PSIG
PENSION SCAMS INDUSTRY GROUP

# COMBATING PENSION SCAMS:

## A Technical Guide

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**Disclaimer:**
The Code is for guidance only and does not purport to constitute legal advice. The Code is not exhaustive and nothing in the Code can be relied upon as evidence of compliance with any other legal or regulatory requirement. The Code relates to circumstances prevailing at the date of its publication and may not have been updated to reflect subsequent developments.

Following the Code does not relieve a party of its legal or regulatory obligations and following the Code might not prevent a claim being brought against a party.

April 2021

# 01 INTRODUCTION

In 2015, the Pensions Scams Industry Group (PSIG) developed a voluntary Code of Good Practice, written by a group of key stakeholders, including trustees, administrators, legal advisers and insurers. This Code set out suggested steps to help identify whether requested transfers should be paid.

The Code itself is not a statutory code, nor does it seek to override guidance issued by regulatory bodies. Rather the Code of Good Practice is voluntary and seeks to set a best practice industry standard to help identify transfer requests that may be fraudulent or a scam. The Code is based on three guiding principles:

1. Transferring schemes should raise awareness of pension scams for members and beneficiaries of their scheme.
2. Transferring schemes should have robust, proportionate and both regulatory and legislatively compliant processes for assessing whether a receiving scheme may be operating as part of a pension scam, and for responding to that risk.
3. Transferring schemes should generally be aware of the known current strategies of the perpetrators of pension scams in order to inform the due diligence they need to undertake and should refer to the warning flags as indicated in TPR (The Pensions Regulator) Guidance, FCA alerts and by Action Fraud.

This Technical Guide forms part of the Pensions Scams Industry Group (PSIG) Code of Good Practice and details the technical context and rationale to the Code. The Technical Guide should be read as part of the full Code of Good Practice and readers should refer to the other Code documents as required.

# 02 PRINCIPLES OF THE CODE

**Principle 1: Transferring schemes should raise awareness of pension scams for members and beneficiaries of their scheme.**

- Scheme members should be made aware of the risks of pension scams. Awareness material, in particular the Regulators' ScamSmart guidance, should be provided in information documents, transfer packs, retirement packs and statements, as well as on websites.
- This material should be sent to scheme members directly, rather than through their advisers. A good way to develop member understanding further is to contact them by telephone directly as part of the due diligence process.
- Please refer to Section 2.1 Communicating the risks of scams to the Member in the Practitioners Guide for further detail.
- Administration staff should be made aware of the risk of pension scams. Staff who deal with scheme members should be made aware of the guidance materials to help them to identify potential pension scams. Staff who undertake detailed due diligence on pension transfers should have an understanding of the Code of Good Practice.
- Where relevant, employers should be made aware of the risk of pension scams.

**Principle 2: Trustees, providers and administrators should have robust, proportionate and both regulatory and legislatively compliant processes for assessing whether a receiving scheme may be operating as part of a pension scam, and for responding to that risk**

- In dealing with a transfer[1] request, transferring schemes should conduct due diligence on the receiving scheme. Where they suspect that the receiving scheme may be involved in a scam, transferring schemes should carefully consider whether the transfer should proceed.
- Appropriate due diligence will vary for different types of pension schemes. In carrying out due diligence, the transferring scheme should aim to collect information over the following areas where applicable:
  - Receiving scheme type.
  - Date of establishment.
  - Legal status of the receiving scheme and any administrators or operators.
  - Location of the receiving scheme and any administrators or operators in relation to the scheme member.
  - Any employment link between the receiving scheme and the scheme member.
  - Marketing methods; for example, ask scheme members to confirm how they became aware of the scheme to which they intend to transfer and establish if they have been contacted by an introducer or company through cold calling, unsolicited text messages or emails, or by being approached directly outside of their place of work, a common method known as "factory-gating".
  - Investment choice; for example, ask scheme members to confirm where the money is to be invested and the investment vehicle being used.
  - Provenance of receiving scheme; the FCA, HMRC, National Crime Agency and Companies House all provide information of possible assistance in checking the provenance of the scheme.
  - Where advice is required, check who the advice is coming from (for some transfers, there can be two advisers, one that has permissions to advise on pension transfers and the other adviser recommending the product and investments where the money is to be invested).

[1]Including pension transfers which are not within the FCA definition of 'Pension Transfer', e.g. because they do not include the transfer of safeguarded benefits.

  - It should also be checked that the entity has not been 'cloned'.
- Transferring schemes should also consider Pension Scams Industry Forum (PSIF) Membership. PSIF operates under PSIG governance to share knowledge within its members of schemes, entities and individuals of concern in terms of pension scamming. PSIF membership has also been encouraged by the Minister for Pensions & Financial Inclusion as outlined in his Foreword to the Code and in his letter to around 90 large schemes[2]. It should be noted however that PSIF membership does not confer any bona fide status on a receiving scheme.
- On 5th June 2020, the FCA published its final rules and guidance on pension transfer advice[3] and these included a ban on contingent charging (where the member only pays when a transfer or pension conversion proceeds, except in certain limited circumstances) as well as measures to:
  - require firms to consider an available workplace pension scheme as a receiving scheme for a transfer;
  - enable firms to give a short form of advice (abridged advice);
  - empower members to make better decisions by improving how advisers disclose charges and requiring checks on consumers' understanding during the advice process; and
  - enable advisers to give better quality advice and improve professionalism by introducing specific continuing professional development on pension transfer advice.
- The FCA also published step by step guidance on what a member should expect when taking advice in connection with transferring out of a defined benefit (DB) scheme or scheme which provides "safeguarded benefits" and into a defined contribution (DC) scheme[4]. The FCA has also issued a consultation on guidance on advising on transfers[5].
  - "Safeguarded benefits" offer additional security and often valuable guarantees that are lost if the member transfers or converts those benefits to flexible benefits. In addition to DB schemes, they also include pension savings with the option to purchase an annuity at a guaranteed rate as well as specific guaranteed growth rates which may be available on some funds (e.g. With Profits funds). The FCA "...expect a firm advising on a pension transfer from a DB scheme or other scheme with safeguarded benefits to consider the assets in which the client's funds will be invested as well as the specific receiving scheme. It is the responsibility of the firm advising on the transfer to take into account the characteristics of these assets."
- The FCA has acknowledged that "non-UK residents considering a pension transfer are likely to need to seek advice from both an overseas adviser for investment advice and a UK adviser for advice on the proposed transfer. In order to advise on the merits of the proposed transfer, the UK adviser should take into account the specific receiving scheme, including:
  - the likely expected returns of the assets in which their client's funds will be invested
  - the associated risks, and
  - all costs and charges that would be borne by their client.

This means liaising with the overseas adviser where necessary."

- The FCA is also "very concerned at the increase (we) have seen in cases in which the introducer has an inappropriate influence on how the authorised firm carries out its business, in particular where the introducer influences the final investment choice."[6]

[2]https://www.gov.uk/government/news/minister-calls-for-schemes-scam-support
[3]https://www.fca.org.uk/publications/policy-statements/ps20-6-pension-transfer-advice-feedback-cp-19-25-final-rules
[4]https://www.fca.org.uk/consumers/pension-transfer/advice-what-expect
[5]https://www.fca.org.uk/publications/guidance-consultations/gc20-1-advising-pension-transfers
[6]https://www.fca.org.uk/news/news-stories/investment-advisers-responsibilities-accepting-business-unauthorised-introducers-lead-generators

- The FCA have also expressed concerns that where the authorised firm delegates regulated activities, for example by outsourcing their advice process to unauthorised entities or to other authorised firms, that these companies either do not have the relevant permissions or are not their appointed representatives.

Please also refer to the FCA passporting guidance[7]. Additional information is contained in Section 3.1.2 of the Practitioner Guide.

- In most cases, an early telephone call from the trustee, provider or administrator to the member directly will help identify the reasons for the transfer request and the source and circumstances of the request, which in turn should help to identify cases where further due diligence is needed and the lines of enquiry to take. To be clear, this is NOT giving financial advice, nor is it a cold call – it is a due diligence step. The representatives making such calls should be clear about the nature and purpose of the call, as members are often groomed by scammers to view a call from the existing scheme as an unreasonable attempt to thwart their desire to transfer. The call process could help reduce due diligence costs and the personal touch can help the member think more clearly about the risks, as is evidenced by the number of members who do change their minds about the specific transfer. Please refer to the excellent Police Foundation report[8] which PSIG helped to develop in this regard.
- The following factors should be considered, in an assessment of a receiving scheme:
  - Risk of scam: Is there a material risk that the member's pension savings could be lost by a pension scam if a transfer payment is made?
  - Risk of making an unauthorised payment: Is there a material risk that the receiving scheme could make an unauthorised payment? Note that the existence of an unauthorised payment or other adverse tax consequences does not mean that a transfer is automatically invalid or that the proposed transfer is a pension scam.
  - Risk of not complying with the statutory deadline: Consider the timescales for complying with the transfer request (and whether you can request an extension from TPR).
- Where there is no material pension scam risk, the transfer should be processed quickly and efficiently.
- Where there is a material pension scam risk, whether or not the member has a statutory transfer right, further transfer details should be checked. This may involve taking legal advice.
- If the member does have a statutory transfer right, you will need to decide whether to proceed with the transfer despite the risk of a scam. This involves assessing the risks of either blocking or allowing the transfer. Again, this may involve taking legal advice. Please see Section 4.2 Determination in the Practitioners Guide for further information.
- If you decide that the transfer should be refused, you should explain why to the member. If the member insists on transferring, trustees, providers or administrators should ensure that the member discharge forms are suitably robust to reduce risk (although note that such discharge forms may not eliminate the risk to trustees and providers of the member or the member's beneficiaries bringing a subsequent claim – Please see Section 7 of the Practitioners Guide for more information).
- Due diligence is not likely to be necessary if the receiving scheme has been vetted previously and is recorded on an internal list of schemes that do not present a pension scam risk (see Internal 'clean list' approach in Section 3.1.1. Initial Analysis – Stage One of the Practitioner Guide). However, what appears to be a vetted scheme may have been cloned or be using falsified paperwork, so details need to be carefully checked.
- Transferring schemes should use their own judgment, take appropriate advice if necessary, and record their decisions.

