
FINAL NOTICE

To: **Berkeley Jacobs Financial Services Limited**

Of: **Berkeley Jacobs House
Laser Quay
Culpeper Close
Rochester
Kent
ME2 4HU**

Date: **11 February 2004**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you final notice about a requirement to pay a financial penalty:

1. THE PENALTY

1.1. The FSA gave you a decision notice on 4 February 2004 which notified you that pursuant to section 206 of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty of £175,000 on Berkeley Jacobs Financial Services Limited ("Berkeley Jacobs") in respect of breaches of the following Rules of the Personal Investment Authority ("PIA"), including Adopted FIMBRA Rules, and of the FSA:

- until 1 December 2001 ("N2"), PIA Rules 4.1 and 7.1.2 and Adopted FIMBRA Rules F18.3(3), F18.7(1)(c), F29.4.1(1), F29.5.1 and F29.8.5(1); and
- from N2, Rules 3.8.4, 3.8.8, 5.2.5, 5.3.5, 5.3.9 and 8.1.3 in the part of the FSA's Handbook entitled *Conduct of Business* ("COB") and Rules 3.1.1 and 3.2.6 in the part of the FSA's Handbook entitled *Senior Management arrangements, Systems and Controls* ("SYSC").

- 1.2. Berkeley Jacobs has confirmed it will not be referring the matter to the Financial Services and Markets Tribunal.
- 1.3. Accordingly, for the reasons listed below and having agreed with Berkeley Jacobs the facts and matters relied upon, the FSA imposes a financial penalty of £175,000 on Berkeley Jacobs (“the Penalty”).

2. RELEVANT STATUTORY PROVISIONS AND REGULATORY RULES

- 2.1. Section 206 of the Act provides:

“If the Authority considers that an authorised person has contravened a requirement imposed on him by or under this Act, it may impose on him a penalty, in respect of the contravention, of such amount as it considers appropriate.”

- 2.2. The Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Civil Remedies, Discipline, Criminal Offences etc) (No2) Order 2001 provides, at Article 8(2), that the power conferred by Section 206 of the Act can be exercised by the FSA in respect of failures by a firm to comply with any of the provisions specified in Rules 1.3.1(6) of the PIA Rules as if the firm had contravened a requirement imposed by the Act.
- 2.3. PIA Rule 1.3.1(6) provided that a PIA Member which failed to comply with PIA Rule 1.3.1(2) was liable to disciplinary action.
- 2.4. PIA Rule 1.3.1(2) provided that a PIA Member had to obey the PIA Rules, which included the FIMBRA Rules.
- 2.5. PIA Rule 4.1 provided that anything said or written, or any document sent, given or shown, to an investor or potential investor in the course of its relevant business must be clear and fair, and not misleading, either in design or content.
- 2.6. PIA Rule 7.1.2 provided that a PIA Member must establish procedures with a view to ensuring that its investment staff and other employees and its appointed representatives and their employees carried out their functions in such a way that the firm complied at all times with the PIA Rules; and it must keep those procedures under review and revise them as appropriate from time to time.
- 2.7. Adopted FIMBRA Rule F18.3(3) provided that a firm must be able to show that there were good grounds for believing each advertisement to be fair and not misleading.
- 2.8. Adopted FIMBRA Rule F18.7(1) provided that advertisements must be presented in a way that was likely to be understood by the persons to whom it was addressed, described clearly the investment or investment service to which it related, and disclosed fairly the risks involved.
- 2.9. Adopted FIMBRA Rule F29.4.1(1) provided that, before performing any service for a client, a firm must obtain and record the personal and financial information necessary to make appropriate recommendations.

