

## complaint

Mr R's complaint is about £45,000 of his self-invested personal pension (SIPP) fund which was placed in a discretionary fund management arrangement with Horizon Stockbroking Limited (Horizon).

## background

I've considered this complaint before. I issued a provisional decision on 20 April 2018. In it I've recapped here the background to the complaint.

*Mr R is represented by Martin Aitken Financial Services Limited (MAFS). That firm advised Mr R about transferring his existing pension arrangements to a self invested personal pension (SIPP).*

*After the transfer Mr R signed an application form to open an account with Horizon. The SIPP provider forwarded the application form dated 19 March 2015. The SIPP provider's covering letter said it was to be the sole account holder as trustee But Mr R's personal details been provided for Horizon's records. Mr R's signature had been crossed through with a note saying he wasn't an authorised signatory. The form was signed on behalf of the SIPP provider 'at the direction' of Mr R.*

*The form recorded:*

- *Mr R was retired and that he had an independent financial adviser – MAFS.*
- *Mr R's financial details: annual income £23,000; his main property was valued at £150,000; he had £100,000 in the bank; and his pension funds totalled £284,000.*
- *£45,000 was to be invested with Horizon.*

*The box for a discretionary service was ticked. That said, amongst other things, that Horizon was permitted to 'enter into any kind of transaction or arrangement for your account, having regard to your financial circumstances. We will take note of what you have stipulated within this Form about your investment objectives and degree of risk and, if applicable, any limit or restriction which you may have specifically imposed as to the kind of investment or transaction which we may enter into on your behalf.'*

*Section 7 was headed 'Investment Risk and Objectives'. The 'high' risk box had been ticked. It said that all of the portfolio can be subject to increased risk and the possibility of significant fluctuation of capital value. There was potential for above average return but there was the risk of substantial loss, potentially in excess of the initial deposit. By selecting high risk the investor was agreeing to invest through a managed CFD (contracts for difference) account.*

*Additional risk warnings about CFDs were set out. A box was ticked confirming that Mr R was only investing money he could afford to lose and he understood it was a high risk speculative product. Investment objectives were recorded as income and capital growth. A ten year time frame was indicated.*

*The section headed 'Understanding and Experience' asked for details of any trades Mr R had undertaken in shares, CFDs, spread betting, foreign exchange, futures or options. 'None' had been written across all sections.*

*A list of permitted investments was enclosed with the form. It also showed prohibited investments – which included CFDs.*

*I've seen a Horizon's account suitability checklist dated 24 February 2015 (so it predates the application form). The amount to be invested was £45,000. Mr R had total net assets of £384,000 – made up of £100,000 cash plus his pension of £284,000. A net asset test was mentioned – the investment was 11% of Mr R's net assets. Against risk profile high or very high 'ok' was written. And, against trading objective, capital growth was shown.*

*The notes said that Mr R was 63 years old with an investment objection of over ten years. The investment was 16% of his pension. He had 'no experience in the markets but has indicated that he understands the product and risk associated with the product.'*

*On 26 March 2015 Horizon wrote to Mr R saying he'd been accepted for a trading account with Horizon. The account had been opened using £45,000 from Mr R's SIPP fund (which had been deposited in the account with Horizon on 23 March 2015).*

*In May 2017 MAFS wrote to Horizon making a formal complaint on Mr R's behalf. MAFS said it hadn't been involved in setting up the Horizon trading account. Although MAFs is mentioned on the application form it says it didn't advise Mr R about the Horizon account. The application form isn't on its client file. It got a copy from the SIPP operator. Mr R had said the form was completed, after he'd signed it and when he wasn't present, by someone I'll call Mr B (or possibly an associate of Mr B). Mr B's business card has been produced. It appears to show he was a representative of Horizon.*

