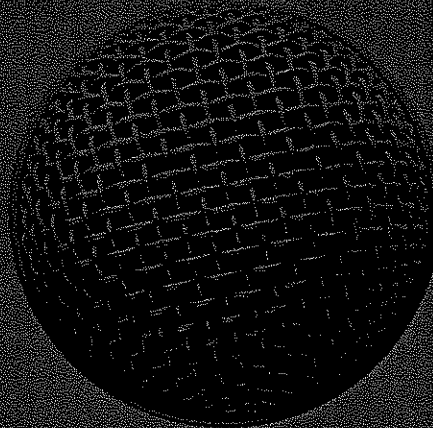


# Should I stay or should I go?

A discussion paper on  
facilitating financial  
advice for pension plan  
members seeking to  
transfer out



EVERSHEDS  
SUTHERLAND



## Should I stay or should I go?

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## A roadmap of options

Baseline

**Point members towards generic sources of information and advice, such as the Money and Pensions Service and unbiased.co.uk**

- Pros – No risk that the trustees are seen to be recommending particular IFAs or taking on responsibility for their advice.
- Cons – Member decision-making and outcomes unlikely to improve. Risk of reputational damage due to poor advice/outcomes.

**Organise either generic pensions education or more scheme specific guidance (not advice) which could include seminars from pensions experts, a helpline, website, modelling tools etc**

- Pros – As above. Quite low risk for trustees. May improve member engagement and understanding.
- Cons – Guidance would not address members' individual financial circumstances. Some risk of inaccurate information, straying into financial advice and claims. Even engaged members remain vulnerable to poor advice and scammers.

Level 1

**Vet and select a single IFA to provide FCA regulated advice tailored to the members, and direct members to them (whilst making clear this is not the only option available)**

- Pros – Members should get a consistent quality of advice and service. Easier to carry out due diligence and control quality with one IFA. Easier to explain to members and fees may be lower than with multiple IFAs.
- Cons – Greater concentration of legal and reputational risk than with multiple IFAs. Problematic and takes time to fill the gap if the IFA runs out of capacity or needs to be removed urgently – leading to a possible lack of trust and reputational risk.

Level 2A

**Vet and select a panel of two or more IFA firms and direct members to them (whilst making clear this is not the only option available)**

- Pros – Members have wider choice, perhaps including IFAs specialist in particular matters. Greater capacity. Using more than one IFA spreads the risk of poor advice compared to Level 2A.
- Cons – Fees may be higher than for a single IFA because of lower volumes. Need for even clearer member communications.

Level 2B

**As with 2A or 2B but with IFA oversight by independent third party overseer**

- Pros – Legal risks to trustees significantly reduced. If members still receive poor advice, liability for this should lie with the IFA or (if the monitoring process was defectively executed) with the independent overseer. Existence of supervision also likely to reduce risk of poor advice and claims, and improve service to members.
- Cons – Time and cost of engaging third party overseer and agreeing terms.

Level 3

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*It would have been helpful if the trustees had compiled a list of advisers willing and able to take on pensions transfer advice for the [British Steel Pension Scheme] members. Instead, members were referred to Unbiased or the FCA website. The former is not unbiased and the latter is not easy to use, nor does it make clear if the particular firm of advisers deal with DB transfers. It also includes advisers under investigation. The trade unions would have liked to recommend specific advisers but were advised that they would be crossing the line into advice.*

Caroline Rookes, Independent Review of communications and support given to British Steel Pension Scheme members (January 2019)

