DRN-5123892

The complaint

Mr D has complained about a transfer of his Phoenix Life Limited personal pensions to a Qualifying Recognised Overseas Pension Scheme (QROPS) in Gibraltar in July 2014. Mr D’s QROPS was subsequently used to invest in the Trafalgar Multi Asset Fund – a Cayman islands based investment fund. The investment now appears to have little or no value. Mr D says he has lost out financially as a result.

Mr D says Phoenix Life failed in its responsibilities when dealing with the transfer request. He says that it should have done more to warn him of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr D says he wouldn’t have transferred, and therefore wouldn’t have put his pension savings at risk, if Phoenix Life had acted as it should have done.

What happened

In January 2014, Mr D says he received a cold call offering him the opportunity to get advice on pension issues. Mr D says this business was called Portia Financial[1]. He says he was then referred to Global Partners Limited[2] (GPL) who, upon Mr D’s authority, requested details and transfer documents in relation to his pension from Phoenix Life.

It appears Phoenix Life provided the requested information around on or around 14 February 2014.

Mr D says he then met with GPL who advised him to transfer his pension to the QROPS and invest in the Trafalgar Multi-asset Fund, which he says he was told would perform better than his existing pension.

Mr D subsequently applied to start a London & Colonial EU QROPS. The QROPS application documents also recorded that it was to be used to invest via the Investors Europe platform and that Mr D’s financial adviser was GPL. However, Phoenix Life wouldn’t have seen those documents at the time.

On 7 May 2014, Phoenix Life received Mr D’s transfer papers from London & Colonial EU. Included in the transfer papers were: Mr D’s discharge paperwork; HMRC forms APSS263

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[1] There is no exact match on the FCA register for Portia Financial. It appears therefore this was not an FCA authorised firm.

[2] Global Partners Limited (GPL) – GPL was a financial adviser regulated in a European Economic Area (EEA) member state. The firm became Tourbillon Limited after June 2014 who were again an EEA regulated financial adviser and entered on the Financial Conduct Authority (FCA) register as having passporting rights to provide services within the UK.

and CA1890; and a letter from HMRC dated 13 November 2012 confirming the QROPS was registered.

Mr D's pension was transferred on 15 July 2014. His transfer value was around £16,800. He was 59 years old at the time of the transfer. In August 2014, around £15,000 was invested in the Trafalgar Multi Asset Fund.

Mr D also held a personal pension with another provider, which was also transferred to the QROPS shortly after this one – an amount of just under £15,500. This was a result of the same advice Mr D received. Mr D has also made a complaint about this transfer, which I am considering separately.

The Trafalgar Multi Asset Fund was managed by a firm called Victory Asset Management. The fund entered liquidation in early 2017. Also the Serious Fraud Office (SFO) has an ongoing investigation into suspected fraud. Mr D's investment is illiquid and so currently has no value.

In December 2021, Mr D complained to Phoenix Life. Briefly, his argument is that Phoenix Life ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the transfer was to an overseas scheme, the catalyst for the transfer was an unsolicited call and he had been advised by an unregulated business.

Phoenix Life didn't uphold the complaint. It said it carried out appropriate checks and applied due diligence. It said the QROPS was registered and it checked it against its internal company checklist, which showed no match. So it said there was no reason to block the transfer.

Mr D referred his complaint to us. Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account relevant law and regulations, regulatory rules, guidance and standards, codes of practice, and (where appropriate) what I consider to have been good industry practice at the relevant time. Where the evidence is incomplete or inconclusive I've reached my decision based on the balance of probabilities – in other words, on what I think is more likely than not to have happened, given the available evidence and wider circumstances.

Mr D's representative has raised a number of points in response to the investigator's assessment that the complaint should not be upheld. Where I deem it necessary to do so, I will specifically refer to and address those points below. But I won't address each and every point raised – instead I'll focus on what I believe are the key issues at the heart of this complaint.

<u>The relevant rules and guidance</u>

Personal pension providers are regulated by FCA. Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such Phoenix Life was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific

FSA/FCA rules governing pension transfer requests, but the following have particular relevance here:

- Principle 2 – A firm must conduct its business with due skill, care and diligence;
- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;
- Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and
- COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

An overseas pension scheme is defined in HMRC regulations as being one which is subject to specified regulatory and taxation restrictions in the country of establishment. To become a QROPS it must also be:

- Recognised, meaning in short that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.
- Qualifying, meaning it must notify HMRC that it is a recognised overseas pension scheme; provide appropriate evidence of this; undertake to adhere to HMRC's requirements; and not be otherwise excluded by HMRC from being a QROPS.