- 2.10. Adopted FIMBRA Rule F29.5.1 provided that a firm might recommend a specific investment or investment agreement to a client only if the firm had good grounds for believing it to be suitable for him in the light of the information he had given the firm and of any relevant facts about him of which the firm was, or ought to have been, aware.
- 2.11. Adopted FIMBRA Rule F29.8.5(1) provided that, where a firm was recommending a client to buy a life policy or, in respect of all or part of an existing life policy, to sell, convert, cancel or surrender it, the information provided under Adopted FIMBRA Rule F29.8.1(1) must include an explanation of the reasons why the firm believed the transaction to be suitable for the client having regard to his financial and other circumstances.
- 2.12. COB Rule 3.8.4 provides that non-real time financial promotions must be clear, fair and not misleading and that a firm must be able to show that it has taken reasonable steps to ensure that a non real-time financial promotion is clear, fair and not misleading.
- 2.13. COB Rule 3.8.8 provides that a specific non-real time financial promotion must include a fair and adequate description of the risks involved.
- 2.14. COB Rule 5.2.5 provides that, before a firm gives a personal recommendation concerning a designated investment to a private customer, or acts as an investment manager for a private customer, it must take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm has agreed to provide.
- 2.15. COB Rule 5.3.5 provides that a firm must take reasonable steps to ensure that it does not in the course of designated investment business make any personal recommendation to a private customer to buy or sell a designated investment or effect a discretionary transaction for a private customer, unless the recommendation or transaction is suitable for the private customer having regard to the facts disclosed by him and other relevant facts about the private customer of which the firm is, or reasonably should be, aware.
- 2.16. COB Rule 5.3.9 provides that an independent intermediary must not make a personal recommendation to a private customer to buy a packaged product if it ought reasonably to be aware of a generally available packaged product which would be more appropriate to the needs and circumstances of the private customer or a packaged product issued or operated by a connected product provider if it ought reasonably to be aware of another generally available packaged product which could satisfy the needs and circumstances of the private customer as well as the connected packaged product.
- 2.17. COB Rule 8.1.3 provides that a firm must, subject to COB Rule 8.1.6, despatch to the customer a written confirmation recording the essential details of the transaction, and must do so promptly.
- 2.18. SYSC Rule 3.1.1 provides that a firm must take reasonable care to establish and maintain such systems and controls as are appropriate to its business.

- 2.19. SYSC Rule 3.2.6 provides that a firm must take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime.

3. REASONS FOR ACTION

- 3.1. The FSA has decided to impose a financial penalty on Berkeley Jacobs in respect of breaches of the PIA Rules, including Adopted FIMBRA Rules, and of the FSA Rules specified in paragraph 1.1 that occurred between December 2000 and June 2003 ("the relevant period") and arose in respect of the following failures on the part of Berkeley Jacobs:

- failure to issue financial promotions that were fair, clear and not misleading;
- failure to gather sufficient information about customers;
- failure to make suitable recommendations;
- failure to issue suitability reports that gave customers adequate and fair information about the recommended transactions; and
- failure of compliance oversight.

- 3.2. Berkeley Jacobs only transacted one type of business, the early vesting of pension benefits during the period in question. However, the process by which that business was achieved was fundamentally flawed and unfair to customers. Misleading and unbalanced advertising was aggravated by a "production line" approach to selling that was overly concerned with releasing cash without balancing this against the inherent risks of early vesting.

- 3.3. The process also involved the transfer of benefits to other pension contracts in order to generate additional cash for the customer. The Berkeley Jacobs process did not consider whether customers' cash requirements could be achieved by simply vesting using the Open Market Option facility. Open Market Options are not subject to the level of charges applicable to those for transfers, where the charges exist to facilitate the payment of commission to the introducing intermediary. The sales process therefore undertook unnecessary transfers which resulted in an additional layer of commission being paid to Berkeley Jacobs.

- 3.4. Berkeley Jacobs also failed to pay sufficient attention to the information needs of its customers and to provide them with adequate information to make an informed decision. Vital information about the cost effectiveness of the process was contained in technical reports but Berkeley Jacobs' advisers did not draw customers' attention to their significance.

- 3.5. Berkeley Jacobs' failings are serious as they potentially affect the pension assets of some of Berkeley Jacobs' customers who would have been approaching retirement. Those customers may well be vulnerable because they do not have sufficient time to make up shortfalls caused by Berkeley Jacobs' non-compliant advice. Early vesting can have seriously detrimental effects to over 50's as their retirement income can be substantially reduced because underlying investment funds have less time to grow with the risk that resultant annuity rates may be materially lower than they could be at normal retirement.
- 3.6. The failings were further aggravated by the lack of adequate compliance controls that should have identified the serious breaches within Berkeley Jacobs' advertising and sales processes.
- 3.7. The failings therefore merit a significant penalty, in that they did not represent isolated incidents, but went to the heart of Berkeley Jacobs' sales process.
- 3.8. In fixing the amount of the penalty, however, the FSA has also had regard to the continuing programme of remedial action Berkeley Jacobs has agreed with the FSA that should, among other things, identify and compensate all customers who may have been affected by its failings. Nevertheless, while recognising the steps taken by Berkeley Jacobs to remedy the problems and its on-going commitment to resolve the issues arising, the FSA notes that this co-operation only occurred once the FSA's actions became fully known to the senior management and Board of the parent company of Berkeley Jacobs, IFG Group plc ("IFG"), the parent company of Berkeley Jacobs, and has been largely in response to the FSA's actions and instigation.
- 3.9. The FSA has further had regard to the limited resources it has been informed are available to Berkeley Jacobs. In this respect the FSA is also mindful that its paramount consideration is to protect the interests of consumers and that the penalty should not therefore be such as might risk jeopardising Berkeley Jacob's ability to complete effectively the programme of remedial action to which it is committed and leaving outstanding liabilities to fall on the Financial Services Compensation Scheme.
- 3.10. In all the circumstances the FSA has concluded that a penalty of £175,000 is appropriate. Were it not for the matters referred to in paragraphs 3.8 and 3.9, the penalty imposed would have been substantially higher.

