant Period, customers were referred to HDIFA through their IFAs. In Ms Dunne's view, as stated in her interview, HDIFA's clients were the IFAs themselves, rather than the end customers, and there had been appropriate consideration of the possible suitability of a transfer long before the referral to HDIFA.
38. The fact that reputable IFAs had identified particular clients as suitable for Pension Transfers prior to referring them to HDIFA forms part of the contemporary evidence required to demonstrate that the transfer is in the best interest of customers as per COBS 19.1.6G.

39. The figures used by the Authority (see paragraph 2.13 of this Notice) to illustrate the transfers made as a proportion of the referrals made to HDIFA do not take into account that these customers had already been identified by these regulated IFAs as likely to be suitable for a Pension Transfer. This lack of context suggests a greater potential for harm to consumers than was the case in reality. This large number of IFAs (at least 110) had their own governance process and compliance expertise and could have raised their own concerns with Ms Dunne about the potential impact of HDIFA's business model on the customers, but, to Mr Fenech's knowledge, they did not do so. Mr Fenech was entitled to take significant comfort from this.
40. The statement by the Authority (see paragraph 2.15 of this Notice) that the FSCS upheld a number of Pension Transfer claims in relation to HDIFA provides limited evidence of consumer harm, confined to isolated cases. Many of these claims either pre-date the Relevant Period and/or HDIFA's appointment as an AR of FSML or are based on administrative issues arising from the Authority's suspension of FSML's permissions in 2017. Although the Authority notes that during the Relevant Period HDIFA provided Pension Transfer advice to 354 customers, it fails to acknowledge that the vast majority of these customers have suffered no demonstrable harm and indeed are likely to have experienced a benefit from the services provided. The FSCS's findings in this limited number of cases cannot be extrapolated to indicate consumer harm across the Relevant Period and across all of HDIFA's customers.
41. **COBS 19.1.6G, which has been in effect since 2007 and applied throughout the Relevant Period, sets out that: "a firm should start by assuming that a transfer, conversion or opt-out from a Defined Benefit Pension Scheme will not be suitable." Accordingly, Mr Fenech is incorrect to assert that it was not necessarily the case in the Relevant Period that there was a regulatory presumption that a transfer out of a Defined Benefit Pension Scheme is unsuitable. Additionally, as the CF1 and CF10 of FSML, it was Mr Fenech's responsibility to take reasonable steps to ensure that HDIFA both understood and complied with the relevant regulatory requirements when providing Pension Transfer advice.**
42. **The Authority also does not agree that HDIFA's clients were the IFAs and not the end customers. Ms Dunne was the qualified PTS, not the IFAs, and it was her responsibility to determine the suitability, or otherwise, of a Pension Transfer in providing Pension Transfer advice to her end customer. She could not rely on any prior assessment made by the IFAs and needed to reach her own conclusions on suitability. As set out above, it was Mr Fenech's responsibility to take reasonable steps to ensure that HDIFA and Ms Dunne complied with their obligations in this regard.**
43. **The fact that regulated IFAs referred customers to HDIFA and did not raise any concerns about HDIFA's business model, does not mean it was reasonable for her to advise customers to transfer. Notwithstanding the presumption that a transfer will generally not be suitable, Ms Dunne advised a significant proportion (327 out of 354) of her customers to complete a Pension Transfer. Ms Dunne's website stated that she looked "for a reason to transfer, rather than a reason not to" which is a statement that clearly goes against that presumption. Given this, and the prevalence of failures within the sample of customer files reviewed, the Authority does not consider that the figures stated at paragraph 2.13 of this Notice overstate the potential for harm to consumers as claimed by Mr Fenech.**

44. **The Authority does not accept that the claims upheld by the FSCS provide limited evidence of consumer harm. The FSCS has so far upheld 10 claims against FSML, nine of them concerning the suitability of Defined Benefit Pension Transfer advice provided by HDIFA during the Relevant Period. Although £759,377 represents the total compensation paid by the FSCS, subject to its limits, the FSCS calculated that those 10 customers had total, unabated losses of £1,931,560. The Authority therefore maintains its view that the findings of the FSCS demonstrate clear evidence of crystallised consumer loss arising from the advice provided by HDIFA under the responsibility of FSML (and therefore Mr Fenech).**