[7] https://www.fca.org.uk/firms/passporting
[8] http://www.police-foundation.org.uk/publication/protecting-peoples-pensions-understanding-and-preventing-scams/

**Principle 3: Transferring schemes should generally be aware of the known current strategies of the perpetrators of pension scams in order to determine the due diligence they need to undertake and they should refer to the warning flags as indicated in TPR Guidance, FCA alerts and by Action Fraud.**

These strategies continue to evolve, but examples at the time of publishing include:

- Pension scams may use documents that look like legitimate scheme documents. Pension scams will typically use scheme documents that have been taken from legitimate schemes. Although these may look appropriate, the scheme may have no intention of following them. Sometimes clues appear in spelling errors in such documents.
- Pension scams will mimic the normal transfer process. Scheme members may appear to have completed and signed the transfer document; however, they may not have actually seen or signed any application form or other document, or be aware that their signature has been used on transfer authorisation paperwork. Machine drawn signatures could well indicate scam activity.
- Those intending to operate pension scams will typically make first contact with scheme members via cold calling, unsolicited text messages or emails and this could still occur notwithstanding the implementation of the cold calling ban. A strong first signal of this would be a letter of authority requesting a company not authorised by the FCA to obtain the required pension information; e.g. a transfer value, etc. There is also a need to be wary of forms which appear to emanate from an FCA authorised source, but where the address is different, and may well be that of an unregulated third party.
- Fewer scams take the form of traditional pension liberation (taking benefits before normal minimum pension age or any protected early pension age) and are more likely to involve investment schemes (sometimes post retirement), SIPPs, SSAS and QROPS.
- Scammers have also developed their approaches, using social media (e.g. Facebook and LinkedIn) to target victims, as well as by “factory-gating” (i.e. approaching people outside their workplace) to contact those likely to have access to significant pension savings. Online promotions utilising search engines such as Google and Bing can also feature offers of free pension reviews and promises of unrealistic or guaranteed investment returns.
- Scheme members may be coached by those attempting to scam them to answer basic due diligence questions posed by transferring schemes.
- Schemes established for pension scams might mimic or clone legitimate scheme names. In particular, this is an issue for QROPS. Make sure that the scheme name matches that shown in the QROPS list, as maintained by HMRC, but also that other details such as the address are correct.
- TPR has also warned that organised crime groups led by married couples or families are running scams worth millions of pounds. In some cases the families have hired rogue financial experts with specialist pension knowledge, including accountants, advisers and trustees, to run the large-scale scams for them. Without these professional enablers, the frauds would not be successful.
- In addition, it has been noted that there has been an increase in the use of discretionary portfolios for pension scams, and in wealth managers making unsuitable investments in high risk and high charging assets for their customers. These have featured share trading accounts in which trading activity generates substantial commissions for the trader, to the clear detriment of the member. Alternatively, the scams may take the form of investments in more conventional funds but within an unnecessarily complex structure usually featuring the purchase of structured notes or investment bonds which hides a myriad of fees and charges. This “fractional scamming” or “skimming” sees multiple entities taking a cut and the value of the underlying investments can be destroyed. Some of these arrangements also feature exit penalties should the member wish to access or transfer the investments within a stated period of time (for example within 5 or 10 years).

- The FCA has recently initiated a review of SIPP providers following specific concerns regarding overseas advisory firms advising expatriates to transfer or switch their UK pensions into an international self-invested personal pension (SIPP)[9]. Overseas advisory firms often invest consumers' pension funds through an offshore investment bond within an international SIPP. The FCA is concerned that consumers who invest in this way may be exposed to high and/or unnecessary charges. They have also expressed their concern that the tax benefits of investing through an offshore investment bond are largely redundant to someone investing in a UK personal pension scheme.
- These "international SIPPs" are not legally defined as such but regularly deal with non-UK resident members (ex-pats) but many of these SIPPs are also sold to UK residents. Members seeking such transfers are frequently from the same jurisdictions popular with QROPS; for example, Europe, Middle East and South East Asia with the transfer being facilitated through intermediaries and advisers outside the UK and its regulation.
- It is very difficult for a ceding scheme to understand how pension transfer advice can be effectively provided when the adviser is based in a different country to the customer. Even if due diligence checks identify concerns, the overriding challenge for transferring schemes is the fact that, as the transfer is to a UK SIPP, a statutory transfer right is likely to exist.
- In their submission to the Work & Pensions Committee Pension Scams Inquiry[10], the FCA has also highlighted that scam typologies continually evolve and that they have now seen three generations of scams:
    - "First-generation scams offered unregulated physical assets – such as commercial property – for direct investment.
    - Second-generation scams obscured those underlying unregulated physical assets by creating a special purpose vehicle (SPV) to acquire them using funding raised by the issue of corporate bonds.
    - Third-generation scams often use the services of a wealth manager to create an investment portfolio that does not require the direct input of the investor; this portfolio then invests in SPV bonds and also that:
    - A more recent development has seen advice firms establish links with wealth managers through shareholdings and common directorships, or seek their own investment management permission thus enabling the set-up of their own investment portfolios. Advice firms advise clients to invest in the portfolios managed by linked wealth managers, or their own portfolios. There may also be links to the issuers of underlying investments housed within the portfolios. The conflicts of interest inherent in this model are often not disclosed to consumers, or otherwise managed."
- Perpetrators of pension scams are likely to apply pressure to force a transfer through. This may include encouraging direct member complaints, or through other channels such as a local MP, or the perpetrators themselves making that contact. These should be dealt with in accordance with the scheme's normal process.
- These transfers are also often subject to high ongoing charges and/or layering of fees and members are often unaware of the negative effect of these fees. The FCA's consultation on pension transfer advice and contingent charging[11] highlights that "Typically, ongoing adviser charges range from 0.5% to 1% of a transferred pot. From the Financial Advice Market Review Baseline report, we know that the typical level of ongoing advice charges on amounts exceeding £200,000 is 0.66%. From our DB4 data collection, we also know that 36% of consumers who transferred invested in a solution costing more than 1.5% each year."
- A concerning trend for international SIPPs (and other transfers) is where an adviser always transfers customers' pensions to the same SIPP irrespective of the customer's profile, size of pension fund or investment history. The funds also end up in the same investment fund. Many of these funds are provided via "investment platforms" which may be either UK based or offshore.

[9]https://www.fca.org.uk/news/news-stories/transferring-switching-uk-pensions-international-self-invested-personal-pensions
[10]https://committees.parliament.uk/writtenevidence/11389/default/
[11]https://www.fca.org.uk/publication/consultation/cp19-25.pdf

- The operators of some SIPPs are going into liquidation because of financial claims against them and the position for any individual redress is uncertain.
- Scams have also broadened to include “secondary scamming", where someone who has been scammed is approached by a third party, often a claims management company, which, for a fee, offers to attempt to recover the lost money. They may attempt to attach blame to the ceding scheme for failing to carry out sufficient due diligence before paying the transfer. When they fail to recover monies the individual is even further out of pocket.
- Further information on pension scams can be found on the TPR and FCA websites.

# 03 BACKGROUND

## 3.1 What is a pension scam?

In August 2017[12] HM Treasury defined a pension scam as;

"The marketing of products and arrangements and successful or unsuccessful attempts by a party (the "scammer") to:

- release funds from an HMRC-registered pension scheme, often resulting in a tax charge that is not anticipated by the member.
- persuade individuals over the normal minimum pension age to flexibly access their pension savings in order to invest in inappropriate investments.
- persuade individuals to transfer their pension savings in order to invest in inappropriate investments.

where the scammer has misled the individual about the nature of, or risks attached to, the purported investment(s), or their appropriateness for that individual investor."