4. BACKGROUND

- 4.1. Berkeley Jacobs is an Independent Financial Adviser and was incorporated on 28 October 1992. Berkeley Jacobs became authorised by the Financial Intermediaries, Managers and Brokers Regulatory Association ("FIMBRA") on 12 February 1993. Subsequently, Berkeley Jacobs became authorised by PIA on 27 January 1997 and remained authorised by PIA until the FSA assumed responsibility for it at N2.
- 4.2. Berkeley Jacobs was acquired from its founder directors/shareholders by IFG in September 2000. Under the terms of the acquisition contract, the founder directors remained in Berkeley Jacobs and continued to run it until September 2003, when they ceased to have any involvement in its management. IFG is a quoted company, with a primary listing in Dublin and a secondary listing on the London Stock Exchange.

- 4.3. Berkeley Jacobs specialises in advising customers on early vesting, i.e. taking pension benefits early.

Discovery of the issues

- 4.4. A focused visit to Berkeley Jacobs was conducted between 5 and 8 August 2002 looking at business resulting from its television advertising campaigns. Berkeley Jacobs was given the results of the visit in a letter dated 21 October 2002. The findings identified serious concerns and numerous rule breaches in relation to systems and controls and selling practices. The visit findings included concerns about Berkeley Jacobs's business model, systems and controls, annuity providers, selling practices, suitability, suitability letters, and switching. Berkeley Jacobs' written response did not accept the concerns raised in the report or the need to carry out the corrective action required.

Remedial action

- 4.5. Once the parent company became fully aware of the extent of the problems at Berkeley Jacobs it appointed an IFG Executive Director as Managing Director and Berkeley Jacobs has since taken positive and proactive steps to resolve the issues identified. These have included:
- undertaking a review of all advertising and financial promotions to ensure that its advertising strategy complied with the FSA's requirements;
 - the appointment of external consultants to review all sales and compliance procedures and to make recommendations for changes, where appropriate;
 - ceasing writing new early vesting business until the appropriate changes to its new business procedures were implemented;
 - undertaking the retraining of its advisers;
 - installing recording equipment in order to monitor the advice given to its customers;
 - the recruitment of additional compliance resource; and
 - undertaking a past business review.

5. CONTRAVENTION OF RELEVANT REGULATORY REQUIREMENTS

- 5.1. The penalty is to be imposed pursuant to Section 206 of the Act in respect of breaches of the PIA Rules, including Adopted FIMBRA Rules, and of the FSA Rules, details of which Rules and breaches are set out below:

(1) Failure to issue financial promotions that are fair, clear and not misleading

- 5.2. Berkeley Jacobs was required to approve only advertisements that provided customers with adequate information and where the information in the advertisement was fair, clear and not misleading by virtue of Adopted FIMBRA Rules F18.3(3) and F18.7(1) and PIA Rule 4.1 until N2 and COB Rules 3.8.4 and 3.8.8 from N2. Berkeley Jacobs failed to do so.

Facts and Matters Relied On

- 5.3. The PIA and FSA Rules required Berkeley Jacobs to ensure that it approved only advertisements and financial promotions that were fair, clear and not misleading, that should have explained adequately the risks involved without unfairly accentuating the benefits.

Newspapers and other written media

- 5.4. “*The key to unlock your pension*” was a series of ten newspaper advertisements that were approved between April 2000 and March 2001. None of the advertisements contained a risk warning that early vesting would reduce income in retirement and may not be suitable for everyone.
- 5.5. An advertisement broadcast on teletext was signed off as approved on 26 July 2000. It stated:

“Are you approaching retirement and

Confused about pension options?

Want advice on the alternatives?

Worried about annuity rates?

Maybe don't even know what an annuity rate is?

Make the most of your pension fund with FREE independent advice from Berkeley Jacobs....”

- 5.6. The advertisement stated that advice on alternatives (to early vesting) was available. That was misleading as Berkeley Jacobs provided only one service, advice on the early vesting of pension funds.
- 5.7. Three different mailshots were approved on 15 June 2000, 5 September 2000 and 29 January 2001. The mailshots portrayed Berkeley Jacobs as offering a range of pension services including early vesting. However, none of these advertisements contained a risk warning that early vesting would reduce income in retirement and that it is not suitable for everyone.
- 5.8. Two further mailshots featuring a man and dog in a car and outside a house were signed off on 16 July 2001 and two further advertisements with different pictures but identical wording were signed off on 19 February 2001 and 13 December 2001. Again, there were no risk warnings that early vesting would reduce income in retirement and was not suitable for everyone.