Backdated Appointed Representative agreement

45. Mr Fenech disputes the allegation that he acted dishonestly and without integrity in breach of Statement of Principle 1, by seeking to create a false impression that an AR agreement between FSML and HDIFA, which was finalised on 20 June 2017, had been in place from 30 August 2012, the date when HDIFA was appointed as FSML's AR. During his second interview with the Authority, Mr Fenech explained how the basis of the working relationship between Ms Dunne and Mr Fenech was *"implied based on the way that we had been working together; the discussions that we had; and the agreements that we had, that we confirmed in writing"*.
46. As Mr Fenech told the Authority during the second interview, when the agreement was sent to the Authority in June 2017, he made it clear that it had been dated in 2017. The fact that Mr Fenech in later correspondence referred to the AR agreement as having been signed on 20 June 2017 is also inconsistent with the Authority's characterisation of Mr Fenech's behaviour in relation to the AR agreement as dishonest.
47. The circumstances in which the AR agreement was provided do not, as the Authority alleges, demonstrate Mr Fenech's awareness of the seriousness of the failure to have an AR agreement in place since 30 August 2012. As Mr Fenech accepted during his second interview, he made certain changes to the agreement at the request of Ms Dunne and did so to *"get it completed and have it signed"* as he was under duress and pressure and panicked due to the request from the Authority. He was also abroad dealing with significant personal matters at that time.
48. Mr Fenech did not leave the Authority with a misleading impression, having positively disclosed in 2017 that this was not a contemporaneous document but rather one which records the agreement which FSML and HDIFA had acted in accordance with since 2012. Providing the AR agreement to the Authority, in the circumstances outlined above, does not indicate a calculated deliberate course of action as alleged by the Authority.
49. **SUP 12.4.2R (in force throughout the Relevant Period) states that before a firm appoints an AR it must establish on reasonable grounds (and on a continuing basis) that the firm has adequate controls over the AR's regulated activities for which the firm has responsibility, and has adequate resources to monitor and enforce compliance by the AR with the relevant requirements applying to the regulated activities for which the firm is responsible, and with which the AR is required to comply under its contract with the firm.**

50. **SUP 12.5.5R(1) sets out that a Principal must ensure that its written contract with each of its ARs complies with the requirements prescribed by Regulation 3 of the AR Regulations. The detailed requirements of Regulation 3 of the AR Regulations mean that an undocumented agreement would not suffice to meet regulatory requirements. Given his considerable experience in financial services, Mr Fenech knew that a written agreement was required to be in place between HDIFA and FSML. However, when HDIFA was appointed as FSML's AR in August 2012, a written AR agreement was not put in place and that remained the position when the Authority asked FSML for a copy of the AR agreement in June 2017.**
51. **In response to the Authority's request, Mr Fenech provided the Authority, on 22 June 2017, with a signed copy of an AR agreement between FSML and HDIFA, which was dated 30 August 2012, without explaining that it had been backdated. The Authority considers this was a clear and deliberate attempt by Mr Fenech to mislead the Authority into believing that a formal signed AR agreement had been in place between FSML and HDIFA since 30 August 2012.**
52. **The email exchange between Mr Fenech and Ms Dunne on 22 June 2017, before the AR agreement was finalised, signed and provided to the Authority, supports that conclusion. Ms Dunne suggested amendments to the draft agreement that Mr Fenech had sent her, and her rationale for doing so was that it was *"abundantly clear it's a document produced after the event."* She then added *"which is the last thing you want to do"*, thereby revealing the motive behind the backdating, which was to conceal the fact that a written AR agreement had not been in place from the date HDIFA had been appointed as an AR on 30 August 2012. Mr Fenech was aware of this, yet made the proposed amendments and provided the backdated AR agreement to the Authority without informing the Authority that it had in fact been finalised and signed that day.**
53. **The Authority does not accept Mr Fenech's submissions that he did not leave the Authority with a misleading impression and that the full circumstances do not indicate a calculated, deliberate course of action. In email correspondence with the Authority on 22 June 2017, Mr Fenech merely stated: *"Please find attached a copy of the current agreement, which is due to be revised extensively as discussed"*. He did not state or clarify that the document purported to record the agreement which the parties had acted in accordance with since 2012. Neither did he make it clear when he sent it to the Authority on 22 June 2017, that it had not been signed until then.**
54. **The first time Mr Fenech disclosed to the Authority that the AR agreement had actually been signed in June 2017 was on 22 May 2018, in an Annex to his response to an information requirement sent to him by the Authority on 1 May 2018. In the Authority's view, this disclosure by Mr Fenech, almost a year later, does not alter its conclusion that Mr Fenech deliberately misled the Authority when he sent a copy of the backdated AR agreement to it in June 2017 and that, in doing so, Mr Fenech acted dishonestly and with a lack of integrity. In addition, the Authority notes Mr Fenech's submissions that, when he amended and signed the backdated AR agreement, he was under duress and pressure and panicked, and that he was dealing with significant personal matters at the time, but does not consider that these provide an excuse for Mr Fenech's actions.**