[12]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638844/Pension_Scams_consultation_response.pdf

## 3.2 A summary of a scam

We show below a table of types of scams, courtesy of PLSA's response to the Work & Pensions Committee Pension Scams Inquiry[13].

| TYPE OF SCAM AND DESCRIPTOR |
|---|
| Pension Liberation: Prior to pension freedoms, scammers devised vehicles for people to access their pensions early by promising them access to some of their money if they were to transfer. With pension freedoms there has been some of this operating for those under 55 but not on the same scale. |
| Small Self-administered scheme (SSAS) pension scam: A company is set up in the saver's name and is used as the employer/SSAS sponsor. The SSAS offers loans back to the saver prior to age 55. The SSAS includes pension scammers as trustees, the money is often not even invested just channelled straight to the pension scammers in a classic Ponzi scheme. |
| Investment scam in SIPP/QROPS: Two versions of this. Sometimes the SIPP and QROPS are run by the scammers. Other times the vehicle is legitimate and it is only the investment that is the scam. The investment is illiquid as far as the legitimate vehicle is concerned but again it is a Ponzi scheme and the saver is left paying for administration charges of the vehicle even after it is clear they have been scammed with the original investment going insolvent. Unfortunately there are cases of legitimate high risk investments being invested in by savers which are not scams, so it may be hard for the pension provider to differentiate. |
| Claims management companies: The scammers re-appear claiming that the investment legitimately went insolvent but the saver is due compensation and that they can claim it for the saver. This often involves phoenixing of firms or at least advisers. |
| Misselling/DB Pension Transfer: This is within the regulatory ecosphere of pension advice. Half of pension transfer advice was considered unsuitable by the FCA and a ban on contingent charging in October will help to stop some of the perverse incentives that exist. There will however continue to be unscrupulous individuals who will advise unsuitable pension transfers for their own profit. The free chicken in a basket/ free pension review for British Steel Pension Scheme members is evidence of this. |
| Online fraud: pension and investment scammers are increasingly using the internet to offer free pension transfer advice. They buy commonly used search terms to do so. Unfortunately some regulated firms also do this, buying search terms of MaPS, Citizens Advice, of big pension schemes, and of advice directories. |

[13]https://committees.parliament.uk/writtenevidence/11838/default/

## 3.3 Scale of the issue

The following is an extract from the TPR's written submission to the Work & Pensions Committee's Pension Scams Inquiry[14].

"A key challenge in understanding the extent of the problem is the lack of comprehensive data. Over the last decade many hundreds of savers have reported losing their retirement to scammers, with £30m reported lost to Action Fraud over the last three years. The true extent is likely to be significantly higher due to under-reporting by both individuals and the pensions sector. Victims may not report for a number of reasons (e.g. failing to spot the signs and not knowing how much is in their pension; the unsuitable nature of a 'long-term' investment not coming to light for years; feeling embarrassed to report that they've been scammed; or simply not knowing where to report it.) There is no requirement for the pensions industry to report suspected scams. A recent scams report from Police Foundation[15], based on data from before the COVID-19 crisis, estimates that £2.5tn of £6.1tn of pension wealth in the UK was "accessible" to scammers because the consumer could move their benefits. Using data supplied by pension companies, the Police Foundation found that, from a relatively small sample of 13 providers, £54m of pension wealth was suspected to have been targeted by scammers in 2019. Of that, potentially £31m was lost. Nearly two-thirds of customers, or 62 per cent, went on to transfer their pension even when warned of the risks, the report found."

## 3.4 Member transfer rights

In certain circumstances, members have the right to transfer their benefits from their current scheme:

- where the relevant legal requirements are met, and the member exercises their transfer right, the transferring scheme has a statutory obligation to make the transfer within six months of the application (or guarantee date in the case of a DB scheme); and.
- the transferring scheme rules may also give the member a right to transfer out even where a member does not have a statutory transfer right.

If the member applies for a statement of entitlement, and has a statutory transfer right, the statement must carry a guarantee date not later than three months from the date of the member's application[16].

Where a member requests a transfer, the trustees/providers must determine whether the member has a transfer right. This will involve checking:

- whether the member has a statutory transfer right. This will involve assessing whether the transfer meets the necessary legal requirements. Please note however that whether a transfer right exists is only relevant if there are concerns regarding the transfer. For drawdown to drawdown transfers; it should be noted that there is no statutory transfer right.
- whether there is a transfer right under the transferring scheme rules; and
- whether the transfer right is at the discretion of the trustees/scheme administrator or is subject to any other conditions, such as the payment not being an unauthorised payment (which in turn will need to be assessed). Where the right is discretionary, those holding the discretion will need to consider whether it is appropriate to agree to the transfer request and, in doing so, exercise the discretion reasonably.

These are complex legal questions which may involve a detailed analysis of the transferring and receiving scheme's governing documents.

TPR provide guidance[17] on statutory transfers of DB pension rights.

[14]https://committees.parliament.uk/writtenevidence/12113/default/
[15]http://www.police-foundation.org.uk/publication/protecting-peoples-pensions-understanding-and-preventing-scams/
[16]Regulation 6, SI 1996/1847, The Occupational Pension Schemes (Transfer Values) Regulations 1996
[17]https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-guidance/db-to-dc-transfers-and-conversions

## 3.5 Pre-Retirement Scam Warnings

Many scams are perpetrated on funds legitimately withdrawn from pensions as referenced by the second aspect of the definition of a pension scam in Section 3.1, namely to "persuade individuals over the normal minimum pension age to flexibly access their pension savings in order to invest in inappropriate investments."

Transferring schemes should do whatever they can to make members aware of the risks of unscrupulous advisers or introducers who may persuade them to invest their encashed scheme savings into inappropriate investment schemes. Please see Section 2 of the Practitioners Guide for full details on how to do this. This includes encouraging members taking cash from pension schemes to call TPAS or Pensionwise, part of the Money and Pensions Service (but both will be rebranded as MoneyHelper from June 2021[18]), for free, impartial guidance on scams risks.

## 3.6 Freedom and Choice in Pensions

From 6 April 2015, greater freedom and choice became available to members of DC pension schemes. With such freedoms come the risks of poor choices and that scammers will target people with access to those freedoms. They may deliberately try to collect information about scheme members approaching retirement age. They may also specifically target DB scheme members who cannot take advantage of the new flexibilities within their existing DB arrangements. This is particularly prevalent where there is a DB scheme in financial distress, as witnessed by the British Steel case. The due diligence set out in the Practitioners Guide applies to transfer payments, but practitioners should also be vigilant where pension benefits are being paid as cash.

[18]https://maps.org.uk/moneyhelper/?cn-reloaded=1

# 04 THE REGULATORY FRAMEWORK

## 4.1 The Pensions Regulator (TPR)

TPR is the UK regulator of work-based pension schemes. It has published[19] detailed information on pension scams and expects trustees and providers to use TPR materials to make members aware of pension scams. The information on TPR's website is regularly updated and includes a trustee checklist to help trustees to work through transfer request due diligence.

TPR must be notified where a statutory transfer from an occupational scheme is not made within the relevant statutory timescales. The TPR has powers to take action, including ability to issue civil penalties in certain circumstances.

TPR cannot predetermine any future regulatory action it may take but where the trustees of the transferring scheme can provide evidence that member funds may be at risk, this would be considered when deciding whether to take action for the non-payment of a transfer.

TPR is not able to waive a trustee's legal duty to carry out a transfer within the statutory deadline where the legislative requirements or requirements under the scheme rules are met. TPR expects the majority of transfer requests will be completed within the statutory deadline.

If the trustees of a transferring occupational pension scheme need more time for due diligence and they meet the extension criteria, then they may apply to TPR for an extension to the normal six-month time period[20]. Circumstances where an extension may be granted include:

- the member has not taken all steps they need to take for the trustees to carry out the transfer; and
- the trustees have not been provided with such information as they reasonably require to properly carry out what the member requires.

The application for the extension must be made within the six-month time period. It should identify the grounds for the extension request, indicate the additional time required and the reasons why the transfer cannot be completed on time.

Where trustees suspect a pension scam, they should consider making such an application as soon as due diligence raises concerns and they consider that the criteria to request an extension are met. Please see Section 3.4.2 Extensions in the Practitioner Guide.

[19]https://www.thepensionsregulator.gov.uk/pension-scams
[20]DB to DC transfers and conversions | The Pensions Regulator

## 4.2 The FCA

The FCA regulates all operators of individual personal pensions, including SIPPs and stakeholder pensions, as well as all regulated financial advice and UK based advisers giving investment and transfer advice. The FCA leads on the regulation of workplace personal pensions, such as Group Personal Pensions and Group SIPPs, with TPR leading on occupational pensions.

The FCA has the overarching strategic objective of ensuring the relevant markets function well, supported by three operational objectives:

- to secure an appropriate degree of protection for consumers
- to protect and enhance the integrity of the UK financial system, and
- to promote effective competition in the interests of consumers.

The FCA seeks to ensure that firms provide consumers with appropriate products and services. The FCA is the conduct regulator for nearly 60,000 financial services firms in the UK[21] including firms and individuals working in the pensions market, such as insurance firms, independent financial advisers (IFAs) and SIPP operators.

To reduce harm from financial crime, the FCA seeks to ensure that firms:

- take appropriate steps to protect themselves against fraud
- put in place systems and controls to mitigate financial crime risk effectively
- can detect and prevent money laundering, and
- do not use corrupt or unethical methods.

