Briefing

BURGES SALMON

Pensions

July 2013

Pension liberation fraud

Importance: ★★★★☆

Trustees and their administrators should review their procedures and paperwork to make sure they identify requests for transfers to pension liberation schemes and process them with extra care. These are important steps to protect the member and the trustees.

Liberation schemes offer early access to pension saving in breach of the normal rules.

Plan A for trustees is to explain the consequences of liberation to the member, including the heavy cost in tax and fees it is likely to involve. Clients tell us that members often withdraw their applications when they understand the full picture.

If a member persists, Plan B is for trustees to reserve the final decision to themselves personally and to agree only if they are satisfied the legal requirements for a legitimate transfer are met to the last letter. If this is not the case they will be able to refuse the application on technical grounds.

Plan B may involve writing to the liberation scheme with detailed and probing questions.

Meanwhile, the first practical step is to slow down the transfer process while the trustees assess the facts and communicate with the member.

Pension liberation

Pension liberation schemes have become common. Typically their promoters encourage a member to transfer to another scheme that promises to release money before age 55 when the normal early access conditions (like ill-health or terminal illness) are not met. They may be promised the money as a lump sum and there may be talk of an advance up front.

These transactions are often fraudulent because the promoters mislead members over the consequences. In these cases, the promoters commit a criminal offence. They often levy very high charges too.

Promoters may also commit other criminal offences e.g. carrying on a regulated investment activity without being authorised to do so under financial services legislation.

The Pensions Regulator (TPR) is part of a broad effort to combat liberation fraud. HMRC, the police, the Serious Fraud Office and the Serious Organised Crime Agency are also involved. Arrests have been made.

TPR has indicated it is unlikely to take action against trustees who delay a decision on a transfer beyond the normal deadline because they see this as being in the member's best interests. Nor do we think it likely the Pensions Ombudsman would regard this as maladministration.

Trustees should consider publicising liberation fraud in a newsletter to members and on the scheme or employer's website. TPR and HMRC have issued suitable materials (see below).

Trustees should report concerns about liberation fraud to TPR and other agencies in the campaign.

The member

At best, a liberation scheme is likely to leave the member with a large tax liability and a pension much reduced by big charges. At worst, a member could lose their entire pension saving to simple theft, and still be left with a hefty tax bill.

If promoters explained the costs, risks and tax consequences in full, that would normally deter anyone who was not in the most acute need of money. It follows that trustees should start from a presumption that any transaction that shows signs of being a fraudulent liberation scheme is precisely that. In the first instance, they should invite the member to present evidence to the contrary.

Tax on amounts taken early is generally 55% even if the member normally pays basic rate tax or no tax at all. HMRC will demand the tax even if the member was unaware there would be tax consequences, offers to put the money back into a pension scheme or has spent it all.

HMRC are emphatic: there is no tax loophole making liberation schemes tax free as promoters often claim.

The trustees

Trustees need to use the time they buy by slowing down a transfer to warn the member and to check whether their suspicions are justified. The legal argument is that by taking time to do these things, they are acting in the member's best long-term interests as well as protecting the rest of the scheme. These steps also help protect the trustees personally.

Many members will have a statutory right to a transfer as long as the transaction meets the requirements in the legislation. In the end, if trustees are satisfied these have all been met, they must allow a member to exercise their right. But there is detail

continued overleaf

on which a liberation scheme might well fall down e.g. is it an *occupational (or personal) pension scheme** as elaborately defined in the legislation? If a box is not ticked, trustees are justified in not proceeding.

Trustees face tax too. If they transfer assets other than to a registered scheme or qualifying recognised overseas scheme, they can face a charge of up to 40% of the amount transferred. This is likely to have to come out of assets supporting other members' benefits.

In addition, trustees only secure the statutory discharge from further liability for the member's benefits if all the legal requirements for a legitimate transfer are met. They are entitled to insist on securing this discharge.

Where a member does not have a statutory right to transfer, trustees will generally have discretion under their scheme rules to allow a transfer on request. They should apply similar disciplines when considering any such request but will generally have more scope to decline. If they agree to a transfer in these circumstances, trustees should consider obtaining a written indemnity and discharge from the member beforehand.

Risk of criminal liability

At worst, trustees could incur criminal liability. In practice, however, the likelihood looks minimal in normal circumstances. Even so, it is a risk trustees are entitled to take into account.

In broad terms, it is a criminal act to deal with any kind of property if you know or suspect it represents the proceeds of crime.

The particular offence trustees (and others running pension schemes) appear most at risk of is making, or being concerned in, an arrangement they know or suspect helps someone else (the promoter) acquire, retain or control property obtained through criminal activity. That property could include assets the promoter has acquired from other pension schemes in the past.

Tell-tale signs

Here are some of the warning signs of a liberation scheme that trustees and administrators might see:

- the receiving scheme is unknown to them but a number of members have mentioned the name,
- the receiving scheme is not registered with HMRC or has only recently become registered,
- the putative new employer is a recently registered company or is based a long way away,
- the member expresses interest in getting their pension before age 55,
- the member reports talk of a loophole, pressure to complete the transaction or an unusual investment strategy and
- the member has taken advice but not from a regulated financial adviser.

The member might see some of these signs:

- they are cold-called e.g. an unsolicited text message,
- an offer of early access before age 55,
- talk of things like legal or tax loopholes, and "unlocking" a "frozen" pension,
- transfer to an overseas scheme,
- they are pressed for personal details at the outset and pressured to complete the transaction quickly,
- an offer of a cash bonus or advance or loan out of their pension saving up front,
- the promoter withholds documentation and
- the member has a poor credit history that is on public record e.g. county court judgments

Letter to members

A warning letter to the member could usefully:

- explain liberation and the warning signs that have alerted the trustees,
- enclose TPR's leaflet on liberation for members considering a transfer and give the address of the liberation pages on its website,
- list the warning signs a member might notice and ask how many they have seen,
- point out that it is unlikely the transaction could be reversed,
- ask the member to confirm in writing whether or not they want to proceed and
- if they do, tell them the trustees will consider their application and possibly carry out further investigations - which might take time.

Trustees should keep an audit trail of all their investigations and communications so they can demonstrate if they have to that they have acted diligently and reasonably in the member's interests.

Materials

TPR has a pack of materials on its website, some addressed to administrators and trustees and some to members. There are also e-learning tools. *See* **http://www.thepensionsregulator.gov.uk/pension-liberation-fraud.aspx**

HMRC explains in detail that there are no tax loopholes allowing general early access and that it will enforce the penal tax charges. *See* **http://www.hmrc.gov.uk/pensionschemes/liberation.htm?WT.ac=PENSIONSCHEMES_LIBERATION**

Contact

If you would more information about pension liberation fraud, please get in touch with your usual contact in our pensions team or with Richard Knight.

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* It is no surprise that the question of what constitutes an *occupational* or *personal pension scheme* has in fact come up in earnest in the liberation context. We anticipate a court hearing into this in July. The court's decision is likely to come a few weeks later.

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