- 5.9. On 26 November 2001 a lengthy flyer was approved. The cover described Berkeley Jacobs as “The Pension Specialists.” The front page states that a number of different services were available including pension analysis and advice (to release tax free cash) and also:

“Retirement Planning

We can review your existir (sic) pension arrangements and give unbiased and professional advice on how to achieve your long-term financial goals.”

- 5.10. This was misleading as the only service offered by Berkeley Jacobs was the release of tax-free cash and reinvestment of the remaining funds.
- 5.11. A further mailshot, signed off on 28 March 2002, had a party theme and offered a £100 Thomas Cook voucher for completing and returning a form of authority for the release of information from trustees/providers. Where customers initially expressed interest, but did not follow it up, a chasing letter was sent. The chase-up letter contained no new information. Further chasing letters, dating from January 2002, were geared at those who overspent at Christmas. None of these chasing letters contained any risk warning that early vesting would reduce pension benefits and was not suitable for everyone.
- 5.12. Ion Berkeley Jacobs ("Ion") is a division of Berkeley Jacobs set up to deal with customers whose pension funds were in excess of £150,000 and who had substantial funds remaining for investment after deduction of the tax free cash. A mailshot dated August 2002 entitled *“How can you make sure your pension fund works as hard as you do”* was aimed at consumers with larger fund sizes. It described Ion as *“a division of Berkeley Jacobs set up to deal specifically with clients who have planned sufficiently to have achieved a larger than average pension fund and now need to consider their options in a balanced, objective way.”* There was no risk warning that early vesting would reduce pension benefits and was not suitable for everyone.
- 5.13. None of Berkeley Jacobs' files or proof advertisements, mailshots or the flyer contained any rationale or the grounds on which it believed the material to be fair, clear and not misleading.

Television

- 5.14. Berkeley Jacobs advertised extensively on Sky television. Berkeley Jacobs was responsible for the approval of a series of short animated commercials that drew attention to the benefits of early vesting. These commercials included:
- (1) A pub scene, in which the main character (Baz) was covered in gold jewellery. The conversation confirmed that Baz was *“doing alright”* and then went on to explain that he had released pension benefits and in the opinion of one of the other characters *“it’s brilliant.”*
 - (2) A red sports car, in which the character Baz appeared. The conversation went on to explain that the driver of the sports car had released pension benefits and in the opinion of Baz *“that’s brilliant.”*

- (3) A holiday, where the conversation between the characters explained that they were out of money with “*a pile of bills at home.*” A fortune telling machine extolled the benefits of early vesting as well as providing a cheque with “*Tax Free Cash*” written on it. One of the characters cheered and said, “*Hurrah, did you hear that boy tax-free cash.*”
 - (4) A news and weather report that explained that early vesting could provide a tax-free lump sum and pension. A weather map was covered with pound signs that the Weather Man pointed to. A voice-over stated “*the long term forecast is brilliant.*”
 - (5) A television gameshow, where a woman in a glittery evening dress was seen throwing money while the voice-over explained that early vesting could provide a tax-free cash sum and pension and was followed by huge applause and the sound effects of winning a jackpot. Money fell over the television set and the characters on screen were seen throwing cash around. The commercial then cut to the letterbox where a cheque appeared that was payable to “*Tax Free Cash.*” The main character was seen as pleased and said “*aaaaaah great!*”
- 5.15. None of the commercials carried any form of risk warning that early vesting would reduce income in retirement and may not be suitable for everyone. Nor did the commercials give a fair and adequate description of the disadvantages of early vesting but, in contrast, encouraged the use of the tax-free lump sum for short-term benefits, such as holidays and the purchase of luxury goods. Early vesting would mean investors sacrificing future pension income for immediate short term gain, but this fact was not mentioned in any of the commercials. None of the advertisements mentioned that early vesting should only be undertaken where there was an overwhelming need and/or no other realisable assets.
- 5.16. In April 2002 the FSA issued Guidance on its future approach to Financial Promotions. Whilst it is accepted that Berkeley Jacobs advertising was neither blatantly or deliberately misleading, the company failed to make any major changes in its approach to advertising at this time.

(2) Failure to gather sufficient information about customers

- 5.17. Berkeley Jacobs was required to obtain sufficient relevant personal and financial information about its customer in order to be able to make suitable recommendations, by virtue of Adopted FIMBRA Rule F29.4.1(1) until N2 and COB Rule 5.2.5 from N2. Berkeley Jacobs failed to do so.

