Law Society of Scotland

Consultation Response

Bulk transfers of defined contribution pensions without member consent

21 February 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Pensions Law Sub-committee welcomes the opportunity to consider and respond to the Department of Work and Pensions call for evidence: *Bulk transfers of defined contribution pensions without member consent*.[1] The Sub-committee has the following comments to put forward for consideration.

Response to questions

Chapter 2: DC-DC bulk transfers

Question 1: In your view, how common are occupational DC-DC bulk transfers without consent and can you give examples of circumstances in which they occur?

DC-DC bulk transfers without consent appear to be increasingly common. Typical scenarios include:

- closing existing occupational DC schemes – or DC sections of hybrid occupational schemes – and transferring both future accrual and existing accrued benefits to a master trust arrangement in order to reduce costs; and
- consolidating hybrid schemes by merger, where in addition to DB benefits, DC benefits must be (separately) transferred without consent – for example, DC AVCs or transferred-in benefits that have resulted in a DC transfer credit.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579033/bulk-transfers-of-defined-contribution-pensions-without-member-consent-call-for-evidence.pdf

Question 2: Can you give an indication of the time/costs of complying with the current requirements, number of DC-DC bulk transfers per year, time/cost of producing the actuarial certificate, and any other information you think might be helpful?

Other respondents will be better placed to answer this question.

Question 3: Do you think there is sufficient clarity regarding what is meant by "broadly no less favourable" and how consistently do you think it is being applied? Some examples of how actuaries actually apply this provision would be helpful.

Some of our members consider this requirement is very unclear in its application to DC benefits and as a result there is little consistency in the way it is applied. In their published Notice on "Actuarial certification of bulk money purchase transfers"[2] dated February 2016, the Institute and Faculty of Actuaries highlight (at paragraphs 7-9) a number of difficulties in the application of this test to occupational DC-DC bulk transfers and suggest that members (i.e. actuaries) seek legal advice.

However, in practice legal and actuarial advice alone often cannot produce a definitive answer to the questions raised by this test in the context of any particular transfer. A broader assessment, as suggested in our response to Question 4 below, would seem more likely to produce practical outcomes that still protect the interests of transferring members and beneficiaries.

Question 4: Do you think that the actuarial certificate or an alternative check of scheme quality still has a role in occupational DC-DC transfers? If so, who ought to carry out such an assessment? What factors should be considered as part of that assessment and which should be excluded? Do you have any thoughts on how the relative strengths and importance of those factors should be weighed up? If not, how would members continue to be protected?

We disagree with the initial view expressed in the Call for Evidence that a reliance on trustees' fiduciary duties alone would not offer adequate clarity for trustees or member protection. In particular:

- trustees are no more likely to come under pressure from a sponsoring employer than any professionals who are required to sign off on any form of prescribed check or test;
- while the decision may ultimately be a difficult one, the trustees' fiduciary duty is in itself very clear and involves an overall assessment of the best interests of the relevant beneficiaries;

[2] Available at https://www.actuaries.org.uk/documents/notice-actuarial-certification-bulk-money-purchase-transfers

- this (existing) test is taken very seriously by all trustees when it is properly explained to them; if anything, the existence of a statutory actuarial test distracts and detracts from the proper consideration of this overriding and ultimately more onerous duty;
- if it is felt that an explicit test nevertheless needs to be set out in legislation, then we would recommend that it be expressed in similar terms to the fiduciary duty and left to the discretion of the trustees, having taken such professional advice as they consider necessary;
- it is important to remember that the quality of trustee decision-making in this area – as it does in other areas – ultimately falls within the Pensions Regulator's overall remit and to any extent to which it is not already covered could be made the subject of suitable guidance.

Question 5: Sometimes occupational DC pensions have valuable guarantees, either borne by the scheme or another body. How do you think the process should differ for these types of scheme?

We do not consider that the process should differ for these types of scheme. Any factors of this nature already need to be taken into account in the exercise of trustees' fiduciary duties.

For example – any guaranteed minimum investment return or guaranteed annuity rate would often be a feature of an underlying policy or other investment rather than of the scheme itself. Any such investment could be transferred to the receiving scheme and remain a feature of the same member's transferred-in benefits. If it was a feature of the scheme itself, then the trustees could insist that it be replicated as a condition of their agreeing to the transfer.