*MAFS said, amongst other things:*

- CFDs were expressly prohibited by the SIPP provider – see its permitted investment list. Horizon had invested Mr R's fund in CFDs and other high risk investments. A large percentage of the money was lost.*
- Mr R's attitude to risk (based on the assessment MAFS had undertaken) was 5 on a scale of 1 to 10. So he was a medium risk investor defined as: 'You are willing to place emphasis on growth investments and are aware that these are liable to fluctuate in value. You can tolerate some fluctuations and volatility, but you tend to stay away from the possibility of dramatic or frequent changes.'*
- Mr B, acting as Horizon's agent in completing the form, shouldn't have recorded, at section 7, Mr R's response (to the statement I've referred to above) as 'yes'. The correct answer should have been 'no'.*
- Even if Mr B wasn't acting on Horizon's behalf there are serious doubts about the suitability of CFDs for Mr R. Information on the application form (about Mr R's income and money on deposit) was incorrect.*
- The form said Horizon would manage investments on Mr R's behalf having regard to his financial circumstances, investment objectives and degree of risk. Mr R was already retired and couldn't afford to lose a large proportion of his pension fund. And he had no investment understanding or experience.*
- Horizon had been negligent and acted in breach of its contract with Mr R. It had breached the regulator's rules (COBS 9.2.6R, 9.2.1R and 9.2.2R).*

*MAFS said three sums (£5,700, £26,243.18 and £200) had been transferred back to Mr R's SIPP bank account from the Horizon account (on 29 December 2015, 21 July 2016 and 9 August 2016) following the sale of the portfolio. So Mr R's net loss was £12,856.82. Adding*

*interest at 8% (to 1 April 2017) increased that to £14,930.82. Or £18,347.57 on a loss of investment return basis.*

*Horizon wrote to Mr R on 1 June 2017 acknowledging the complaint. Mr R also asked us to look into the matter. We sent a copy of Mr R's complaint form to Horizon and asked it to investigate and let Mr R have a final response.*

*Horizon didn't respond within eight weeks. We wrote to Horizon on 3 August 2017 saying we were going to look into Mr R's complaint and asking Horizon to let us have its comments and supporting documents. We repeated our request for Horizon's business file several times. But Horizon didn't supply it.*

*Our investigator issued her view on 5 October 2017. She said she'd had to complete her review without seeing Horizon's file and based on information Mr R had supplied. She upheld the complaint. She said the account opening form contained inaccuracies. Mr R had no previous investment experience. CFDs were high risk and Mr R shouldn't have invested in them.*

*Horizon then got in touch. It said it hadn't been getting our emails asking for information. We gave Horizon more time to respond. I've summarised Horizon's main points.*

- *Mr B wasn't a representative of Horizon. Mr B worked with MAFS and another regulated firm generating pension leads.*
- *MAFS has a conflict of interest – it had also been involved in the advice process. It was trying to shift responsibility for its clients' complaints to Horizon.*
- *MAFS had given specific pension advice. Horizon has never been regulated to advise on pensions. Advice to transfer from a defined benefit pension scheme to a SIPP wasn't given by Horizon but by other regulated firms.*
- *Horizon offers discretionary fund management assessing the appropriateness of an investment strategy for each client. The introducing IFA takes responsibility for assessing the client's objectives, offering advice and assessing the suitability of any recommended pension solution and related investment strategy. Neither Horizon (nor the SIPP provider) will accept the business without an IFA advising the client.*
- *Advice to open the account with Horizon was given by a regulated IFA. The IFA should have completed a suitability report, investment objectives and risk profile.*

*MAFS denied any conflict of interest. It said, in summary:*

- *Mr R was a transactional client. MAFS had just advised him on the pension transfer, selected the provider and set up the SIPP. It recommended the funds be held in the SIPP cash account because the case was being referred back to Mr R's IFA – Future Wealth Management (an appointed representative of another regulated firm, PI Financial Limited).*
- *Mr R had been introduced by Mr B. His history, his dealings with MAFS and how he operated was set out. Mr B (even though he wasn't regulated to give investment advice) was a key influence in Mr R's (and others') decision to invest.*
- *It was Future Wealth Management and Mr B who recommended that Mr R invest with Horizon. Mr R had located text messages which backed that up.*
- *Mr R (and others) had been approached by Mr B after accessing government sponsored websites. This had been reported to the relevant authorities.*