Facts and Matters Relied On

Information gathering from occupational schemes

- 5.18. Where customers had preserved pension benefits with an occupational scheme, one of the options available could be the early release of benefits direct from the scheme. In order to assess the amount of benefits available, Berkeley Jacobs would need to request that information from the scheme trustees. Berkeley Jacobs did not, in all cases, ascertain whether the trustees of occupational schemes were willing to offer terms for the early release of preserved benefits.

Information gathering from other sources

- 5.19. Berkeley Jacobs did not obtain information about customers' entitlement to the state pension.

Information gathering from customers

- 5.20. While Berkeley Jacobs did not have specific written procedures for the gathering of customer information, it was accepted practice by advisers to use a form designed specifically to gather customer information, the Client Profile form. None of the versions of the Client Profile form used by Berkeley Jacobs sought information about:

- the amount of income that customers thought they would need in retirement;
- the value of unencumbered life assurance contracts;
- relevant information about current pension provision, specifically where the customer was, at the time, a member of an occupational scheme.

(3) Failure to make suitable recommendations

- 5.21. Berkeley Jacobs was required to make only suitable recommendations based on the personal and financial information that it had, or ought to have had, about its customers, by virtue of Adopted FIMBRA Rule F29.5.1(1) until N2 and COB Rule 5.3.5 from N2. Berkeley Jacobs failed to do so.

Facts and Matters Relied On

Failure to gather sufficient information about customers

- 5.22. As detailed above, Berkeley Jacobs did not obtain sufficient relevant information from, either the customer, the occupational scheme/provider or The Pension Service. Without adequate information about customers' personal and financial circumstances, Berkeley Jacobs' advisers did not have sufficient information to judge whether the early release of pension benefits were suitable.

Failure to carry out a comparison of the options available to customers

5.23. Berkeley Jacobs' advisers did not carry out a comparison of the wider, non-pension options available to customers. Although, Berkeley Jacobs' advisers did enquire whether customers wished to explore alternative non-pension alternatives to releasing pension benefits, the onus was placed on the customer to determine whether that course of action was appropriate. However, a number of customers did not have the skills or knowledge to be able to a judgement about the most appropriate option. The skills and knowledge necessary to undertake a comparison of alternatives would have included:

- knowledge about the mortgage and loan market;
- how to calculate the costs of mortgages and/or loans;
- knowledge about other investments that customers have, such as, Personal Equity Plans, Instant Savings Accounts, unit trusts, savings policies, bank and building society deposits;
- knowledge about annuity rates; and
- knowledge about mortality, mortality rates and how to apply those to individual customer's circumstances.

5.24. Berkeley Jacobs' advisers ought to have had these skills and knowledge, which should have caused them to consider each different type of asset or alternative method of raising cash and compare them with the alternative of early vesting. The objective of the comparison should have been to determine which alternative was the most cost-effective method and suitable means to meet the customer's objectives. No comparisons of alternatives were undertaken by Berkeley Jacobs' advisers.

Failure to assess attitude to risk

5.25. Early release of pension benefits and the maximising of cash are transactions that contain risks. Generally, these risks are that:

- there are reduced benefits (i.e. cash and pension) as benefits are actuarially reduced and/or investment funds will not grow sufficiently to provide the benefits that would be expected at the customer's normal retirement date;
- by maximising the amount of cash taken, any resultant pension will be reduced;
- guarantees from final salary occupational schemes will be lost;
- discretionary increases from final salary schemes will be lost;
- early withdrawal penalties will be imposed;

- annuity rates will be significantly different when customers come to retirement; and
 - additional tax will be payable on the extra income, particularly where it causes the customer to become a higher rate taxpayer.
- 5.26. Berkeley Jacobs' advisers did not assess customers' attitude to risk when gathering information as Berkeley Jacobs' Client Profile form was only designed to gather information about customers' attitude to investment funds for the protected rights element of any transfer or switch that needs to remain invested. For cases where there was no protected rights element, information about customers' attitude to investment funds was not sought in a number of cases. A review by the FSA of 250 customer files showed that information about attitude to investment funds was not sought in 40 (16%) cases.
- 5.27. Customers' attitude to investment funds might be similar to their actual risk profile and could then be used as a guide as to whether customers were willing to undertake transactions that can be classified as risky. However, Berkeley Jacobs' advisers did not use information gathered about customers' attitude to investment funds to influence their recommendations. During the review of 250 cases it was identified that the investment risk level on the Client Profile form showed that:
- 19 customers (7.6%) had a risk level described as "no risk";
 - 29 customers (11.6%) had a risk level described as "cautious"; and
 - 41 customers (16.4%) had a risk level described as "low risk".
- 5.28. A total of 89 customers (35.6% of the cases reviewed) had indicated to Berkeley Jacobs' advisers that they wished to place pension funds into investments that contained little or no risk, but the advisers paid no attention to that fact when considering the suitability of the transaction as a whole.

