DRN-5200435

The complaint

Mr H has complained about a transfer of his personal pension with The Prudential Assurance Company Limited to a Qualifying Recognised Overseas Pension Scheme (QROPS) in Gibraltar in November 2014. Mr H says he has lost out financially as a result.

Mr H says Prudential 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 H says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Prudential had acted as it should have done.

What happened

On 5 April 2014, Mr H signed a letter of authority allowing AWM Financial Services ("AWM") to obtain details, and transfer documents, in relation to his pension. On 10 April 2014, AWM wrote to Prudential, enclosing Mr H's letter of authority and information request. This letter correctly stated that AWM was authorised and regulated by the Financial Conduct Authority.

Mr H says his interest in the transfer followed an unsolicited approach. He says he was attracted by the prospect of improved investment returns.

Mr H subsequently applied to start a QROPS with STM Fidecs.

On 8 August 2014 Mr H's transfer papers were sent to Prudential. These were sent in by STM Fidecs Pension Trustees Limited ("STM"). Included in the transfer papers were: Prudential's transfer forms; Lifetime allowance declaration; APSS263 (HMRC QROPS member information form); HMRC confirmation of QROPS recognition from 14 April 2011.

Prudential responded to STM on 3 September 2014 to explain that Mr H's pension was invested in its With Profits Fund. And it sent an additional receiving scheme declaration that it required to be able to transfer to an overseas scheme.

On 24 September 2014 STM sent Prudential another transfer request with the previously missing information.

On 15 October 2014 Prudential again wrote to STM explaining that it still required two forms of customer identification and a completed APSS263 form. This was subsequently provided by STM.

Prudential wrote to both STM and Mr H on 7 November 2014 to confirm its completion of the transfer. The transfer value was around £57,000. Mr H was 49 years old at the time of the transfer.

Mr H also had a pension with another pension provider and a similar transfer request was sent to that provider by STM on 8 August 2014 as well. That resulted in a second transfer being completed to the QROPS in September 2014 of around £5,400.

In August 2020, Mr H complained to Prudential. His argument is that due to a lack of proper due diligence, Prudential transferred his pension into an inappropriate pension product.

In September 2020 Mr H also referred a complaint about this transfer to the Financial Services Compensation Scheme ("FSCS") against AWM who had ceased to trade. In that referral he explained that he had been cold called by AWM and advised to transfer his pensions to the QROPS. In that he explained that the QROPS had invested around £46,000 in 'STM Life Assurance PCC Plc' and around £12,000 in 'CFS Mutual'. I understand the latter is a trading name of the Cornerstone Friendly Society, which was a UK investment firm also in default to the FSCS. That tallies with a comment Mr H has made to our investigator that he was told not all money could go into the QROPS and about £12,000 had to stay in the UK. Mr H has also told us that he's received £12,000 from the FSCS in respect of that investment – and £8,000 of liquid funds remain in the QROPS.

Prudential didn't uphold the complaint. It said that the QROPS was a valid receiving scheme and Mr H had a legal right to transfer. It explained that it was not responsible for the suitability of the investments that the QROPS trustees allowed.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide. I issued a provisional decision explaining the reasons why I didn't think Mr H's complaint should be upheld.

What I said in my provisional decision

"*The relevant rules and guidance*

Personal pension providers are regulated by the Financial Conduct Authority (FCA). Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such Prudential 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.

<u>What did personal pension providers need to do?</u>

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.*

<u>The circumstances surrounding the transfer – what does the evidence suggest happened?</u>

Mr H and his professional representative have provided what I consider to be quite limited information. For example, I have no evidence from the receiving scheme in this case to substantiate how the transferred funds were invested.

I have seen an FSCS claim form that was sent for Mr H in September 2020. And in that it is clear that his testimony is that he was "cold called by AWM Financial Services Limited, who persuaded him to move his pensions from Prudential and [a second provider] to STM Fidecs Pension Trustee Ltd by promising him greater returns…". This testimony is corroborated by the signed letter of authority that Prudential received from AWM in April 2014.

It appears FSCS initially declined Mr H's complaint on two occasions, and at the second point a document that appears to be part of an STM application form emerged, naming a Spanish adviser as the Financial adviser who set up the QROPS. But then named High Street Boutique Finance as the investment adviser. It appears to have led to FSCS asking Mr H to pursue his claim with that Spanish adviser instead.

This document is page 4 of 8. I have asked Mr H's representative for the remainder of this document for context and have not been provided with it.

Mr H has made no mention in his testimony of a Spanish advice firm.

What I can see is that on the original transfer pack request from AWM in April 2014, the alternative email address for the AWM member of staff was at @thehighstreet.com domain. High Street Boutique Finance Limited was registered to the same address as AWM Financial Services and appeared to be using the same staff. Mr H has said to our investigator that he received a copy of a leaflet by the Pensions Regulator from High Street Boutique, and that it was this firm "who sold me on the idea of changing my pensions". And relatively recently, he's said he changed to using a different solicitor for his FSCS claim and was successful at the third attempt, receiving another £50,000.

What is clear from the contemporaneous evidence is that Mr H had signed a letter of authority for AWM ahead of the transfer. AWM were authorised by the FCA. And Mr H was sufficiently persuaded that he was advised by AWM in the testimony he gave to FSCS. He also recalls dealing with High Street Boutique, but that appears to be because they traded from the same address. So I am persuaded, on a balance of probability, that if Mr H had been asked by Prudential who was advising he would more likely than not have told Prudential AWM was his adviser, in the same way he told the FSCS that was the case. Even if at the same time he might also have mentioned the sister company High Street Boutique.