- *It had made enquiries of the SIPP provider about CFDs being prohibited. The SIPP provider had said its investment committee had authorised a concession for Horizon allowing a 20% exposure to CFDs. It wasn't clear why that cap hadn't been applied.*
- *Mr B had used a Horizon business card and email address. He'd acted as Horizon's agent when he completed the application form for Mr R. Horizon was liable for Mr B's failure to capture Mr R's correct response at section 7 of the form.*
- *Even if Mr B was acting independently of Horizon there are serious doubts about the suitability of CFDs for Mr R. Large parts of the application form were completed incorrectly. Horizon didn't get confirmation from Mr R that the information was correct. Horizon's approach in Mr R's case (and others) was reckless. Horizon hadn't undertaken due diligence to ensure the investments were consistent with Mr R's financial circumstances and attitude to risk.*

I went on to set out my provisional findings. I agreed with the investigator that the complaint should be upheld. Again I've repeated what I said here:

*I've noted what Horizon says about MAFS having a conflict of interest. I haven't seen MAFS' file. But MAFS says it didn't recommend Horizon to Mr R and didn't advise him about the investments.*

*But MAFS did recommend the transfers of Mr R's existing pensions arrangements to the SIPP. It says it recommended the transferred funds be held in cash, pending advice from another regulated firm. But the regulator has made it clear that an adviser has to consider, as part of the suitability of the transfer, the intended underlying investments. So, to advise on the suitability of the transfer, MAFS needed to know what Mr R intended to invest in.*

*And I note that the Horizon account isn't the only problem. Mr R is now in serious financial difficulty. He also invested money via another investment management company (Strand Capital Limited). That company is now in administration. It seems Mr R's holdings with that company no longer have any value. He's made a claim to the liquidators. But, as things stand, the value of Mr R's SIPP in January 2017 was £243,698.82. That has reduced, as at 28 February 2018, to £15,299.02.*

*There might be some suggestion that the transfer to the SIPP wasn't itself suitable – especially if it involved a transfer from a defined benefits (or final salary) arrangement. So a complaint about the transfer itself may be something that Mr R may want to think about.*

*But, as things stand, I'm only considering Mr R's complaint against Horizon.*

*It's not entirely clear to me how the account with Horizon came about. MAFS is mentioned on Horizon's application form. But, as I've said, it says it wasn't involved and didn't know about the account at the time. I don't disregard what's been said about the part Mr B played. And I note that another regulated firm (Future Wealth Management) might also have been involved.*

*But as a regulated firm – and irrespective of other parties' involvements – Horizon had certain regulatory obligations. It had to comply with the regulator's rules (set out in the FCA's handbook). These start with the high level standards including the principles. The principles include: 2 Skill, care and diligence; 6 Customers' interests; 7 Communications with clients.*

*Horizon also has to comply with the conduct of business (COBS) rules. These include the client's best interests rule. And COBS 10 also applies. Horizon had to assess whether CFD*

*trading was appropriate for Mr R. I think Horizon recognised that – it carried out what it's termed a suitability check. I think that was the appropriateness test Horizon was required to carry out under COBS 10.*

*There's a dispute about the information shown on the application form and which formed, in part at least, the basis of Horizon's suitability (or appropriateness) assessment. In particular it's contended that Mr R's income and capital was overstated.*

*But, even if the details on the form were correct, I don't think Horizon was justified in concluding that CFD trading was appropriate for Mr R. His pension fund was some £284,000. There's no mention of any other pension arrangements. I'm not sure that £45,000 (almost 16% of his pension fund) was money he could afford to lose (despite what he'd said on the form and even taking into account the £100,000 savings he apparently had).*

*But, even if I'm wrong about that, there's another, more important, point. What was clear from the form was that Mr R had no investment experience.*

*Investing in CFDs can put all the capital at risk. CFDs are a high risk, speculative product. And I bear in mind what the regulator has said about CFDs. The regulator has identified a number of key areas of concern:*