Failure to utilise critical yield

- 5.29. For transfers from final salary occupational schemes, the FSA's Rules required Berkeley Jacobs to conduct a Transfer Analysis Report ("TVAS"). Part of the TVAS was an appraisal of the investment yield required to match the benefits available from the occupational scheme that would enable customers to understand, in simple terms, the yield required to match their existing benefits. The critical yield figure enables customers to assess whether the transaction offers good value when compared to returns expected in the investment climate at the time of the transaction. For example, expected annualised yields on pension funds should be in the region of between 5% and 9% (these are also the current limits of returns used on pension illustrations produced by regulated firms). Therefore, a critical yield in excess of the upper limit of 9% should be viewed as poor value. Of the 250 customer files reviewed by the FSA, 150 (60%) involved transfers from final salary occupational schemes where:
- 52 transactions (35%) had a critical yield in excess of 10% per annum;

- 11 transactions (7%) had a critical yield in excess of 15% per annum; and
 - 6 transactions (4%) had a critical yield in excess of 20% per annum.
- 5.30. Some of Berkeley Jacobs' advisers did not make customers aware of the significance of the critical yield figure. The advisers placed the onus for deciding whether the critical yield figure was relevant with the customer when this should have been the responsibility of the adviser. The advisers should have made the customer aware of the significance of the critical yield figure in assessing whether the early vesting transaction represented good value.

Failure to assess customers' need for income in retirement

- 5.31. Berkeley Jacobs' advisers did not obtain details about how much income customers needed, or would have liked to have in retirement, as the Client Profile form did not include a relevant question to elicit that information. Without these relevant pieces of information, Berkeley Jacobs' advisers could not determine whether customers planned to utilise their preserved benefits to provide income in retirement. This information would be significant when assessing the customer's overall retirement strategy.

Failure to prioritise competing objectives

- 5.32. The primary objective of any pension product is to provide income in retirement. When the primary objective was changed, for example, to provide a lump sum to meet a cash need, then the need for income in retirement did not disappear. Where a customer has competing objectives, the adviser should agree with the customer which of those objectives has the greater priority. The prioritisation would enable both the customer and adviser to understand which objective should be satisfied first. Berkeley Jacobs' advisers did not prioritise customers' objectives.

Failure to assess the effect on DWP/DSS benefits

- 5.33. Berkeley Jacobs' advisers did point out to customers that DWP/DSS benefits might be affected by the receipt of a cash payment and recommended that each customer should contact their particular benefits office to see if their benefits would be affected. However, Berkeley Jacobs advisers did not seek to include within their assessment of suitability whether the release of cash affected those benefits.

Failure to consider annuity options

- 5.34. Berkeley Jacobs' sales processes did not require its staff to utilise the Open Market Option facility. Berkeley Jacobs' advisers only used the three product providers that provided the overall immediate vesting facility as providers of annuities. Furthermore, Berkeley Jacobs' advisers did not consider impaired life annuity where the customer was in poor health.

(4) Failure to issue suitability reports that gave customers adequate and fair information about the recommended transactions

- 5.35. Berkeley Jacobs was required to issue suitability reports that gave customers adequate and fair information about the recommended transactions, by virtue of Adopted FIMBRA Rule F29.8.5(1) until N2 and COB Rule 8.1.3 from N2. Berkeley Jacobs failed to do so.

Facts and Matters Relied On

Breaches affecting all suitability reports where a transfer from a final salary scheme was recommended

- 5.36. Berkeley Jacobs' suitability reports did not refer to the relevant critical yield figures, although the critical yield figure was contained in the TVAS annexed to the suitability report. Suitability reports did not warn about the commercial reality of accepting Berkeley Jacobs' recommendation. This was important as customers had the option to leave the benefits within the final salary scheme if they were of the opinion that any potential benefits were unlikely to be achieved.

Breaches affecting all suitability reports

- 5.37. Within the bundle of documents that formed the suitability report was a single A4 sheet which contained in large bold type the amount of tax-free cash that was available together with (in smaller type) details of the pension also payable. However, the A4 sheet itself contained no risk warnings that early vesting would cause a reduced income in retirement. The only risk warning about reduced pensions was a general risk warning, to the effect that early vesting could cause reduced pension payments, which was made within the text of the report but in much smaller text and separate from the A4 sheet.

