Pension liberation fraud: a warning for trustees

Revised November 2013

Pension briefing

HIGHLIGHTS

At this time of austerity, the opportunity to unlock pension savings before normal minimum pension age can be particularly attractive to members. The Pensions Regulator has issued guidance making clear that pension scheme trustees should be alert to the risks of pension liberation. This briefing note explores the implications of pension liberation fraud and provides practical tips on how to guard against it when administering transfers out.

WHAT IS PENSION LIBERATION FRAUD?

Members are encouraged to "liberate" their pension savings by requesting a transfer to an arrangement that allows them access to the funds before their minimum pension age (usually 55). The member is not made aware of or is misled as to the adverse tax consequences.

The Pensions Regulator is concerned that the phenomenon is on the increase. Organisations promoting pension liberation are using a variety of techniques, including cold calling and mass texting. In some cases, cash incentives are offered to encourage members to make the transfer.

Adverse consequences for the member

Payment of the proceeds of a pension that has been "liberated" will almost certainly constitute an unauthorised payment under the Finance Act 2004. This will attract a 40% tax charge (and potentially an additional 15% surcharge, depending on how much of the member's pension is paid out). If the member does not declare these unauthorised payments to HMRC, there may also be penalties and interest to pay.

As well as the adverse tax consequences, there are often high fees in the form of a "commission" or "arrangement fee". This is rarely made clear to members at the outset.

Adverse consequences for trustees

Where a scheme pays an unauthorised payment, the scheme administrator will be liable for a scheme sanction charge of 40% of the amount of the unauthorised payment (reduced to 15% if the member has paid the unauthorised payments charge).

In addition, the statutory discharge applicable to trustees in respect of a member who transfers out is only available if the trustees have taken all reasonable steps to ensure that the trustees or managers of the receiving scheme are acting in good faith. There is therefore a responsibility on trustees not to respond blindly to a member's request to transfer out.

Trustees' role in preventing fraud

The Pensions Regulator has made clear that it expects trustees to take active steps to protect members from pension liberation fraud.

As a minimum, trustees should have systems in place that seek to identify when a member may be dealing with a scheme involved in pension liberation. In addition, trustees should consider actively contacting members about the risk of pension liberation fraud.

Questions for the member

The Pensions Advisory Service (TPAS), together with the Pensions Regulator and others, has produced a short information sheet to help members understand the risks of pension liberation fraud. You should instruct your scheme administrator to include this in its response to any request for a transfer and to include a link to information from TPAS, the Pensions Regulator and HMRC on any scheme website. In addition, the administrator should ask the member:

- how he or she became aware of the receiving scheme;
- how the scheme was described (asking to see copies of promotional material);
- whether he or she has been given a copy of the documents he will be signing;
- whether he or she has been put under time pressure;
- whether he or she has taken independent financial advice.

Historically, scheme administrators have tended to focus (and be judged) on completing transfer out requests quickly. Their emphasis may therefore need to change – a swift response is still desirable, but the first step in the process may be a quick request for further information.

Checklist in respect of the receiving scheme

Where there is a risk of pension liberation, trustees should take reasonable steps to ensure that the receiving scheme is acting in good faith. You (or the scheme administrator acting on your behalf) should investigate the following:

- Whether the scheme is registered with HMRC. If the scheme is newly registered, this may also be cause for concern, especially if the scheme was previously unknown to you but is now involved in more than one transfer request.

  In a departure from its previous "process now, check later" approach, HMRC has announced that it will no longer automatically confirm that a scheme is registered on successful submission of the online registration form but will conduct more detailed investigations before registration is accepted. HMRC will also disclose to scheme administrators seeking confirmation of the registration status of a receiving scheme (without asking that scheme's consent) whether the conditions for registration are or are not met.

  However, HMRC and the Pensions Regulator have made it clear that seeking confirmation of registration status is not the only check that a transferring scheme should carry out and rely on in deciding whether to make a transfer.

- If the transfer is to an occupational scheme, is it registered with the Pensions Regulator?
- The status of any corporate employer registered with Companies House. If the company is newly registered or a dormant company with no trading history, you may wish to investigate further.

Discharge for trustees

To reinforce warnings to members, and to protect themselves, trustees should ask members to sign a suitable discharge when requesting that a transfer go ahead. The following could be used:

"I confirm that I have read the leaflet "Predators stalk your pension", issued by the Pensions Advisory Service, and I do not believe that any of the concerns it raises about pension liberation are relevant to the transfer of my benefits out of the [name of scheme].

I understand that attempting to access some or all of my pension benefits before I am age 55 may have very serious tax consequences, which could greatly reduce the amount of my benefits.

I accept that after my benefits have been transferred out of the [name of scheme] I will have no further claim to benefits from the Scheme."

What should you do if you have a concern?

The starting point is that trustees have a duty to carry out a member's transfer request. However, where you have reason to believe that pension liberation may be an issue and are in the process of investigating this, you may need to delay the transfer. Whilst in theory any delay could be criticised by the Pensions Regulator or the Pensions Ombudsman, they are likely to take into account concerns over pension liberation in assessing whether it is appropriate to do so.

The National Fraud Intelligence Bureau is willing to share some information on schemes and companies that have been involved in pension liberation fraud with the industry. If your scheme is experiencing pension liberation activity and you would like to receive their periodic alerts, you can send an email to NFIBOutputs@cityoflondon.pnn.police.uk.

The Bureau carefully vets new additions to the list of recipients of its alerts, so some follow-up questions can be expected.

You can report suspected liberation activity to the Action Fraud helpline on 0300 123 2040.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

KEY HOGAN LOVELLS PARTNERS

Jane Samsworth	**+44 20 7296 2974**	**jane.samsworth@hoganlovells.com**
Katie Banks	**+44 20 7296 2545**	**katie.banks@hoganlovells.com**
Duncan Buchanan	**+44 20 7296 2323**	**duncan.buchanan@hoganlovells.com**
Claire Southern	**+44 20 7296 5316**	**claire.southern@hoganlovells.com**
Edward Brown	**+44 20 7296 5995**	**edward.brown@hoganlovells.com**

Pensions360:
the full picture
www.hoganlovells.com/pensions360

About Pensions360

Hogan Lovells' broad cross-practice capability covers the full spectrum of legal advice from lawyers who understand pension clients; advising on issues from scheme investments, corporate restructurings and transactions, to funding solutions and interaction with the Regulator or the courts. The ability to draw on specialists from other practices who are not only experts in their field but have an in-depth understanding of pension issues sets us apart from our competitors.

www.hoganlovells.com