As a general rule, the more unusual or complex any such feature might be, the more convinced are our members that an overall assessment as part of the trustees' fiduciary duties represents the only viable solution.

Question 6: Do you have any experience of how the scheme relationship condition works in practice? Do you think it serves a useful purpose or does it act as an obstacle in some circumstances? What is the frequency and impact of these obstacles?

As a general rule the scheme relationship condition simply acts as an obstacle and serves no useful purpose. We are not aware of any credible suggestion that the imposition of this test does or could improve the security of transferred benefits or that it could improve member experiences or outcomes in any other way.

However, the scheme relationship condition often gives rise to uncertainty in the planning of bulk transfer exercises. In practice - and depending on the particular situation in question- this uncertainty tends to remain as an unresolved minor residual concern, or be bypassed in some way that simply adds cost and complexity to the transaction (for example by arranging a temporary period of participation in the receiving scheme).

Question 7: What is the impact of the current provisions around bulk transfers for 'orphaned DC schemes', where there are no surviving employers in relation to the scheme? Do you think that we need special provision for such schemes, for example, to allow pension providers to carry out a transfer where certain conditions are met? How do you think this should work in practice?

We have significant concerns that the additional complexity that would be occasioned by the need to define an "orphaned" scheme and by the imposition of additional conditions for such schemes in order to bypass the scheme relationship condition. We would prefer to see the scheme relationship condition removed.

Question 8: Are there any other areas of the occupational DC-DC bulk transfer provisions that you think need simplifying and do you have examples of how they are not working?

There are no other areas of occupational DC-DC bulk transfer provision which we consider should be simplified through secondary legislation. Ideally, section 73 of the Pension Schemes Act 1993 would be modified to simplify (but not remove) the requirement that transfer credits be granted in the receiving scheme; defining "transfer credits" by reference to "earners" creates an unnecessary complication.

Chapter 3: Bulk transfers from stakeholder schemes

Question 9: In your view, how common are stakeholder to stakeholder DC-DC bulk transfers without consent and can you give some examples of circumstances in which they occur?

Stakeholder to stakeholder DC-DC bulk transfers are increasingly common, following the change of emphasis in the marketplace caused by the withdrawal of stakeholder designation requirements and the introduction of automatic enrolment. They occur in two situations:

- the winding up of a stakeholder pension scheme and the bulk transfer of benefits relating to all beneficiaries of the scheme; and
- the bulk transfer of benefits relating to beneficiaries connected with a particular employer, a particular category or type of employer, or a particular category of business within a stakeholder pension scheme that is not winding up.

Question 10: Do you think that the current restrictions on bulk transfers without consent from stakeholder pension schemes should be lifted so that they are treated in the same way as those from personal pension schemes, ie under FCA principles and rules? If so, to what types of scheme should these transfers be allowed?

Yes. We suggest that insisting that the receiving scheme must be a stakeholder pension scheme

- in the case of a stakeholder pension scheme that is winding up (under Regulation 3 of the Stakeholder Regulations 2000); and
- in the case of a stakeholder pension scheme that is also an occupational pension scheme (under Regulation 12 of the Preservation Regulations 1991),

simply constrains the ability of the transferring scheme to best serve the interests of its members and other beneficiaries. While practitioners certainly know of exceptions, as a result of the marketplace changes mentioned above we feel that stakeholder pension schemes are increasingly unlikely, as a general rule, to incorporate the full range of modern features and flexibilities. Insisting that only a stakeholder pension scheme can be used for these purposes restricts choice and can, therefore, only be expected in time to lead to poorer member experiences and outcomes.

We agree that existing FCA principles and rules – coupled with Part 2 of the Consumer Rights Act 2015, which also applies in these circumstances – already provide a suitable level of protection across the full range of personal pensions and stakeholder pensions.

In the case of the two sets of Regulations mentioned above, referring simply to registered pension schemes that are also personal pension schemes would ensure that these protections were properly integrated into DWP-sponsored pensions legislation in a suitably flexible manner.

Question 11: Do you think that providers of transferring schemes should be able to invoke the bulk transfer without consent provisions where a stakeholder scheme has not yet commenced winding up?

Yes. Please see answer to Question 9 above.

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