The FCA can take action against firms and individuals involved in scams in the sectors and markets that it regulates. This can include enforcement action against firms and individuals and restricting or imposing requirements on firms' business. The FCA's enforcement action makes it clear that there are real and meaningful consequences for firms or individuals that do not follow the rules.

The FCA provides information on pension scams[22].

## 4.3 HMRC

Where a pension scheme meets certain conditions, it can be registered by HMRC.

HMRC's registration process has been changed to deter pension scams:

- HMRC carries out a risk assessment before deciding whether to register a pension scheme.
- HMRC requires that the main purpose of a registered pension scheme should be to provide authorised pension benefits.
- HMRC can de-register a scheme where it has reason to believe it is involved in pension scams or if the pension scheme administrator is not fit and proper.

A transferring scheme can also ask HMRC to confirm the registration status of the receiving scheme. HMRC can do so without the consent of the receiving scheme. Please see Section 3.2.1 HMRC requests in the Practitioner Guide for further information.

Tax legislation specifies the payments which registered pension scheme can make without incurring an unauthorised payments tax charge. A transfer of a member's pension benefits will be an unauthorised payment if it is not a recognised transfer. To be a recognised transfer, various conditions need to be met, including that the receiving scheme is a registered pension scheme or a QROPS.

[21]https://www.fca.org.uk/publication/business-plans/business-plan-2020-21.pdf
[22]https://www.fca.org.uk/scamsmart/how-avoid-pension-scams

It is not just non-recognised transfers that result in unauthorised payments. Many of the payments made by schemes involved in pension scam activity, such as pension payments before normal minimum pension age, will be unauthorised.

Unauthorised payments could result in the following tax charges:

**(i)** an "unauthorised payments charge" of 40% of the value of the payment;

**(ii)** an "unauthorised payments surcharge" of a further 15% of the payment;

**(iii)** a "scheme sanction charge" of up to 40% of the unauthorised payment (subject to partial deduction to the extent payment is made of the unauthorised payments charge); and

**(iv)** in extreme cases, if the scheme loses its registered status, a deregistration charge of 40% of the scheme assets.

The charges at (i) and (ii) would be levied on the member. The charges at (iii) and (iv) would be borne by the scheme.

The person liable for the unauthorised payments surcharge (only, not the unauthorised payments charge) can apply for discharge of their liability to the surcharge if they can show that it would not be just and reasonable for them to be liable in respect of the unauthorised payment[23] in what is referred to as the "good faith" discharge.

Since 6 April 2018, HMRC can refuse to register or de-register an occupational pension scheme if a sponsoring employer has been dormant for a complete month in the year before the decision date.

For certain transfers requested after 8 March 2017, an overseas transfer charge could apply.[24]

## 4.4 The Pensions Ombudsman (TPO)[25]

TPO can decide complaints of injustice due to maladministration and disputes of fact or law. Members may complain to TPO if trustees/ providers have blocked a transfer that the member believes should have been made, or if a transfer is made which a member believes should not have been.

Where a complaint is upheld, depending on the facts of the case, TPO could require a blocked transfer to be made and/or compensation to be paid for financial loss and/or any member distress or inconvenience.

TPO must determine matters in accordance with the law and will therefore assess cases by reference to whether members have a statutory transfer right and/or transfer rights under the scheme rules TPO will take into account good practice on due diligence by a ceding scheme in its determination.

[23]https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm134100
[24]https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm112010
[25]Where to go for help with your pension complaint.pdf (pensions-ombudsman.org.uk)

## 4.5 Financial Ombudsman (FOS)[26]

The Financial Ombudsman (FOS) deals with complaints about businesses regulated by the Financial Conduct Authority (FCA) not just pension schemes.

FOS can only look at a complaint about a workplace pension if it's about the way it's been administered by an FCA-regulated business, or if it and its investments have been advised upon by an FCA-regulated business. All other complaints about workplace pensions are dealt with by the Pensions Ombudsman.

FOS determinations look to achieve a fair and reasonable outcome rather than being based on the definitive legal position.

# 05 POTENTIAL CONSEQUENCES FOR TRUSTEES AND PROVIDERS

The difficulty for those faced with a suspected pension scam is that the member may have a statutory transfer right (or a right to transfer under the scheme), but the trustee or provider has regulatory and other general responsibilities to act with due care and in the best interests of their scheme's members, who could risk losing their pension savings through pension scams. Whether the trustees or providers block or allow the transfer, there are potentially negative consequences for trustees/providers to consider.

If trustees/providers block a valid transfer request, the potential consequences include:

- For occupational schemes, TPR may take action where there was a statutory transfer right, including imposing a fine of up to £1,000 on an individual and up to £10,000 in any other case on anyone who has failed to take all such reasonable steps to transfer. Any evidence that a transfer would have risked the loss of member's funds may be a mitigating factor.
- The member could complain to TPO that they had a right to transfer and the trustees/providers should not have blocked it. Costs may be incurred defending the complaint which, if upheld, could result in compensation covering any actual financial loss and/or a payment for any distress or inconvenience caused. TPO's key focus in determining a complaint is likely to be on whether the member has a transfer right and, based on TPO's determinations published to date, where such a right exists it is likely that the complaint would be upheld.
- Having to recalculate and pay the transfer value.
- If FOS uphold a complaint, they will try, as far as possible, to put the complainant in the position that they would have been in but for the business's error. This could take the form of financial compensation paid to their pension plan or directly to the member. FOS may also make an award for any trouble and upset caused. Different compensation limits apply depending on when the complaint was made[27].

[26] https://www.financial-ombudsman.org.uk/
[27] https://www.financial-ombudsman.org.uk/consumers/expect/compensation

- Reputational issues for the trustees/providers if it is perceived that they have blocked a legitimate transfer request.
- An upheld complaint or court decision may make it harder for future pension transfers of concern to be blocked or delayed.

If trustees/providers transfer to a scheme which is a pension scam vehicle, the potential consequences include:

- A potential unauthorised payment, resulting in tax penalties for the member and the transferring scheme.
- The member could complain to TPO or FOS that the trustees/providers should not have transferred. Again, costs may be incurred defending the complaint which, if upheld, could result in a compensation covering any financial loss to the member of the transfer having been made and/or a payment for distress or inconvenience. Recent determinations have centred on whether or not adequate due diligence and warnings have been given to members.
- The scheme statutory discharge may be ineffective, meaning the member, and any contingent beneficiaries, could still claim scheme benefits, despite the transfer.
- A bespoke, non-statutory discharge, may not bind contingent beneficiaries, meaning the scheme could face claims by contingent beneficiaries for benefits.
- Reputational issues for the trustees/providers if it is perceived that they have not adequately protected member benefits.

Trustees may wish to take legal advice in any individual case.

# 06 PRECEDENTS

## 6.1 The Pensions Ombudsman (TPO)

**Early TPO determinations and Hughes v Royal London**

TPO published three determinations in January 2015 for cases where providers had blocked transfers because they suspected the receiving scheme was involved with pension scams.

In all three cases, following a detailed analysis of the receiving schemes' governing documents, TPO concluded that there was no statutory transfer right (although in one case the complaint was partly upheld in relation to the exercise of a discretionary transfer power under the scheme rules), but the providers had not carried out the necessary analysis to establish the members' transfer rights.

In his closing observations, TPO commented that "providers, trustees, managers and administrators will want to keep in mind that strictly they can only refuse to make a transfer beyond the end of the statutory period if there is no statutory right to it. They should satisfy themselves of the position, on the balance of probabilities and a correct interpretation of the law, based on such evidence as they can obtain from the member or receiving scheme or other sources – and reaching a decision may involve drawing inferences from a failure to provide evidence. Where they find that there is no right to transfer they should be expected to be able to justify that to the person asserting the right."

In an update published alongside the determinations TPO stated that "if the transferors had had a statutory right that they were determined to enforce, even in the face of severe warnings, then, after the providers had made such enquiries as thought necessary to establish whether the right existed, the providers could not have further resisted payment".

The High Court, in the case of Hughes v Royal London Mutual Insurance Society Ltd[28] (an appeal arising from TPO's Determination, PO-7126) confirmed that members' statutory rights were paramount.

In its judgment, the High Court also overturned TPO's interpretation of the Pensions Schemes Act 1993 relating to a member's right to a transfer. In particular it held that, while a member had to be in receipt of earnings ('an earner' as described in the legislation) to be able to take a transfer to an occupational scheme, those earnings did NOT have to come from an employer participating in the scheme.

The decision in the case of Hughes remains the current legal position although the Pensions Schemes Act 2021 has seen the law changed to allow regulations to be made which could require a genuine employment link if the transfer is to be made to an occupational pension scheme. The government has stated that it will consult with the industry on the details of the draft regulations. Scammers may anticipate this legal change by asking members to sign bogus employment contracts, service contracts or zero hours contracts.