Overseas schemes that have notified HMRC that they qualify to be a QROPS are included in a published list on HMRC's website.

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme, which is either registered with HMRC for tax purposes or is a QROPS. And indeed they may also have a right to transfer under the terms of the contract.

This right came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

The Scorpion guidance was launched by The Pensions Regulator (TPR). It was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, the Pensions Advisory Service (TPAS), TPR, the SFO, and the FSA/FCA, all of which endorsed the guidance, allowing their names and logos to appear in Scorpion materials. The guidance comprised the following:

- An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of agreeing to cash in a pension early and identifies a number of warning signs to look out for.
- A longer booklet issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.

- An ‘action pack’ for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should “look out for” various warning signs of liberation. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request.

  Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.

TPR issued the guidance under the powers at s.12 of the Pension Act 2004. Thus, for the bodies regulated by TPR, the status of the guidance was that it provided them with information, education and/or assistance, as opposed to creating any new binding rule or legal duty. Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. So, the tenor of the guidance is essentially a set of prompts and suggestions, not requirements.

The FSA’s endorsement of the Scorpion guidance was relatively informal: it didn’t take the form of Handbook Guidance, because it was not issued under s.139A of the Financial Services and Markets Act (FSMA), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute “confirmed industry guidance”, as can be seen by consulting the list of all such FSA/FCA guidance on its website.

I take from the above that the contents of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it doesn’t necessarily mean a firm has broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member’s legal rights.

That said, the launch of the Scorpion guidance was an important moment in so far it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance’s specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

In those circumstances, I consider firms which received pension transfer requests needed to pay regard to the contents of the Scorpion guidance as a matter of good industry practice. It means February 2013 marks an inflection point in terms of what was expected of personal pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator’s Principles and COBS 2.1.1R.

What did personal pension providers need to do?

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained.

And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:

1. When TPR launched the Scorpion guidance in February 2013, its press release said the Scorpion insert should be provided in the information sent to members requesting a transfer. It said on its website that it wanted the inclusion of the Scorpion insert in transfer packs to "become best practice". The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the liberation threat they were facing.

   Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.

2. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process *didn't* involve the sending of transfer packs.

3. The Scorpion guidance asked firms to look out for the tell-tale signs of pension liberation scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The action pack points to the warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.

4. These were additional requirements over and above what a ceding scheme would always have needed to when processing a QROPS transfer. Those requirements included checking whether the QROPS was on HMRC's published list, and ensuring the necessary HMRC forms were completed.

5. The considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.

The circumstances surrounding the transfer – what does the evidence suggest happened?

Mr D says that following an unsolicited call from a business with an offer to provide advice on his pension, he was referred to and then met with a representative from GPL. Mr D says GPL then recommended he transfer his pension to a QROPS and invest his pension benefits in the Trafalgar Multi Asset fund.
He says he was told about excellent returns and that investing this way would be much better than his existing pension arrangement.

The documentary evidence from the time supports that it was GPL Mr D met with. I can see GPL completed a Client Confidential Financial Review Questionnaire or fact-find document in March 2014, which recorded Mr D's circumstances and objectives. This type of document is typically used to help an adviser provide advice. And this is exactly what it said the purpose of the document was at the top of the fact-find. I can also see that the QROPS application Mr D signed recorded GPL as his professional adviser.

From what I understand of Mr D's circumstances, he doesn't appear to have had the requisite skill or knowledge to carry out a pension transfer of this nature without advice. And being told that a transfer would generate better investment returns than leaving things where they are, is the type of language consistent with being advised.

So, I think Mr D's recollections about the discussion he had with GPL are plausible. And I think it was these discussions, and the prospect of the higher investment returns he was told he would receive, that prompted him to transfer. I also think the evidence shows that GPL advised Mr D to transfer.

What did Phoenix Life do and was it enough?

The Scorpion insert:

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

Phoenix Life says that, at the time in question it was including the Scorpion insert in transfer packs as a manual insert. And it has provided a copy of the longer version of the leaflet in submitting its file.

But looking at the copy of the transfer pack Phoenix Life sent to Mr D, there is no reference to the Scorpion leaflet. And Phoenix Life hasn't provided anything else, for example a process document from the time, to support what it says. So, I don't think the evidence supports a finding that Mr D, more likely than not, did receive a copy of the leaflet.

