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Restricting the statutory right to transfer

Trustees and providers have had to devote a great deal of time and expense over the past decade to the fight against pension scammers, who seek to deprive members of their pension savings.

One of the problems faced by the industry has been that a member's statutory right to transfer has generally outweighed any concerns that might exist about a proposed receiving pension scheme to which pension savings are to be transferred.

The DWP is seeking to redress the balance by consulting on draft regulations that would make it easier for trustees and providers to refuse a transfer where there are concerns about possible pension scam activity.

The consultation runs until 9 June 2021 and the DWP intends to introduce the regulations this autumn.

In this issue: Background | The government's proposals | Comment

Background

Pension scams deprive members of their hard-earned savings in retirement and do nothing to improve the image of pension schemes in the minds of those affected.

While various initiatives, such as the code of good practice on combating pension scams from the Pension Scams Industry Group, have assisted trustees and providers, there has been a real need for more help from the government, in terms of giving those running pension schemes the power to refuse to make transfers where scam concerns exist.

The Pension Schemes Act 2021 includes provisions to restrict the statutory right of members to transfer, specifically to combat pension scam activity. Thankfully, this has been given high priority by the DWP, with this consultation coming just a few months after Royal Assent was given to the Act.

The government's proposals

The DWP is proposing four conditions for all statutory transfers, without exceptions, including where a member has already taken, or is required to take, regulated financial advice. (It should be noted that the evidence required to meet these conditions is not a simple replacement for the transfer due diligence that trustees and providers already undertake.)

1. Low-risk transfers

Under the first condition, trustees and providers will be required to confirm whether a transfer is to be made to a type of receiving scheme that presents a low risk of scam activity. If so, the transfer should be able to proceed as normal.

To meet this condition, the trustees or providers of the transferring scheme would need to confirm that the receiving scheme has been authorised or established in accordance with the relevant requirements for that scheme:

- Personal pension providers authorised and regulated by the Financial Conduct Authority, that are insurers authorised by the Prudential Regulatory Authority, or within the same corporate group as such an insurer.
- Authorised master trusts.
- A public service pension scheme established by the Public Service Pensions Act 2013.
- Authorised collective money purchase schemes (when the appropriate regulations come into force to provide for these schemes).

The DWP is interested in hearing about any additional types of scheme that should be considered as low risk.

2. An employment link for transfers to occupational pension schemes

An employment link of at least three months will need to be demonstrated between the member and the pension scheme they wish to transfer to. This is because the only legitimate reason for such a transfer is where a link exists between the member, the employer and the receiving scheme.

Evidence will be required to confirm that contributions have been paid into the scheme, by the member and their employer, as well as evidence of employment earnings from the receiving scheme's sponsoring employer. This could be demonstrated by provision of an employer letter, pay slips, bank statements, and a schedule of payments to the scheme.

3. A residency link for transfers to qualifying recognised overseas pension schemes (QROPS)

If a member cannot confirm an employment link with a QROPS, they will be required to demonstrate residency in the same financial jurisdiction as the proposed receiving scheme for at least six months. The Pensions Regulator will explore how best to support schemes to understand and apply the residency link requirement through guidance.

For conditions 2 and 3, members will have to provide evidence of either an employment or residency link (unless this has already been provided in respect of the same receiving scheme in the previous 12 months).

Where these employment or residency conditions are met, the transfer can proceed. Without this evidence, there is no statutory right to transfer.

4. Other cases

For all other transfers (which are not covered by one of the three conditions above), trustees will be required to determine if the circumstances giving rise to the red or amber flags listed below apply. Where the flags are not present the fourth condition will be satisfied and the transfer will be able to proceed.

In the majority of cases, the DWP expects that transferring scheme trustees and providers should be able to quickly determine whether the red or amber flags are present, so that transfers can proceed without delay. Where sufficient information is already held from existing due diligence to decide about the presence of flags, it should be possible to determine whether this fourth condition is satisfied without the need for additional checks.

However, in the minority of cases, where the flags may be present, trustees and providers will have the power to request information, at their discretion, to assess the circumstances of the transfer and to intervene to protect the member from a scam.

Red flags

The trustees must decide if they have a reasonable belief that any of the following red flag circumstances apply to a transfer:

- financial advice has been provided by firms or individuals without the appropriate regulatory permissions, or such firms or individuals have been involved in recommending that the member make the transfer; and/or
- the member has been contacted unsolicited in person, by telephone, text, letter or email, or via social media; and/or
- the member was offered incentives to transfer, including free pension reviews, early access to some or all of their pension savings before normal pension age, a savings advance or cashback from their pension savings; and/or
- the member was pressured to complete the transfer quickly, within a short or time limited period.

Reasonable belief means that the belief is based on reasonable grounds. This does not mean that the trustees' belief needs to be correct.

A member's refusal to provide the trustees with information in relation to the transfer also constitutes a red flag. Should any of these red flags be present, the transfer may not proceed.

Amber flags

A transfer will be able to proceed where one or more of the amber flags are present if the member has taken scams guidance from the Money and Pensions Service (MaPS) (or they provide evidence of having taken the guidance in the previous 12 months). Where the guidance is taken, MaPS will provide the member with a unique identifier to demonstrate this.

The member will, therefore, be aware of the risk of a scam in the circumstances of their case and will be empowered to decide whether they still want to proceed despite an identified risk factor which has required them to take that guidance.

Amber flags, in connection with the receiving scheme, are identified as:

- high risk or unregulated investments included in the receiving scheme; and/or
- unclear or high fees being charged by the receiving scheme; and/or

- complicated or unorthodox investment structures; and/or
- overseas investments or any overseas-based advisers; and/or
- a high volume of transfers to a single receiving scheme or involving a single adviser or firm.

Due diligence

The DWP does not wish to see evidence gathering imposed where it is not needed. Standard questions asked of members should take a tiered approach, in that members are only asked questions relevant to their destination.

The DWP has produced a set of standard questions for trustees to ask members in relation to the fourth condition set out in an annex to the consultation. Trustees can ask members for information above the standard questions, alongside other details gathered. This information should be proportionate so members are not unfairly burdened with excessive information requests or penalised for failure to meet these requests.

Comment

The DWP rightly notes that "pension scammers' activities are by their very nature hard to track, and continually evolving, in order to escape prosecution and exploit people when they are at their most vulnerable."

It is, therefore, frustrating to note the incredibly slow pace of change in the law in this regard. The DWP originally consulted on proposals that have eventually led to this latest consultation as far back as December 2016.

The scammers' tactics are constantly changing, and the fact is that pension liberation-style scams, where members are convinced to transfer their pension savings to a scam arrangement, are no longer the main form of pension scam. Instead the scammers have increasingly turned their attention to investment vehicles that target the over-55s who can immediately access their pension savings.

This consultation is welcome, as anything to make the lives of scammers harder is a positive step, but the proposals are unlikely to have the same impact as they would have done several years ago.

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