- *inadequate assessment of prospective clients' knowledge;*
- *insufficient account taken of client's previous transactional experience;*
- *inadequate risk warnings to prospective clients who fail appropriateness assessments;*
- *failure to evaluate whether failed applicants should be allowed to make CFD transactions.*

*Concerns have been voiced by the regulator that firms didn't have in place proper processes to assess the appropriateness of CFD trading for prospective clients. And that could result in firms failing to identify clients for whom CFDs are not appropriate. I think that applies here.*

*Based on the information Horizon had (and even if it had been accurate) I don't think Horizon was right to conclude that CFDS were an appropriate investment for Mr R, given his lack of investment experience.*

I went on to set out how Horizon should redress Mr R.

Mr R's representative had nothing further to add. Horizon said it was disappointed with my provisional decision. It sympathised with Mr R given his current financial position but didn't agree with my appraisal of what had happened. In particular Horizon said:

- We'd taken everything Mr R's representative had said as being totally accurate. Horizon referred to another complaint with the same representative. That case demonstrated Mr B was 'working alongside' MAFS' adviser. When Horizon queried the client's risk profile when carrying out its 'appropriateness test' he referred Horizon's feedback to his advisers – Mr B and MAFS. So MAFS was obviously involved in the advice process.
- Horizon's CFD solution was promoted as a high risk investment but relied on an IFA recommending it after assessing client suitability. Horizon only carried out an appropriateness test after an application was received.
- CFDs were permitted by the SIPP provider but restricted to 20% of the pension fund.
- Mr B had no contractual relationship with Horizon – he'd been introduced through MAFS and Future Wealth Management.

- An IFA can't give advice about transferring a pension without considering how the fund is to be invested. MAFS' involvement in another case shows what MAFS has said is misleading. Other clients have confirmed Mr B and MAFS worked together in giving pension advice. Yet MAFS has encouraged complaints against Horizon and others. The adviser no longer works for MAFS having left '*under a cloud*'. We should request a copy of MAFS' file which will show MAFS was involved in the advice process. Liability should fall on MAFS, not Horizon.

## **my findings**

I've considered all the available evidence and arguments again to decide what's fair and reasonable in the circumstances of this complaint.

I've concentrated on what Horizon has said in response to my provisional decision. In the main Horizon has focused on what others did or didn't do – in particular Mr B and Mr R's representative, MAFS. Horizon has also referred to other complaints from different consumers who MAFS is also representing.

Mr B wasn't regulated. So although I can take into his involvement into account he doesn't come within this service's jurisdiction and I can't make any award against him.

As far as MAFS is concerned, I said in my provisional decision that Mr R might want to think about if he should have been advised to transfer. But as things stand, Mr R hasn't made a complaint about MAFS' advice to transfer. So we haven't looked into if that advice was suitable.

I agree with Horizon that MAFS should have given Mr R advice about investing his pension fund – advising on the suitability of a pension transfer generally involves advice on the suitability of the intended underlying investment. I don't know what, if any, MAFS gave Mr R about investing the transfer proceeds. It may be that MAFS advised Mr R to invest differently – that is not in CFDs via an account with Horizon.

It's unclear exactly how the account with Horizon came about and if, as Horizon suggests happened with other investors, MAFS and/or Mr B was involved. I'm only considering Mr R's complaint. The circumstances of that complaint may be different from others.

It's clear Horizon considers MAFS' involvement is an attempt to deflect blame and that what MAFS says isn't reliable. Horizon suggests I should get MAFS' file. I've thought about that but I don't think it's necessary.

But I don't think I need to find out exactly what went on – and some of which might be disputed in any event – in order to reach fair and reasonable conclusions about Horizon's part in the matter. And I maintain, for the reasons I set out in my provisional decision and below, that Mr R's complaint should be upheld.

Regardless of the parts played by others, Horizon is an FCA regulated business. It has to comply with the rules set out by the FCA in its handbook. These start with the High Level Standards including the principles – which include: 2 Skill, care and diligence; 6 Customers' interests; 7 Communications with clients.