Breaches affecting suitability reports post-June 2002

- 5.38. The version of the suitability report that was in use after June 2002 contained the following phrase in the introductory paragraph *“In providing a service to you to release money from your deferred benefits there is no suggestion that this course of action is recommended by Berkeley Jacobs.”* This phrase was an attempt by Berkeley Jacobs to abdicate responsibility to make suitable recommendations.

(5) Failure of compliance oversight

- 5.39. Berkeley Jacobs was required to have appropriate compliance arrangements that ensured that its staff carried out their duties in such a way that it complied with the rules of the relevant regulator. This was by virtue of PIA Rule 7.1.2(1) until N2 and SYSC Rules 3.1.1 and 3.2.6 from N2. Berkeley Jacobs failed to do so.

Facts and matters relied on

Berkeley Jacobs' requirement to define objectives

- 5.40. The compliance sign-off procedure of the sales process was evidenced by the completion of a “*Certification of verification of pension transfer and opt out*” form. The certificate included a statement by the pension specialist that he had examined the recommendation and satisfied himself about “*suitability of advice to client objectives.*” However, the FSA's review of 250 customer files identified that in 39 cases (19%) there was no defined objective recorded on the Client Profile form.

Limited advice offered

- 5.41. Berkeley Jacobs' Compliance staff believed that the advisers had a limited responsibility to explain the alternatives available to the customer. However, in circumstances where the customer stated his aspiration to access preserved retirement benefits, this limited responsibility did not extend to considering or recommending a transaction other than the vesting of preserved retirement benefits. Rather, the adviser's responsibility was restricted to listing the alternatives within the suitability report in which Berkeley Jacobs recommended the release of pension funds. Compliance checking of customer files was conducted on the same basis.

Limited disclosure offered

- 5.42. Compliance staff did not, when checking the suitability report on a customer file, expect to see disclosure of the advantages and disadvantages or the consequences of using alternative methods of raising cash other than accessing preserved retirement benefits. They would only expect to see the disclosure of the consequences and disadvantages of the recommended action. In part this was because the customer would have indicated that he was open to the option of releasing money from his pension fund as a method of releasing cash.

Category of new business not signed off

- 5.43. Compliance staff did not check the recommendations made by Ion due to the level of experience and expertise within the division. This was contrary to Section 12 of the Berkeley Jacobs' Compliance Manual that required the work of all advisers to be cross checked.

Adequacy of checks applied to new business

- 5.44. The monitoring of new business failed to prevent the failure by Berkeley Jacobs' advisers to comply with one or more of the PIA Rules, including Adopted FIMBRA Rules, and the SYSC Rules in relation to:
- gathering sufficient information about customers personal and financial circumstances;
 - making suitable recommendations; and

- issuing suitability reports/reasons why letters that clearly disclosed the risks associated with accepting advisers' recommendations.
- 5.45. Berkeley Jacobs had not previously identified the problems discovered by the FSA's Supervision visit in August 2002. The associated weaknesses in Berkeley Jacobs' sales processes had not previously been identified by its compliance procedures.

6. RELEVANT GUIDANCE ON SANCTION

- 6.1. The FSA's policy on the imposition of financial penalties is set out in Chapter 13 of the Enforcement Manual that forms part of the FSA Handbook ("ENF"). The principal purpose of a financial penalty is to promote high standards of regulatory conduct by deterring firms who have breached regulatory requirements from committing further contraventions, helping to deter other firms from committing contraventions and demonstrating generally to firms the benefits of compliant behaviour.
- 6.2. In determining whether a financial penalty is appropriate, and if so its level, the FSA is required to consider all the relevant circumstances of the case. ENF 13.3.3 sets out the factors that may be of particular relevance in determining the level of a financial penalty. They are not exhaustive (ENF 13.3.4).
- 6.3. Article 8(4) of the Pre-N2 Misconduct Order provides that, where the FSA is considering the imposition of a financial penalty, it must have regard to:
- "... any statement made by the relevant recognised self-regulating organisation ... which was in force when the conduct in question took place with respect to its policy on the taking of disciplinary action and the imposition of, and amount of, penalties (whether issued as guidance, contained in the rules of that organisation or otherwise)."*
- 6.4. Relevant PIA guidance was contained in Annex D of "PIA's Approach to Discipline – Statement of Policy" (issued December 1995). In all material respects this guidance required consideration of the same factors as those identified in ENF 13. Further, this guidance made it clear that the criteria for determining the level of sanction were not to be applied rigidly. The FSA has taken this guidance into account in considering the appropriate sanction in this case.
- 6.5. The FSA considers that the following factors (which are expressed in terms of both the FSA and the equivalent PIA guidance) to be particularly relevant in this case:
- ENF 13.3.3(1): The seriousness of the misconduct or contravention*
PIA guidance: The seriousness of the breaches
- 6.6. The level of the financial penalty should be proportionate to the nature and seriousness of the contraventions. The breaches identified in this case were serious as they related to the whole business of Berkeley Jacobs and potentially affected some 5,000 customers.