**Mr N: insufficient warning leads to need for reinstatement**

In a more recent TPO case (PO-12763), a pension scheme member (Mr N) complained that the Authority responsible for the administration of his scheme (the Police Pension Scheme) transferred his pension fund to a new pension scheme without adequate checks. He also alleged that the Authority failed to provide him with a sufficient warning as required by TPR. Mr N was concerned that his entire pension fund may have been lost or misappropriated because of the transfer. TPO upheld the complaint against the Authority because it failed to:

- conduct adequate checks and enquiries in relation to Mr N's new pension scheme;
- to send Mr N the TPR transfer fraud warning leaflet; and
- engage directly with Mr N regarding the concerns it should have had with his transfer request, if properly assessed.

Importantly in this case, the transfer request was received in November 2013, nine months after TPR launched its Scorpion campaign warning of pension liberation/scam risks. TPO has previously held that from February 2013 there was an increase in the expected diligence when considering transfer requests. As such, more would have been expected of the Authority in this case.

The Authority was directed to reinstate Mr N's Scheme benefits, or provide equivalent benefits, adjusting for any revaluation since the transfer. To avoid 'double counting', the Authority could recover from Mr N any amount of his pension fund that the trustees of the new pension scheme can retrieve for him. The Authority was also directed to pay Mr N £1,000 to reflect the materially significant distress and inconvenience.

The determination reinforces the need for robust due diligence when trustees and administrators receive a transfer application. It also serves as a reminder of the importance of clear and prominent member warnings about pension scam risks.

[28]Hughes v The Royal London Mutual Insurance Society Ltd [2016] EWHC 319 (Ch) (19 February 2016) (bailii.org)

**Mention of the Code of Good Practice by TPO/ need for proportionate due diligence**

The Code of Good Practice was mentioned by TPO as a source for considering due diligence processes to combat pension scams (paragraph 32 of PO-16907 from June 2018). The same determination reminds us that the transfer value must be used to "obtain transfer credits in a receiving scheme" and that, if there were serious doubts about that, it could be that the statutory transfer right would not be established. No specific ruling was made in that regard as TPO determined that the receiving scheme had not established it was registered with HMRC meaning there was no statutory right.
A further TPO determination from September 2018 (PO-19383) has highlighted due diligence should be proportionate. TPO found that the level of due diligence was too high in relation to a relatively well-known pension scheme. TPO noted that there was nothing in the Code to recommend the level of due diligence undertaken when presented with a large, well established and easily verifiable scheme. However, whilst the Code does not explicitly connect scheme size and legitimacy, it does state, in Section 3.1 of the Practitioners Guide, that an initial risk assessment should be made, ruling out the need for more extensive due diligence when the receiving scheme legitimacy is easy to establish.

Another recent TPO determination from March 2020 (PO-26700, Mr S) does provide comfort though that it is reasonable for a trustee to seek scheme documentation where there is a question around whether the legal requirements relating to cash equivalents have been met. Standard Life in that case was entitled to have declined the transfer where the member could not provide documentation to clarify whether the prospective receiving scheme was an occupational or personal pension scheme.

**Recent determinations: difficult balancing act**

Additional determinations further demonstrate the difficulties in balancing members rights, carrying out transfer due diligence and endeavouring to act in members best financial interests.

**PO 22236, Ms N**

In this case, the member had moved to Canada and asked for a transfer to a Canadian pension scheme which, at the time of the request, was a Qualifying Recognised Overseas Pension Scheme (QROPS) and so capable of receiving an authorised (recognised) transfer. However, by the time the pension provider was ready to process the transfer, following its due diligence checks, the receiving scheme was removed from the QROPS list.

The member complained and TPO upheld the complaint, holding that the delays in paying the transfer constituted maladministration. TPO directed the provider to process the transfer, to the extent it did not conflict with scheme rules and to pay any tax charges incurred by Ms N arising from the fact that the receiving scheme had lost its QROPS status. TPO noted that, under section 151(2) of the Pension Schemes Act 1993, he had the power to order the provider to make the transfer. On this basis, the provider would be exempt from having to pay a scheme sanction charge by virtue of section 241(2) of the FA 2004.

**PO 21489, Mrs H and PO 22965, Mr E**

In this case, TPO upheld a member's complaint regarding the transfer of her benefits to an alleged pension scam arrangement. According to TPO, the transferring scheme administrator failed to:

- properly consider whether the member had a statutory transfer right (in this case the member did not)
- carry out proper due diligence on the receiving scheme, and
- engage directly with the member regarding concerns it should have had about the transfer.

The scheme administrator was directed to reinstate the member's scheme benefits or to provide equivalent benefits. An award for distress and inconvenience was also made. However, the scheme administrator was entitled to recover from the member any funds from the receiving scheme that might be recovered from the receiving scheme in future. Similar directions were given in the earlier determination of Mr N, PO 12763.
The decision is perhaps unusual in that Mrs H did not have a statutory right, living off State benefits

at the time, leaving the administrator to consider a transfer on a discretionary basis. However, unlike with the determination of Mr N, Mrs H had clearly been provided with the Regulator's Scorpion materials but simply not had certain red flags drawn to her attention. TPO placed weight on Mrs H's lack of financial awareness in determining that she would have changed her mind had she had been made aware of the risks. The importance of due diligence is mentioned above. Whether or not the due diligence carried-out is sufficient is a matter that will be judged against industry practice at the time of the transfer. This is illustrated in June 2020 determinations.

Similarly in PO 22965 (Mr E), TPO took account of a member not being financially sophisticated in finding that he would have changed his mind had he received appropriate warnings about his transfer before it took place.

PO 27889 and PO 27901, Mr Z

Mr Z was a member of two personal pensions (PPs) with two different providers. He received an unsolicited call from an adviser, who offered to carry out a free pension review. Acting on the advice, he established a limited company and, in 2013, subsequently transferred £3,197.19 (from one PP) and £31,899.42 (from the other) into the same small self-administered scheme (SSAS). The funds were subsequently lost or misappropriated. Mr Z raised complaints against both providers.

In response, the providers both submitted that the due diligence they carried out was reflective of industry practice at the time. They had checked that the necessary transfer forms were duly completed, checked the registration of the receiving SSAS with HMRC and received confirmation from the SSAS administrator that it was able to accept Mr Z's transfer fund. One provider added that they had advised Mr Z to seek regulated financial advice and both noted that Mr Z had a statutory transfer right.

TPO dismissed Mr Z's complaints. Even though new pensions liberation fraud guidance had been issued by TPR in February 2013, at which time Mr Z's transfers were being processed, TPO had previously held that providers must be allowed a reasonable period of three months to consider and implement new guidance and introduce appropriate procedures.

In addition, TPO noted that Mr Z was either aware of pensions liberation or was made aware following correspondence relating to his PPs and one provider had warned him of the possible tax consequences of early pension access.

TPO found that Mr Z would still have chosen to transfer his pensions even if he had received further warnings. He concluded that both providers had carried out all necessary checks in accordance with the standards of practice at the time. Therefore, there was no maladministration.

**Word of warning: risk of lost investment opportunity if transfer delayed unreasonably**

Whilst not specifically in the context of a pension scams/liberation determination, the case of Mr T (CAS-38354-V5L8) involving the Tenco Executive Pension Scheme adds a note of caution when it comes to considering delaying a transfer without proper basis.

In that case, Mr T complained that an undue and avoidable delay was caused in the transfer of his pension to a new provider. As a result he lost the opportunity to invest in the stock markets immediately following the Brexit referendum result in June 2016. A finding of maladministration was made where 46 working days had passed without evidence that the transfers were being actively progressed and where Mr T had made it clear from the outset that he wanted the transfers completed expeditiously. However, TPO's original finding was that the loss claimed by Mr T was not reasonably foreseeable, a point then successfully challenged on appeal before the High Court in 2019.

The matter was remitted to TPO, who determined that Mr T would have invested his pension funds in the FTSE 100 Index immediately after the Brexit leave vote, resulting in a lost profit of about £43,700. James Hay was ordered to pay this sum together with interest at the court's judgment rate of 8%.

This case has been followed in December 2020 with a further determination (PO-26512, Mr E) where unreasonable delay has resulted in a direction that the member can recover investment loss if satisfactory evidence of it is provided within a reasonable timeframe.

In a pension scams context, it is more difficult to see a basis for attaching liability for investment loss unless it transpires of course that the intended receiving scheme was legitimate and not a scam. In any event, reasonable progression of due diligence where a transfer has given rise initially to red flags ought to provide some defence against liability for investment loss. What it does show though is that a good paper-trail is needed of questions asked and answers received to ensure no undue delay is experienced along the way.

**Mr Y (PO-24361): trustee's refusal to transfer members fund to overseas pension arrangement on grounds of "irrelevant" factors amounted to maladministration**

TPO has partly upheld a complaint brought by a deferred member of a defined benefit (DB) pension fund concerning the fund's delay in transferring his pension to another scheme. The member had initially requested to transfer his three UK-based pensions to an overseas personal pension scheme in Jersey. At the time, his December 2017 cash equivalent transfer value (CETV) quotation was guaranteed until March 2018. Shortly before the deadline, the member's independent financial adviser (IFA) submitted the transfer forms. However, the administrator later discovered that the forms covered transfers to UK-based pension schemes, whereas the member was required to submit an overseas transfer form. Soon after, the relevant overseas transfer form was completed and the administrator confirmed the December 2017 CETV quotation had been secured.