That said, the leaflet in use at the time was the version published in February 2013. That would have warned Mr D of the risk of companies telling consumers that they could access cash from their pensions before age 55. And this wasn't what Mr D was being told and wasn't his reason for transferring. So despite what Mr D's representative has said, the type of risk being warned about at that time wasn't something that was relevant to Mr D's circumstances. He had not been offered any cash incentives and he said he hadn't been rushed into the transfer.

So, I'm satisfied Mr D wouldn't have stopped the transfer even if Phoenix Life had sent the Scorpion insert. It simply wasn't warning about the type of harm that Mr M was about to suffer – I don't think it would've been very impactful on its own. And the content would not, reasonably, have caused him to be concerned about the advice he received.

Due diligence:

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of pension liberation and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk.

Phoenix Life received the following information from London & Colonial EU with the transfer request: a letter from HMRC dated 13 November 2012 confirming the QROPS was registered along with the relevant HMRC forms (APSS263 and CA1890.) On the day of the transfer, Phoenix Life also re-checked that the receiving QROPS was on HMRC's published list. This step ensured that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Mr D's statutory right, and potentially other legal rights, to transfer.

With this check Phoenix Life established that the QROPS was not a recently registered scheme. So, one of the key things prompting a ceding scheme to do further due diligence under the Scorpion guidance (a recently registered, or in this case recognised) scheme was not present in this case. So, I don't think it was unreasonable for Phoenix Life to have believed the risk of liberation was low in this case and that after checking the scheme against its own internal list, it actioned the transfer without carrying out further due diligence.

Mr D's representative has said that the overseas nature of his transfer request represented a significant scam / pension liberation warning sign. I can also see that it disagrees with the investigator's interpretation of the 2013 Action Pack's reference to "Transfers overseas" and how this wasn't the type of overseas transfer the pack was directed to. But I agree with what the investigator said. And I think they explained things clearly, so I can only broadly repeat what they said in response.

Transfers overseas wasn't included in the bulleted list of things a ceding scheme should look out for, each represented by an exclamation mark graphic. But I agree that Phoenix Life should have considered things in the round (including, for example, the case studies in the action pack) to decide if there was a material risk of liberation presenting itself in a transfer request. Page 8 of the action pack used the same exclamation mark graphic (denoting a 'warning sign') in the example of an individual who transferred to a pension scheme which, after paying her a cash incentive, invested the rest of the funds overseas. The warning sign was shown as:

> ***"Transfers overseas***
> *One technique that pension fraudsters use is to send a large portion of the pension transfer overseas. This makes the funds harder to trace and retrieve when the arrangement is closed down."*

Clearly where an UK occupational scheme transfers funds overseas, that was being highlighted by TPR as a potential warning sign of pension liberation activity. Many such schemes that I'm aware of have employed that strategy. But it doesn't seem to me that TPR was referring here to the type of transfer Mr D was making to a QROPS.

The reference to a 'portion' of the funds being transferred overseas makes clear, in my view, that it's referring to a UK pension scheme – *i.e.* the entire transfer from the ceding scheme isn't directly to an overseas arrangement. The case study goes on to indicate beyond doubt that it was a UK occupational scheme, as it says the scheme was subsequently closed down after both HMRC and TPR took action. Also, the case study follows someone who transferred in order to take cash from her pension, *not* someone who transferred with the intention of investing in a specific way.

So in my view, QROPS were not evidently the focus of TPR's concerns at the time the 2013 action pack was issued. And the key point to stress here is that the purpose of the action pack at that time was to direct efforts on preventing early release pension liberation, rather than anything else.

In Mr D's case the QROPS had been showing on HMRC's published list without issue since November 2012. So in my view, London & Colonial EU was even less likely to have been a vehicle for early release pension liberation – otherwise it would most probably have already been removed from the QROPS list.

As I said above, this means that one of the key things prompting a ceding scheme to do further due diligence under the Scorpion guidance (a recently registered, or in this case recognised) scheme also wasn't present in this case. So, for the reasons I've already given above, the fact that the transfer went overseas wouldn't have been a cause for concern in this particular case. And no other features of the transfer stood out as being warning signs of early release pension liberation.

It wasn't until the 24 July 2014 update to the Scorpion guidance that the focus shifted away from just pension liberation to pension scams in general. This gave more prominence to overseas investments. And the potential for a QROPS to facilitate investments which were at risk of a scam in that wider sense, rather than liberating funds back to the member, was greater.

I can see that Mr D's representative disagrees that the 2014 update to the guidance broadened the types of situation and scam warning signs pension providers were asked to look out for and seems to be saying that Phoenix Life should have spotted these issues in his transfer. But these weren't the issues Phoenix Life was being asked to look out for at that time, so it wouldn't be fair or reasonable to expect a ceding scheme to go further than TPR's guidance was asking it to at the time.