<u>What did Prudential do and was it enough?</u>

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.

Prudential received a request for transfer information from AWM in April 2014. Prudential ought to have contacted Mr H directly to provide him with either the Scorpion insert or the same sort of information by another means. I have seen no evidence that Prudential contacted Mr H at all at that stage. It responded directly to AWM and the content of that correspondence gives no indication that the Scorpion insert was included. So I don't think that Prudential provided Mr H with the warnings that the Scorpion campaign suggested that consumers should have.

The Scorpion insert that was available in April 2014 was the one published in February 2013. It warned that companies were claiming that consumers could access their pensions before age 55 and that there were serious tax consequences of that. The focus of this was to educate consumers about pension liberation. Which was not something that Mr H was doing. He had not been offered any cash incentives. So I am not persuaded that this insert would have seemed alarming to him.

In the circumstances of Mr H's transfer I don't think that the contents of the Scorpion insert would have caused Mr H to take a different course of action if he had been sent it. And in any event, his recollections are that High Street Boutique had shown this insert to him already.

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. By the time the transfer was requested the Scorpion guidance had been updated (in July 2014) and it is this Scorpion Action Pack that I am considering when determining whether Prudential processed the transfer in a reasonable way.

Prudential received the following information from STM with the transfer request: transfer discharge forms and confirmation of HMRC recognition of the scheme. It also 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 H's statutory right, and potentially other legal rights, to transfer.

The Scorpion Action Pack had a section entitled "types of scams to watch out for", with bullet points indicating common features of scams. One of those bullet points warned of "transfers of money overseas, meaning the money is harder to recover". Whilst I consider that the remaining items on the list of common features would not have been known to Prudential without it contacting Mr H, the fact that the transfer was overseas would have been evident given the nature of the receiving scheme. So I think Prudential should therefore have followed up on it to find out if other signs of a scam were present. Given this common feature of a scam, I think it would have been fair and reasonable – and good practice – for Prudential to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

The check list provided a series of questions to help transferring schemes assess the potential threat by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the check list could have been addressed by checking online resources such as Companies House and HMRC. Others would have *required contacting the consumer. The check list is divided into three parts (which I've numbered for ease of reading and not because I think the check list was designed to be followed in a particular order):*

1. *The nature/status of the receiving scheme*

   Sample questions: Is the receiving scheme newly registered with HMRC?

2. *Description/promotion of the scheme*

   Sample questions: Do descriptions, promotional materials or adverts of the receiving scheme include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares' or allude to overseas investments or unusual, creative or new investment techniques?

3. *The scheme member*

   Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?

Opposite each question, or group of questions, the check list identified actions that should help the transferring scheme establish the facts.

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether a scam was a realistic threat. Given the warning sign that should have been apparent when dealing with Mr H's transfer request, and the relatively limited information it had about the transfer, I think in this case Prudential should have addressed all three parts of the check list and contacted Mr H as part of its due diligence.

Had it done so, I think Prudential would have established that:

- *The receiving scheme was not newly established, having been running for over three years.*
- *There was no indication that Mr H had been promised any cash incentive to transfer.*
- *Prudential would likely have established that Mr H was being advised by a firm that was regulated by the FCA - AWM Financial Services, for the reasons I gave above. Although it may also have been made aware that this followed an unsolicited approach.*
- *I am not persuaded that Prudential would have been alerted to unusual or creative investment types. There is no clear evidence regarding the investments made or the amount of information that Mr H had about those at the time, except that he was advised to continue to invest £12,000 in the UK – in what would have seemed at the time to be a reputable, FCA regulated investment (CFS Mutual). Based on the testimony provided to FSCS the likely initial investments in the QROPS were not likely to cause particular alarm for Prudential at the time.*

It follows that, even if Prudential had done all it should have done, I'm satisfied that it wouldn't have considered there to be reason to provide any further warnings to Mr H. I say this because it would have discounted the risk that Mr H may have been about to make any *unauthorised access to his pension, or was falling victim to a typical sort of investment scam involving unregulated parties. Whilst it may have ascertained that Mr H was cold called, it would have been reassured that Mr H was being advised on the transfer by a regulated firm. And I don't think the intended investments would have appeared sufficiently unusual for Prudential to consider it needed to take further action.*"

Responses to my provisional decision

Neither party offered any new evidence or arguments for me to consider.

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.

In the absence of any new evidence or arguments, this has meant reconsidering the same evidence and arguments that were available to me prior to reaching my provisional decision. And, for the same reasons as I set out in my provisional decision, my final decision is that Mr H's complaint is not upheld. I summarise the reasons for that as follows:

- Prudential did not do enough to satisfy me that it followed the industry guidance that had been put in place to help safeguard customers. There was a warning sign in the information that Prudential received (a transfer of money overseas) that meant it ought to have conducted greater due diligence than it did.

- I have to also consider whether Prudential's failure to conduct better due diligence likely had a bearing on the loss Mr H suffered. And, for the reasons in my provisional decision, I don't think it did. That's because the due diligence that it's reasonable to expect Prudential to have done was not likely, in this case, to have flagged any additional warning signs. So, as explained in my provisional decision, I don't think that it would have led Prudential to consider that there was a material risk of pension liberation or other scam.

- It follows that Prudential would not have had cause to provide any further warning to Mr H. And, even though I don't think it provided Mr H with the Scorpion insert, the evidence suggests that Mr H was already aware of the risks that were highlighted in it. So the failure to provide that is unlikely to have made any difference in this case either.

My final decision

For the reasons set out in my provisional decision and above, I am not upholding Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 15 January 2025.

Gary Lane
Ombudsman