Financial Penalty

55. The Authority's calculation of the disgorgement figure is incorrect. The Authority has applied the percentage of FSML's revenue during the Relevant Period that it states was derived from FSML's position as Principal of HDIFA and then applied this percentage to Mr Fenech's entire drawings and income from FSML during the Relevant Period. However, the dividends and drawings taken by Mr Fenech from FSML during the Relevant Period reflect income generated from Mr Fenech's own successful, legitimate IFA business, not from HDIFA's activities. At no point during, before or after the Relevant Period was Mr Fenech generating a significant profit by reason of his role as Principal of HDIFA. Instead, FSML was ultimately subsidising HDIFA, or at most breaking even from the relationship. The Authority's calculation of the percentage of Mr Fenech's income from FSML during the Relevant Period fails to distinguish between the business costs of FSML's activities and HDIFA's income. The Authority's disgorgement calculation is therefore disproportionate and does not reflect any financial benefit received by Mr Fenech, which in relation to HDIFA was negligible.
56. In addition, the imposition of the proposed financial penalty would cause exceptional hardship to Mr Fenech. The liquidation of FSML is now complete, and Mr Fenech has not worked in the financial services sector since 2017, resulting in a complete loss of livelihood.
57. The proposed financial penalty in this case is also inconsistent with the financial penalty imposed in the matter of *Alistair Rae Burns v FCA*³. Mr Burns was responsible for wholly unsuitable advice relating to the transfer of pension funds into inherently risky overseas property investments. Mr Burns was also found to have a significant financial interest in the outcome of the unsuitable advice given to customers. The financial penalty in that case was initially calculated at a value of £233,600 but was ultimately reduced by the Tribunal to £60,000.
58. The proposed financial penalty is inconsistent with and well in excess of that imposed upon Mr Burns in circumstances when Ms Dunne (as Mr Fenech's AR) was advising on the transfer of funds into mostly regulated investments. The AR arrangement was not one which directly benefitted Mr Fenech nor one in which he had any improper financial interest. Accordingly, the proposed level of financial penalty is entirely disproportionate to the alleged misconduct.
59. **The Authority considers that Mr Fenech derived direct financial benefit from the fees generated by the non-compliant Pension Transfer advice process operated by HDIFA during the Relevant Period. Mr Fenech received a benefit of £455,446 from FSML during the Relevant Period by way of dividends and drawings and the Authority considers that 15.43% (£70,275) of this is attributable to Mr Fenech's misconduct in relation to HDIFA's non-compliant Pension Transfer advice process during the Relevant Period.**
60. **The Authority accepts that disgorgement is subject to direct costs/commissions which are directly referable to the monies directly derived from the breach. However, general business overheads which are not directly referable to the non-compliant business line are not deductible from the disgorgement sum as a matter of course⁴. The Authority does not consider that there is sufficient evidence to demonstrate that the**

³ *Alistair Rae Burns v The Financial Conduct Authority* [2018] UKUT 246 (TCC)

⁴ *The Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch) at [221].

business costs referred to by Mr Fenech are anything more than general business overheads. The Authority therefore considers that the disgorgement figure has been correctly calculated and is proportionate.

61. **The Authority's penalty policy provides at DEPP 6.5D.1G(2) that, where an individual claims that payment of the proposed penalty will cause them serious financial hardship, the Authority will consider whether to reduce the proposed penalty only if: (a) the individual provides verifiable evidence that payment of the penalty will cause them serious financial hardship; and (b) the individual provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by the Authority about their financial position. Further, DEPP 6.5D.1G(3) provides that the onus is on the individual to satisfy the Authority that payment of the penalty will cause them serious financial hardship. In this case, Mr Fenech has not provided the Authority with verifiable evidence that payment of the financial penalty would cause him serious financial hardship. Accordingly, the Authority has not reduced the financial penalty.**
62. **Mr Fenech's argument for a lesser penalty by comparing the proposed penalty with the penalty imposed in the case of *Burns* is not a valid comparison. The calculation of the penalty in any case turns on the specific facts and financial position of the subject in that case. Further, the reason the Tribunal reduced the penalty from £233,600 to £60,000 was because it concluded that the Authority was time-barred from taking action in relation to Mr Burns' failure to take reasonable steps to ensure that his firm's advice process complied with relevant regulatory requirements. As a result, a penalty was only imposed in respect of Mr Burns' conflict of interest failings.**

Limitation

Breach of Statement of Principle 1: reckless disregard of concerns raised by the external compliance consultant