By mid-2018, the member was dissatisfied with the delay and filed a complaint against the administrator, noting that its "excessive" questions and insistence on carrying out standard checks on all overseas transfers caused him to suffer consequential losses.

The member argued that the administrator's due diligence was excessive and erroneous in relation to its request for further information regarding the receiving scheme's declaration of trust. However, the TPO held that there was no maladministration on the administrator's part, explaining that its request was reasonable to allow the fund trustees to establish whether the receiving scheme rules satisfied the legal requirement of a qualifying recognised overseas pension scheme (QROPS) to allow the overseas transfer to take place without incurring tax charges and sanctions. TPO also pointed out that there had been undue delay on the administrator's part in requesting that information.

TPO concluded that:

The trustee took into account irrelevant factors when it decided to decline Mr Y's transfer request and did not explain the reasons for its refusal in a clear and consistent manner and that:

- It inappropriately asked Mr Y to cover the costs of further due diligence, even though it did not believe further due diligence would likely address whether the receiving scheme would qualify as a QROPS.
- It caused delays when reviewing the information submitted for Mr Y's transfer request.
- Certain aspects of the service Mr Y received from both the administrator and the trustee were unacceptable.

TPO determined that, since the member had a statutory right to transfer, by virtue of pensions legislation, a transfer to an overseas arrangement was permitted provided that the transferring scheme is an HMRC registered scheme, and the receiving scheme is a QROPS. Therefore, the trustee's refusal to allow the transfer on the basis that HMRC would not guarantee a scheme appearing on the list of ROPS to be a QROPS amounted to maladministration.

TPO ordered the trustee to pay the member £1,000 for the serious distress and inconvenience caused and directed it to redetermine whether the receiving scheme is a QROPS, without consideration of the possibility that HMRC might decide to withdraw QROPS status in the future. Additional provisions to ensure that Mr Y did not suffer financial detriment should the transfer payment subsequently be made were also stipulated.

# 6.2 UK Court Cases

**Fraud Compensation Fund: Pension Protection Fund v Dalriada Pension Trustees High Court Case**

The recent High Court judgment in the case of the PPF v Dalriada[29] could result in compensation being payable to certain scammed pension schemes from the Fraud Compensation Fund (FCF). This fund is aimed at compensating occupational pension schemes where losses to a scheme result from dishonesty and there is evidence that a criminal offence might have been committed. Where compensation is payable, it would be paid to the scheme, which will then pay benefits under the scheme rules.

Each case will have to be considered on its own merits, but it is anticipated that many liberation schemes which facilitated early access to pension funds may be eligible for fraud compensation.

This is a key judgment and important questions for specific cases will be whether a liberation scheme was a sham from the outset (i.e. did all the parties know it was bogus) and were the losses due to dishonesty/fraud or just bad management. Very few pension liberation schemes are likely to be shams, because the legal test for a sham is difficult to establish, and the sheer number of members enticed into them makes it difficult to see how the test could be met. Some schemes may well be shown to be legally valid, but badly managed by the trustees (i.e. they invested in inappropriate assets). Unless dishonesty can be proven, there will be no cover under the FCF.

Key issues raised by the judgment include:

- How the FCF will meet the potential number of eligible claims; and
- To what extent compensation will be payable as even for eligible schemes: losses must be attributable to the dishonest act.
- The judgment has no bearing on the possibility of members of pension liberation schemes being subject to personal tax penalties although it leaves scope for scheme sanction charges levied on the schemes being recovered from the FCF.

The outcome of this case will not have any impact on compensation for personal pension schemes, which tend to be the model used for more recent scams. Members of personal pension schemes might have recourse to the FSCS but this is uncertain and depends on individual circumstances and might involve considerable delay if the relevant regulated entity is not insolvent and not on the FSCS' list of companies "in default" – important prerequisites for a claim.

# Other Court Cases

**FCA v Avacade Limited and Alexandra Associates (UK) Limited**

The FCA's recent High Court action against Avacade Limited and Alexandra Associates (UK) Limited saw the Court order that £10.7 million should be paid back to the victims.

The FCA's case concerned the activities of Avacade Limited (in liquidation) and Alexandra Associates (UK) Limited trading as Avacade Future Solutions (AA) and their directors. The two companies provided a pension report service and made misleading statements which induced consumers to transfer their pensions into self-invested personal pensions (SIPPs) to invest in alternative investments such as HotPods (office space available for rent), tree plantations and Brazilian property developments.

More than 2,000 consumers transferred in the region of £91.8m from their pensions into SIPPs. Approximately £68m of that amount was invested in products promoted by Avacade and approximately £905,000 was invested into a product promoted by AA – a fixed rate bond relating to a Brazilian property development. From these investments Avacade and AA earned commissions in the region of £10.7m. Many of the underlying investments have failed or are in liquidation.

[29] https://www.bailii.org/ew/cases/EWHC/Ch/2020/2960.pdf

**Adams v Carey Pensions**

The appeal is being heard by the High Court in 2021. The appeal follows the original judgment in May 2019. The judgment was considered a landmark ruling for the SIPP industry given it created the possibility of SIPP operators being less likely to be liable for the investments they accept into their SIPPs.

Mr Adams was introduced to Carey Pensions (now Options UK Personal Pensions) by an unregulated introducer. He then invested his pension in Store First storage units. Carey carried out the transaction on an execution-only basis as Mr Adams had instructed. The investments subsequently failed and Mr Adams took Carey Pensions to court to attempt to secure redress.

During the 2018 trial, Mr Adams' representatives argued that:

- Carey had breached FCA Conduct of Business (COBS) rules which require a firm to act fairly, honestly and in accordance with the best interests of clients;
- that it was responsible for any advice given by the introducer;
- that the introducer arranged the underlying investment; and
- that Carey was in a joint venture with the introducer and was therefore jointly liable for its actions.

The judgment ruled that Carey was acting on an execution-only basis; that it did not advise Adams; that the investment in Store First was high risk; and that Adams was responsible for his own investment decisions. The ruling also outlined that the introducer fell short of 'arranging the investment' and that it did not advise Adams to enter the SIPP.

## 6.3 International Court Cases

**Khuller v FNB Appeal, Royal Court of Guernsey**

The appeal concerned a decision of the Royal Court of Guernsey from 2nd December 2019 Khuller v FNB, in which the Royal Court dismissed actions for breach of duty by FNB.

The original decision concerned losses that had occurred on underlying investments in an insurance bond within a QROPS. Ms Khuller had been advised by an unregulated adviser while she was living in Thailand and had transferred her two UK DB pensions into the QROPS.

The most significant loss arose from the investment of approximately half the pension fund in the LM Performance fund. This fund lost all its value. The Court did not find the Trustees grossly negligent or indeed negligent at all as the Trustees had reasonably relied on the advice of an appointed investment adviser/manager. The blurring of those differing roles was a critical aspect in the successful appeal which found that the Trustees had been grossly negligent and in breach of their duties in allowing the investments.

This is an important decision highlighting the difference between an investment adviser and investment manager when appointed by trustees and how it affects their normal responsibilities in a non-reserved powers trust. The appeal was made on both the facts of the case and the conclusion of law made.

Essentially it was based on two key elements of the case. Firstly the appointment of the adviser and secondly the investments made. The latter element was where the appeal found success. The trustees sought to show that they could rely on the delegation to the adviser/manager to remove or qualify their duties as trustees and in any event to be liable the trustees had to be shown to have acted with gross negligence. Whilst in the appeal the appointment of the adviser was seen to be reasonable as certain checks had been made by the trustees and thus the original decision was undisturbed, the decision concerning breach of duties as regards the choice of investments was overturned as it was concluded a mistake had been made in the original decision as to the position to which the adviser was appointed. The appointment was as an adviser not as an investment manager and clear delegation of the trustees' responsibilities was not achieved.

In reality, the adviser made direct instructions to the bond holder without prior knowledge of the trustees, who saw themselves unable to choose investments as they were not investment professionals. The appeal court concluded the trustees had acted with indifference to its duty and the identified risks, which qualifies as being grossly negligent.

This case demonstrates that whilst some offshore advisers may have acted poorly for their clients, the trustees may be liable for claims if they have not properly delegated their responsibilities or used reserved powers trusts. As noted in the case it "… illustrates the dangers inherent in prioritising a smooth path for sales…".

**Spain & Gibraltar Court Cases**

PSIG continues to monitor the various international court cases which are currently being progressed and which may well impact matters in the UK. These include the trial of those accused of fraud and falsification charges in the Premier Pension Solutions and Continental Wealth Management transfer cases in Denia, Spain and the claim by STM Fidecs in Gibraltar against thirteen defendants for the return of "misappropriated" money in the Trafalgar Multi Asset Fund case. These cases all relate to scams on UK pension scheme members.