ENF 13.3.3(2): The extent to which the contravention was deliberate or reckless PIA guidance: Whether the member deliberately or recklessly failed to meet PIA's requirements

- 6.7. There is no evidence that Berkeley Jacobs deliberately breached PIA's requirements or the FSA's Rules. However, its failure to adapt adequately its procedures following earlier supervision visits is an aggravating factor.

ENF 13.3.3(3): The size, financial resources and other circumstances of the firm PIA guidance: The extent to which the member's governing body or senior management was culpable. The member's ability to pay

- 6.8. Under the terms of the Share Purchase Agreement entered into by IFG in September 2000 with the founder directors/shareholders of Berkeley Jacobs, its management and day to day control was to remain with the founder directors until 2004. Although they reported to IFG's UK Financial Services CEO, the founder directors continued to run Berkeley Jacobs until September 2003 when they were removed. Since then IFG has invested substantial sums in a re-organisation of Berkeley Jacobs and has undertaken to support Berkeley Jacob's commitment to the programme of remedial action it has agreed with the FSA, including the review of all sales between December 2000 and March 2003 which should identify and compensate all customers who are entitled to redress.

ENF 13.3.3(4): The amount of profit accrued or loss avoided PIA guidance: The extent to which, as a result of the breaches, the member gained benefit or avoided loss.

- 6.9. Berkeley Jacobs' financial statements indicate that it had an aggregate turnover of some £12million in the two years ended 31 December 2002 which generated an aggregate net profit of some £4million. All of that profit related to the business which gave rise to the breaches identified. However under the terms of its acquisition of Berkeley Jacobs, IFG not only paid consideration of some £6 million but also agreed to pay a further £6 million by way of an earn out until January 2004. IFG itself did not therefore make a profit from the business which gave rise to the breaches identified and has since invested in excess of £750,000 directly in Berkeley Jacobs to rectify the business and make it compliant, thereby incurring a loss in Berkeley Jacobs for the year ended 31 December 2003 in excess of £1 million.

ENF 13.3.3(5): Conduct following the contravention PIA guidance: The firm's response once the breaches were identified

- 6.10. Berkeley Jacobs did not identify the breaches. Nor did it accept the FSA's concerns when it was first notified of them following the FSA's Supervision visit in October 2002. However, after the gravity of the matter became clear to IFG, the founder directors were removed from management of the company and an Executive Director was appointed Managing Director and Berkeley Jacobs did then take extensive and appropriate remedial action to address the concerns identified.
- 6.11. The FSA also acknowledges the extent of the investment that IFG has already put into Berkeley Jacobs to rectify the compliance issues in the company and the proposals Berkeley Jacobs has put forward to meet the requirements of the past business review.

ENF 13.3.3(6): Disciplinary record and compliance history
PIA guidance: The firm's regulatory history

- 6.12. Berkeley Jacobs has no previous disciplinary history.

ENF 13.3.3(7): Previous action taken by the FSA in relation to similar behaviour by other firms

PIA guidance: The way in which PIA has dealt with similar cases in the past

- 6.13. The FSA has not previously taken action against a firm of this type for equivalent rule breaches. The FSA and PIA have taken action against firms for mis-selling and breaches of the rules relating to suitability, and financial promotions; and these cases have been taken into consideration insofar as they contain relevant similarities.

ENF 13.3.3(8): Action taken by other regulatory authorities

- 6.14. There has been no action taken by other regulatory bodies.

7. IMPORTANT NOTICES

This Final Notice is given to Berkeley Jacobs in accordance with Section 390 of the Act.

Manner of Payment

The Penalty must be paid to the FSA in full.

Time for payment

The Penalty must be paid to the FSA no later than 24 February 2004, being not less than 14 days beginning with the date on which the Notice is given to Berkeley Jacobs.

If the Penalty is not paid

If all or any of the Penalty is outstanding on 24 February 2004, the FSA may recover the outstanding amount as a debt owed by Berkeley Jacobs and due to the FSA.

Publicity

Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Notice relates. Under these provisions, the FSA must publish such information about the matter to which this Notice relates as the FSA considers appropriate. The information may be published in such a manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to Berkeley Jacobs or prejudicial to the interests of consumers.

The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

For more information concerning this matter generally, you should contact David Bates at the FSA (direct line: 020 7066 1446 /fax: 020 7066 1447).

Julia MR Dunn
Head of Retail Selling
FSA Enforcement Division