There are also the Conduct of Business (COBS) rules that a regulated firm such as Horizon has to comply with. These include the client's best interests rule. And COBS 10 also applies – Horizon accepts it needed to assess if CFD trading was appropriate for Mr R.

For the reasons I explained in my provisional decision I think from what Horizon saw – and regardless of what any other party told Horizon or said or did – Horizon should have realised that CFD trading wasn't appropriate for Mr R. And that by accepting his application Horizon wouldn't be acting in his best interests.

I think that was or should have been apparent from the application form Mr R completed to open his account with Horizon. As I said in my provisional decision, even if Mr R's capital and income were correctly recorded, I don't think Horizon was justified in concluding that CFD trading was appropriate for Mr R.

His pension fund was (apparently) some £284,000. There's no mention of any other pension arrangements. I'm not sure that £45,000 (almost 16% of his pension fund) was money he could afford to lose (despite what he'd said on the form and even taking into account the £100,000 savings he apparently had). But, as I said, even if I was wrong about that, there's another, more important, point. What was clear from the form was that Mr R had no investment experience.

Regardless of what there might be on MAFS' file, I've seen Horizon's own documents – the application form Mr R completed to open his account with Horizon and the account suitability checklist with notes about Mr R's risk profile, objective and investment experience. In particular Horizon recorded he had *'no experience in the markets but has indicated that he understands the product and risk associated with the product.'*

If Horizon had explored further with Mr R or his adviser(s) Horizon would have its own evidence of those further enquiries. But Horizon hasn't produced anything which evidences that it did probe further before accepting Mr R as a client. So it's unclear why Horizon was justified in saying that Mr R understood the product and the associated risks. I don't think his confirmation on the application form was, on its own, sufficient for Horizon to reach that conclusion. I haven't seen that Horizon undertook a proper or adequate assessment of Mr R's knowledge and experience. I think if Horizon had done more it would have identified that CFD trading wasn't appropriate for Mr R.

If Horizon hadn't accepted Mr R as a client Mr R wouldn't have lost the money he did. So Horizon is directly responsible for the losses Mr R incurred on his CFD trading account with Horizon.

In saying that it may be that some other party has some responsibility. If Horizon thinks that is the case then it can if so advised pursue that other party to meet all or part of the redress that Horizon has had to pay to Mr R.

Based on the information Horizon had (and even if it had been accurate) I don't think Horizon was right to conclude that CFDS were an appropriate investment for Mr R, given his lack of investment experience.

So I'm upholding Mr R's complaint against Horizon. It should redress him for the financial loss he's suffered as a result of his CFD trading through Horizon. I've set out below how Horizon should calculate compensation. I think the matter will have caused Mr R some worry and distress and so I've included an award for that too.

**fair compensation**

To compensate Mr R fairly, Horizon must:

Compare the performance of Mr R's investment with that of the benchmark shown. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. Horizon should add interest as set out below.

Horizon should pay into Mr R's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Horizon is unable to pay the compensation into Mr R's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. The *notional* allowance should be calculated using Mr R's expected marginal rate of tax in retirement. Mr R is likely to be a basic rate taxpayer in retirement. The reduction should equal the current basic rate of tax.

Pay Mr R £150 compensation for the worry and distress he's suffered.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Horizon account	transferred	FTSE UK Private Investors Income Total Return Index	date of investment	date transferred	8% simple a year from date transferred to date of payment

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

**actual value**

This means the actual amount payable from the investment at the end date.

**fair value**

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any withdrawal, income or other distribution out of the investment should be deducted from the *fair value* calculation at the point it was actually paid. That's so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I'll accept if Horizon totals all those payments and deducts that figure at the end instead of deducting periodically.



### **why is this remedy suitable?**

I've chosen this method of compensation because:

- Mr R wanted capital growth and was prepared to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- The additional interest is for being deprived on the use of any compensation since the end date.

### **my final decision**

I uphold Mr R's complaint. Horizon Stockbroking Limited should calculate and pay redress to Mr R as I've set out above.

Horizon Stockbroking Limited should provide details of the calculation, in a clear and simple format, to Mr R.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 18 July 2018.

Lesley Stead  
**ombudsman**