In addition, the following is an extract from a recent International Adviser article[30]

**Isle of Man & Malta Court Cases**

"A group of UK and international investors have launched a multi-million-pound claim against life insurers Quilter International and Friends Provident International. The claim, which has secured litigation funding, centres around what the group alleges was the mis-selling of "high-risk funds" through insurance wrappers to "unsophisticated British and international investors living overseas". The products were described as life assurance policies, but the group said they were "unit-linked" and featured high risk funds which were "entirely inappropriate for unsophisticated investors". The group said that many of the expats are now retired and have lost their life savings.

The case is being brought by UK-based law firm Signature Litigation, which said that the insurers "sidestepped British investment regulations" by selling over £100m ($124m, €112m) worth of these products via the Isle of Man. Both life insurance companies deny any wrongdoing.

Again, we will await the outcome of this case with interest but it is already evident that some SIPP operators may be exposed to Ombudsman determinations and potential litigation if they have not undertaken sufficient due diligence on the investments which are made available via their SIPP offerings. The Berkeley Burke High Court judicial review in 2018 is perhaps the most high profile example in the UK but the July 2020 judgment by Malta's Arbiter for Financial Services is also worth highlighting in view of the potential implications for international SIPP providers.

The Maltese arbiter has concluded that Momentum Pensions Malta was partly responsible for the losses suffered by 55 clients of defunct advice firm Continental Wealth Management (CWM).

Momentum accepted business from CWM, which was an unlicensed investment adviser and allowed an unsuitable portfolio of underlying investments

[30]https://international-adviser.com/investors-launch-legal-claim-against-two-life-insurance-giants/

to be created within the retirement scheme. The portfolio comprised high-risk structured products of a non-retail nature, which conflicted with the risk profiles of the scheme members. The arbiter concluded that:

"There is sufficient and convincing evidence of deficiencies on the part of [Momentum] in the undertaking of its obligations and duties as trustee and retirement scheme administrator of the scheme." and that "it is also evidently clear that such deficiencies prevented the losses from being minimised and in a way contributed in part to the losses experienced."

He added: "Whilst the retirement scheme administrator was not responsible to provide investment advice to the complainants, [they] had clear duties to check and ensure that the portfolio composition recommended by the investment adviser provided a suitable level of diversification and was inter alia in line with the applicable requirements in order to ensure that the portfolio composition was one enabling the aim of the retirement scheme to be achieved with the necessary prudence required in respect of a pension scheme." Taking into account the role and responsibilities of CWM, "the arbiter considers that [Momentum] is to be only partially held responsible for the losses incurred." Momentum has been ordered to pay complainants 70% of the "net realised losses sustained on their investment portfolio".

The implications for transferring schemes are clear: they must ensure that their services are provided to the highest possible standards and evidenced by robust and challenging governance. TPO has also shown in previous determination that he will not hesitate to order benefits to be reinstated if sufficient due diligence has not been undertaken or adequate member scam warnings have not been provided.

# 07 DEVELOPMENTS

## 7.1 Pension Schemes Act 2021

The Pension Schemes Act paves the way for a change to the statutory transfer right, the details of which will be developed in forthcoming Regulations, based on the provisions outlined in clause 125 of the Act. The Regulations will require consultation prior to implementation but are expected to include a requirement of evidence of an earnings link to an employer of the receiving scheme, where it is an occupational pension scheme.

The Act has also provided scope for a requirement that transferees seek independent guidance if sufficient pension scam warning signs are identified. Trustees will need to look closely at the detail of draft Regulations once they are produced. Regulations are expected to be in place by October 2021. A further update to the Code will be issued to reflect the new Regulations.

## 7.2 Work & Pensions Committee Inquiry

In July 2020, the Work and Pensions Committee also launched an inquiry[31] into the impact of pension freedoms and level of protection for pension savers. The three-stage "broad inquiry" will investigate how savers are protected as they move from saving for retirement to using their pension savings under freedom rules. The inquiry has first been focussing on pension scams before moving on to accessing pension savings and saving for later life. PSIG has provided a formal response to the Committee and Margaret Snowdon OBE, Chair of PSIG, has also provided oral evidence.

The report was published on 28th March[32]. PSIG welcomes this excellent, clear and helpful report.

## 7.3 All Party Parliamentary Group

An All Party Parliamentary Group (APPG) has also been established to look into pension scams. PSIG will update the Code as required to reflect anything which may emerge from this group.

[31] https://committees.parliament.uk/work/457/protecting-pension-savers-five-years-on-from-the-pension-freedoms-pension-scams/
[32] https://committees.parliament.uk/publications/5322/documents/53036/default/

## 7.4 FCA Call for Input on the Consumer Investments Market

In September 2020, the FCA issued a Call for Input on the Consumer Investments Market.[33] Section 7 is entitled Tackling Scams and the paper asked;

- How can people be better protected from scams?
- What do you think are the most suitable and proportionate remedies to further tackle scams and other investment harms?

Other questions the FCA have posed include:

- How can we better ensure that those who have the financial resources to accept the risks of higher risk investments can do so if they wish, but in a way that ensures they understand the risk they are taking?
- How can we use the regulation of financial promotions to make it easier for people to understand the level of regulatory protections afforded to them when they invest?
- What more can we do to ensure that when people lose money because of an act or omission of a regulated firm, they are appropriately compensated and that it is paid for fairly by those who cause the loss?

PSIG has provided a formal response to the FCA.

## 7.5 HM Treasury Consultations On Regulatory Framework For Approval Of Financial Promotions & Cryptoasset Promotions

In July 2020, HM Treasury published two consultations proposing amendments to the UK regulatory framework for approval of financial promotions[34] and with respect to cryptoasset promotions[35]. The consultation papers propose changes to the way that unauthorised persons communicate financial promotions more generally and also specifically in regards to cryptoassets.

The consultations follow the November 2019 FCA ban on the promotion of speculative mini-bonds to retail investors and guidance for firms on approving financial promotions and their concern regarding due diligence and the investors' understanding of the products being marketed.

The consultations outline that additional safeguards are required to ensure that approval by an authorised person is a genuinely effective means of ensuring that consumers are protected from deficient or potentially harmful financial promotions.

[33] https://www.fca.org.uk/publication/call-for-input/consumer-investments-market.pdf
[34] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902101/Financial_Promotions_Unauthorised_Firms_Consultation.pdf
[35] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902891/Cryptoasset_promotions_consultation.pdf

## 7.6 Pension Schemes Act 2021

As part of the Regulator's efforts to prevent pension scamming, in November 2020 in partnership with PSIG, it launched its Combat Scams Pledge initiative[36]. It asks trustees, providers and administrators of pension schemes to pledge to do what they can to protect scheme members and follow the principles of the PSIG) Code of Good Practice. Making the pledge requires a commitment to:

- "regularly warn members about pension scams
- encourage members asking for cash drawdown to get impartial guidance from The Pensions Advisory Service
- get to know the warning signs of a scam and best practice for transfers by completing the scams module in the Trustee Toolkit and encouraging all relevant staff or trustees to do so; studying and using the resources on the Financial Conduct Authority (FCA) ScamSmart website, our (TPR's) scams information and the PSIG code; considering becoming a member of the Pension Scams Industry Forum by contacting PSIG
- take appropriate due diligence measures by carrying out checks on pension transfers and documenting pension transfer procedures
- clearly warning members if they insist on high-risk transfers being paid
- report concerns about a scam to the authorities and communicate this to the scheme member"

PSIG welcomes TPR's initiative and the opportunity for transferring schemes to formally pledge and evidence their commitment to this. The Code is fully aligned with the both the new pension scams module within the Trustee Toolkit and the separate training materials which have been developed to support the pledge.

Scams are now so complex that the pensions industry alone will never be able to prevent them all. However, TPR has taken action against scammers, most notably the successful High Court prosecution ordering four individual defendants to repay the funds (£13.7m) they dishonestly misused or misappropriated from the pension schemes – the first time such an order has been obtained. Further information on this case can be found in the Case Studies section of this Code.

Project Bloom, the multi-agency initiative chaired by TPR, has been instrumental in sharing intelligence which has led to criminal prosecutions and successful convictions. Bloom has also successfully disrupted scammers by taking down websites, adverts, and intervening to secure pension assets that would otherwise fall into the hands of the scammers.

TPR and the FCA have also joined forces to launch the ScamSmart campaign[37] urging people to be aware of scammers targeting their pension savings. The campaign targets savers aged between 45 and 65, which the regulators say is the group most at risk.

The regulators have also taken additional actions following the Covid-19 pandemic and, from April 2020, savers looking to transfer from a DB to a DC pension during the crisis must be warned that it's unlikely to be in their best long-term interests. As outlined in Section 2.1 of the Practitioners Guide, under TPR guidance[38] trustees are asked to send DB members looking to move retirement funds a letter warning them of the risks during the pandemic and urging them to consider the decision carefully. The guidance also calls on trustees to:

- highlight the free, impartial pensions guidance from Pension Wise, including phone appointments and online information;
- encourage members to take regulated advice to understand their retirement options;
- identify increased risks in how a member has decided to access their pension funds and give appropriate warnings of the risks and implications of their chosen option; and
- monitor CETV requests and inform FCA of unusual or concerning patterns, such as spikes or the same adviser across multitude of requests.