I appreciate that a technical definition of liberation could include a high-risk investment being used to re-route a consumer's pension funds into the hands of a fraudster, without the consumer benefiting directly in any way. But for the reasons I've already given, that activity wasn't the focus of TPR's Scorpion campaign at the time of Mr D's transfer. And that's what I think it's important for me to recognise here.

The main message given both in the action pack and insert at that time was of consumers receiving upfront offers of cash. So, I don't think it would be fair and reasonable for me to expect a ceding scheme to have been on the lookout for something else.

There was always a possibility that some consumers might suffer losses from making inappropriate investments as a result of transferring to a QROPS .That might also happen where they transferred to some UK schemes, such as SIPPs. So it doesn't to my mind mean it would have been a proportionate response to place *all* QROPS transfers under suspicion as soon as the February 2013 Scorpion campaign gave ceding schemes a new role to carry out due diligence.

Once again, Phoenix Life's role was to balance out the risk of enabling pension liberation with the risk of unfairly holding up legitimate pension transfers that were not for the purposes of liberation. I think it was appropriate for Phoenix Life to concentrate on which transfers (including some of those to QROPS) were at greater risk of liberation. It was clear that TPR thought that the greatest risk lay with schemes that had only recently been registered/recognised by HMRC, and/or the member was given an unsolicited offer of early access to cash. That's for good reason, because a scheme which had remained on HMRC's

QROPS list for a longer time without issue was less likely to be involved in this sort of activity.

That was consistent in my view with the approach TPR had taken to transfers to SIPPs in the 2013 action pack checklist. Not all SIPPs were under suspicion – only those claiming to be a SIPP but which were not authorised by the Financial Conduct Authority.

They would rightly be seen as at greater risk of liberation. A QROPS in another EU country will generally be authorised by the equivalent regulator to the FCA in its country of establishment, in order to qualify for that definition.

Mr D's representative says that some of the circumstances behind the transfer were unusual enough in themselves that Phoenix Life should have done more to warn him about what he was intending to do, even if the liberation threat would have appeared minimal. They've said that any movement of a well-regulated UK pension scheme such as Mr D's to a scheme registered in a different jurisdiction, without any explanation for such a move was an unusual step to take, so Phoenix Life should've carried out further checks as it represented a potential scam situation.

At the time (unlike today) there wasn't a prospect of a tax charge that had to be levied by the ceding scheme in certain circumstances where someone transferred their pension overseas whilst remaining resident in the UK. And importantly, I think whether it was appropriate for Mr D to be transferring his pension overseas was a financial planning matter that it wasn't Phoenix Life's role to question or intervene in.

Without a reason to suspect that the transfer was in some way connected to pension liberation – the threat Phoenix Life was tasked with identifying at the time of Mr D's transfer – I don't think it had sufficient reason to question what his reasons were for establishing the QROPS.

Mr D's representative has also said that, because Phoenix Life received an information request from GPL in January 2014 with a registered address in Gibraltar, yet a correspondence address in the UK, this was indicative of cold calling, which it ought to have picked up on as a warning sign. It says it was unlikely that Mr D had initiated contact with an overseas advisory firm.

I'm not persuaded that this, of itself, is indicative of cold calling. As Mr D was transferring to a QROPS, it wouldn't be unusual that overseas parties would be involved. And I don't think there would have been a purpose to Phoenix Life attempting to piece together the very limited information it had about who might have been involved in the process and the extent of their role – for example who, if anyone, had advised Mr D and/or who had initiated the process. The action pack set out a framework under which it would have got to the bottom of that matter by asking Mr D directly. But that would only happen if the circumstances warranted it (because the transfer had been deemed at heightened risk of liberation activity). And in this case, I'm satisfied the circumstances did not warrant such enquiries of Mr D.

In my view, these arguments misread what should, reasonably, have been expected of transferring schemes at that time. Investigations into the receiving scheme were a means to an end: to establish the risk of liberation. Once that threat was discounted, then I think it reasonable for ceding schemes to consider the scam threat as being minimal and process the transfer as normal, which is what Phoenix Life did in Mr D's case.

So, while I understand Mr D has lost out financially by investing in high-risk investments, which were likely unsuitable for him, in the circumstances and for the reasons I've given, it is not fair and reasonable for Phoenix Life to put right those losses.

My final decision

For the reasons above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 20 February 2025.
Paul Featherstone
Ombudsman