63. Mr Fenech does not accept the Authority's assertion that the earliest date on which the Authority could have been aware of this alleged breach by Mr Fenech of Statement of Principle 1, or had information from which it could have been inferred, was 2 October 2020. By this date, Mr Fenech had been under investigation by the Authority's Enforcement and Supervision departments for almost three years. Mr Fenech was also subject to enquiries from the Authority's Authorisations department during 2019, so the Authority was fully aware of Mr Fenech's business and HDIFA's operations. The Authority was also aware of Ms Dunne's business model and was aware that Mr Fenech was acting as HDIFA's Principal.
64. In addition, the limitation period started before 2 October 2020 because the Authority was aware of both its 2013 and 2014 alerts and HDIFA's business model, which the Authority claims was contrary to those alerts, much earlier than that date.
65. **This particular misconduct concerns Mr Fenech's reckless response to the concerns raised by the external compliance consultant in January 2015, by unreasonably permitting HDIFA to continue to operate its deficient two-adviser advice model after he was aware that the compliance consultant considered it did not comply with regulatory requirements,**

including after he himself raised such concerns in February 2016. The Authority considers the limitation period in respect of this particular misconduct commenced on 1 October 2020 (not 2 October 2020 as Mr Fenech submits), which is the date when the Authority received a response from Mr Fenech to an information requirement it had sent to FSML on 18 September 2020 which enclosed copies of the January 2015 and February 2016 correspondence.

66. **The Authority accepts that it is time-barred from taking disciplinary action in respect of Mr Fenech’s oversight of HDIFA’s deficient two-adviser advice model, because it became aware that HDIFA was operating that model in July 2015. However, Mr Fenech’s reckless breach of Statement of Principle 1, as set out in this Notice, is separate and different from that misconduct. The Authority was not aware until October 2020 of the concerns raised by the compliance consultant, and subsequently by himself, and so was not aware until then that Mr Fenech had not acted on those concerns. This conduct was reckless and involved a lack of integrity, and so was conduct of a different nature to that which the Authority accepts is time-barred.**
67. **The Authority’s allegation that Mr Fenech acted recklessly does not include an allegation that he disregarded the Authority’s alerts. Instead, this breach of Statement of Principle 1 is based upon the concerns raised by the compliance consultant, which drew attention to a provisional FOS decision which had considered the alerts. Accordingly, the limitation period in respect of this particular misconduct commences with the Authority’s awareness of the relevant emails sent by FSML’s external compliance consultant, not the existence of the alerts.**

Breach of Statement of Principle 7

68. The Authority failed to take into account key documents which would suggest that the limitation deadline in respect of this breach expired before the Warning Notice was issued, rather than being 8 March 2023 as asserted by the Authority. Following the Authority’s alert issued on 24 January 2017 titled “Advising on Pension Transfers – Our Expectation”, Ms Dunne wrote to the Authority on 25 January 2017 setting out her understanding of the regulatory requirements and providing a detailed account of her own working arrangements, with specific reference to the two-adviser advice model and her status as an authorised AR through HDIFA.
69. Mr Fenech also wrote to the Authority on 26 January 2017, setting out both FSML’s and HDIFA’s business models in relation to Defined Benefit Pension Transfers. This document made it clear that HDIFA was supervised by FSML and the terms under which the two-adviser advice model was operated by HDIFA as an AR of FSML.
70. It is therefore not reasonable for the Authority to assert that it was not aware prior to 8 March 2017 that Ms Dunne was operating a two-adviser advice model, and of her wider business practices in relation to Pension Transfer advice, and therefore of Mr Fenech’s responsibilities in relation to these.
71. **The Authority accepts that it did know before 8 March 2017 that HDIFA was operating a deficient two-adviser advice model, but does not accept that it knew about the separate file review failings which came to light during the Authority’s 2019-2020 file review and which form the basis of its conclusion that Mr Fenech breached Statement of Principle 7. In addition, the Authority could not have known of these failings from either**

Ms Dunne's letter of 25 January 2017 or Mr Fenech's letter of 26 January 2017.

- 72. The file reviews carried out in 2019-2020 revealed wide-ranging failures in respect of HDIFA's customer files, including a failure to gather necessary information at the fact-finding stage (COBS 9.2.2R); a failure to ensure that Personal Recommendations were clear, fair and not misleading (COBS 4.2.1R); and a failure to ensure that Personal Recommendations explained adequately why the Pension Transfer was suitable for the customer (COBS 9.2.1R).**
- 73. The Authority considers it became aware of these particular failings on 8 March 2017, when it received eight client files from Mr Fenech. Accordingly, the Authority considers the limitation date to be 8 March 2023 in respect of this particular misconduct.**