[36]https://www.thepensionsregulator.gov.uk/en/pension-scams/pledge-to-combat-pension-scams?msdynttrid=p5TEy22gFSNrjDckaYX4Ypbm557PZcq HTVzRWZ1Q7nQ
[37]https://www.fca.org.uk/scamsmart/how-avoid-pension-scams
[38]https://www.thepensionsregulator.gov.uk/en/covid-19-coronavirus-what-you-need-to-consider/communicating-to-members-during-covid-19

## 7.7 FCA Action

**FCA & British Steel Advice Complaints**

The FCA intervention in the British Steel Pension Scheme transfer advice scandal should also be noted. The FCA has written to over 7,000 former members of the scheme to let them know that they may have received unsuitable advice to transfer and to encourage them to make a complaint against their adviser. Any compensation is awarded by the Financial Ombudsman Service, unless the adviser has gone bankrupt or into liquidation, in which case it is paid under the Financial Services Compensation Scheme.

**FCA Letter "Managing the risks of Defined Benefits to Defined Contribution transfers"**[39]

This letter was sent to the Chief Executive Officers of major providers on 22nd March 2019. In it, the FCA detailed how providers should treat customers fairly in the context of DB to DC transfers. From a pension scam prevention perspective, the key requirements are outlined in the following paragraph:

"Management Information (MI) – You need to ensure your MI is sufficiently detailed to enable management to fully understand and manage the risks from DB pension transfers. You should use metrics that allow meaningful oversight, specifically on customer/adviser behaviour. This should identify negative trends, such as a high volume of transfers from a single scheme over a short period or customers transferring out of new DC arrangements soon after transferring from DB schemes. You should also assess MI for completeness. For example, where you monitor insistent customers, this should cover all applicable transfers including those accepted through platforms. Without this, the MI cannot accurately reflect your overall risk profile. Where you identify negative trends, we expect you to investigate and assess what action you may need to take, including notifying us."

These requirements have been incorporated within Section 3.1.2 of the Practitioners Guide.

**International SIPPs & Offshore Investment Bonds**

As outlined in Section 2, the FCA has provided information for consumers on transferring or switching UK pensions into international self-invested personal pensions (SIPPs).[40]

Overseas advisory firms often invest consumers' pension funds through an offshore investment bond within an international SIPP. The FCA is concerned that consumers who invest in this way may be exposed to high and/or unnecessary charges. They are also concerned that the tax benefits of investing through an offshore investment bond are largely redundant to someone investing in a UK personal pension scheme.

The FCA has written to providers of international SIPPs and an additional letter to those which provide offshore investment bonds via the SIPP[41] requesting detailed information.

**FCA Register**

From December 2019, the FCA no longer updates the FCA Register with information on individuals such as CF30s who no longer hold Approved Persons roles. This is because the FCA is extending the Senior Managers and Certification Regime to all FCA solo-regulated firms who will then be solely responsible for assessing the suitability of their staff.

To make information on individuals more accessible, the FCA has launched the directory for solo-regulated firms in December 2020 with information on certified staff and others once they have been assessed as fit and proper, including those who previously held a CF30 role.

Trustees and providers should check that the advice firm has the correct permission to advise on pension transfers by verifying the firm's details on the FCA Register. The firm information section allows trustees to contact firms directly for more information. The FCA also intends to include links to other useful sources of information.

[39]https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-managing-the-risks-of-defined-benefits-to-defined-contribution-transfers.pdf
[40]Information for consumers on transferring or switching UK pensions into international self-invested personal pensions (SIPPs)
[41]https://international-adviser.com/international-sipps-latest-fca-crackdown-target/?NLID=20201214-IA-NEWS-AM-ACI-BANNERS&NL_issueDate=20201214&utm_source=20201214-IA-NEWS-AM-ACI-BANNERS-20201214&utm_medium=email&utm_campaign=investmentnews&utm_visit

## 7.8 Claims Management Companies

Claims Management Companies (CMCs) are encouraging scam victims to start actions against transferring schemes. Claims firms are identifying people who have transferred from pension schemes and have become a victim of a pension scam or are otherwise having problems following the transfer.

Such firms typically ask members to sign letters of authority so that the firm can act on their behalf for the purpose of alleging that transferring schemes did not conduct adequate checks before allowing transfers-out.

Many of these claims are clearly speculative and, in those circumstances, schemes are encouraged to respond 'robustly' to them stating, so far as relevant that:

- in connection with any transfer, the [transferring scheme] has always followed prevailing legislation, its trust deed and rules and guidance from the TPR; and
- for occupational pension schemes, if a member or former member has a complaint or dispute then, in the first instance, the individual member should follow the procedure set out in the scheme's internal dispute resolution procedure [and include a summary of the IDRP].

Another tactic is to get members to make General Data Protection Regulation (GDPR) Data Subject Access Requests (DSARs). Those subject to a DSAR will need to comply and take any advice they deem necessary. However, consider whether every document request properly falls within the scope of a DSAR. In some cases, a Claims Management Company might attempt to obtain disclosure to which it is not entitled. For example, due diligence undertaken in looking into the prospective receiving scheme, which might prove extensive, need not be disclosed under a DSAR if the member concerned is not specifically identifiable from it and if that due diligence could just as easily relate to a transfer request made by another member. By contrast, any conclusions reached from that due diligence and relayed to the specific member might well need to be provided. It is possible to redact information gathered to prevent financial crime. This could apply to due diligence that highlights any suspicions, which might assist scammers improve their techniques.

PSIG has called for further guidance from the Information Commissioner's Office (ICO) to address the issue of DSARs being used by dubious Claims Management Companies (sometimes on the back of cold-calling) to facilitate spurious compensation claims following a pension transfer. This "secondary scamming" is now a key concern. DSARs are being used not to enable pension scheme members to understand how and why their data is being used but rather by Claims Management Companies to facilitate such redress complaints. There have also been examples recently in the pensions press of individuals (including directors) of former advice firms – some with numerous FSCS claims against them for poor pensions advice – establishing or moving to claims management firms and then offering claims management services to former clients of the now defunct advice business.

## 7.9 Other Guidance

**PASA Defined Benefit Transfers Code of Good Practice**

In July 2019 the Pensions Administration Standards Association (PASA) DB Transfers Working Group released guidance[42] focusing on what was defined as a "Standard" or straightforward case. It was originally intended this Guidance would be Part 1 of a two-part release with Part 2 covering "Non Standard" Cases. It was subsequently agreed, rather than produce a Part 2, a Code of Good Practice (the Code) would be created to cover all DB transfers. PASA has consulted on the Code and expects to publish a full version in 2021.

The Chair of the PASA DB Transfers Working Group, James Ellison, said "The time taken to process DB transfers varies hugely, some taking months to execute. Unfortunately, delays damage relationships with scheme members and lead to a breakdown of trust. This can result in members making decisions which are not in their best interest, or worse still, increase the risk of becoming victims of pension scams. Scammers often use the time taken to process a transfer to create an impression of trustees seeking to hold on to a member's money and to incite them. It is a horribly sophisticated process and there are lots of members already making poor choices. We are extremely mindful of needing to find the balance between member protection and their statutory right to take their pension in a different shape or form, via a flexible arrangement. As a group, our key objective is to create a framework to help deliver this balance. This Code sets out to create faster, well-communicated, efficient and cost-effective strategies scheme administrators and wider stakeholders can execute."

The PASA Code is complementary to the PSIG Code of Good Practice which, of course, focuses purely on pension scams.

**Personal Finance Society's Code of Good Practice On Advising Defined Benefit Pension Transfers**

The Personal Finance Society's Pensions Advice Taskforce has published a voluntary Code of Good Practice[43] on advising DB pension transfers. This sets out the "gold standard" that advisers must attain when seeking to become accredited under the scheme. The standards are in excess of those set out under regulation and include declaring conflicts of interest and all fees expected from a transfer and are aimed at helping consumers identify ethical advisers. It is expected that in due course accredited advisers will be shown on a register held by the Money and Pensions Service (to be rebranded as MoneyHelper from June 2021[44]).

**FCA, TPR and TPAS Joint Protocol On Defined Benefit Pension Transfers**

The FCA, TPR and TPAS have published a joint protocol[45] to enable early intervention by them to help selected pension scheme trustees ensure that their members are adequately and fully informed when considering transferring their DB pensions. If an event occurs that the regulators believe could lead to increased transfer activity, such as a scheme restructure, they will contact the trustees, reminding them of their obligations. The regulators therefore expect scheme trustees of DB schemes to keep certain electronic records of transfers, including the name of the receiving scheme, the name of the regulated IFA firm, the IFA individual who gave advice (although it should be noted that this may not be possible without direct enquiry of the firm employing the adviser), the Cash Equivalent Transfer Value (CETV) amount, the guarantee date and the date of payment.

[42] https://www.pasa-uk.com/guidance/db-transfers/
[43] https://www.thepfs.org/about-us/initiatives/the-pension-transfer-gold-standard/
[44] https://maps.org.uk/moneyhelper/?cn-reloaded=1
[45] https://www.fca.org.uk/publication/mou/fca-tpr-tpas-joint-protocol.pdf