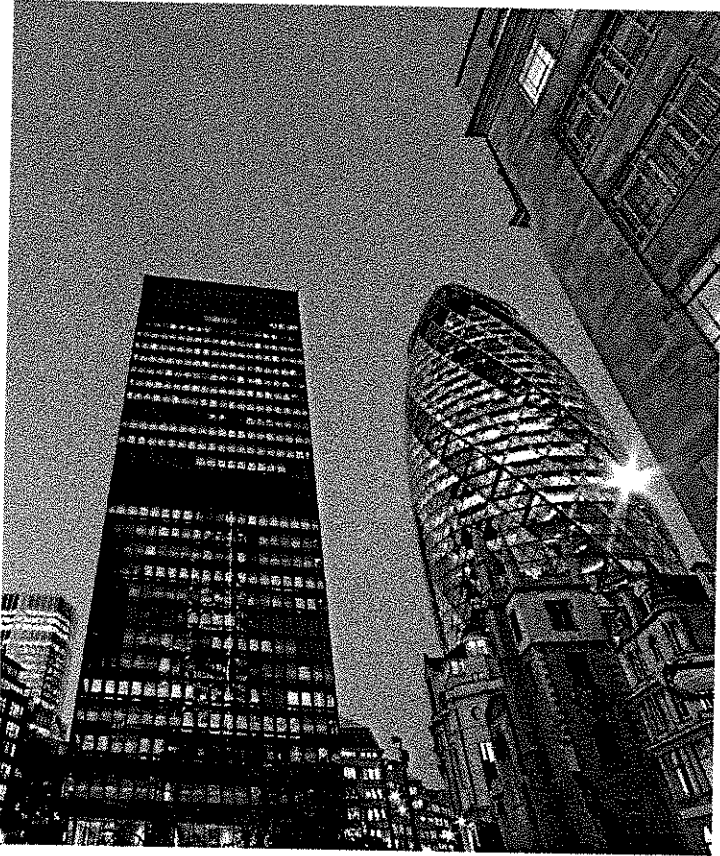


## 1. Introduction

- 1.1 Few pensions issues are more topical or contentious than whether trustees and employers should actively help pension plan members by facilitating access to independent financial advice (IFA advice). A clear challenge and barrier is the fear of being found to be responsible if it all goes horribly wrong – leading to reputational and litigation risks. Better, so the theory goes, simply to refer members to a directory of independent financial advisers (IFAs) and leave them to find their own adviser. That way, the responsibility sits with the member, and the trustees and employers are protected if the advice turns out to be poor.
- 1.2 This analysis is one-sided. It only looks at the risks of doing something and ignores the risks of doing nothing. It assumes that all the risk can be parked with the members and that no reputational or other risk attaches to trustees and employers if they take no action. The British Steel case shows this isn't so.
- 1.3 **Although the issue of facilitating members' access to IFA advice is a general one across defined benefit (DB), defined contribution (DC) and benefit decisions in general, this paper is focused on transfers from DB to DC plans since this is where the question of IFA advice comes into sharpest focus.**
- 1.4 A DC pension is sometimes perceived to be the "poor relation" of the gold plated DB occupational plan. Yet the pension freedoms introduced in 2015, together with record high DB transfer values, have motivated large numbers of members to abandon the relatively secure environs of their DB plan in favour of the less certain but more flexible world of DC – sometimes for good reasons and sometimes not.<sup>1</sup>
- 1.5 According to estimates obtained by Royal London, around 100,000 members undertook a pension transfer in 2017/18 and roughly 210,000 did so in 2018/19, with average transfer values around the £150,000 mark.<sup>2</sup> Those with DB benefits worth over £30,000 in the plan are required by law to obtain IFA advice before they transfer – but trustees and sponsoring employers are under no legal obligation to help members source this.
- 1.6 In this context, DB plan trustees and employers face a quandary. Should they engage with members' interest in pension transfers, helping them to source financial advice and perhaps contribute to the cost of that advice? Or should they leave members to peruse the internet, comb the local high street or wait to be approached and seek financial advice from whoever they wish?
- 1.7 The purpose of this paper is to assist DB plan trustees in addressing this difficult question. We do not suggest that there is a simple right answer: the market is still evolving and there are strong views on both sides of this debate. But we hope this paper will help trustees – and sponsoring employers who may become involved in this process and sometimes contribute towards the cost of advice – to make a realistic assessment of the pros and cons of facilitating IFA advice for their members.<sup>3</sup>

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## 2. The context for this paper

2.1 In 2018, Eversheds Sutherland and Royal London published a discussion paper for DB plan trustees looking at whether to include information on transfer options in pre-retirement member communications<sup>4</sup>. We touched briefly in that paper on the subject of facilitating IFA advice for members. A year on, we feel the time has come for a detailed discussion and debate focusing more closely on that area. Reasons for this include:

2.1.1 work we are doing in this area with some of our own clients. A number are embracing the idea of facilitating financial advice for their members, and concluding that the risks of doing this within a well-governed framework are less than the risks of doing nothing. A good example<sup>5</sup> is the innovative approach being adopted by Tesco (see case study on next page)

- 2.1.2 the high profile example of the British Steel Pension Scheme restructuring exercise in 2017/18. The ensuing Work and Pensions Select Committee inquiry<sup>6</sup> and Rookes report<sup>7</sup> both expressed grave concerns over the inadequate support received by members in deciding whether or not to transfer out their benefits
- 2.1.3 Financial Conduct Authority (FCA) research<sup>8</sup> showing that:
  - 2.1.3.1 234,951 DB plan members received advice on whether to transfer benefits worth £82.8 billion between April 2015 and September 2018 (with an average transfer value of just over £350,000)<sup>9</sup>
  - 2.1.3.2 69% were recommended to transfer out (despite the FCA's starting assumption that this is not likely to be in members' interests), and
  - 2.1.3.3 the financial harm created by unsuitable DB transfer advice is up to £2 billion a year
- 2.1.4 research by XPS Pensions Group which found that in the vast majority<sup>10</sup> of cases surveyed, transfers were not made to low cost workplace pensions (where a charge cap of 0.75% applies) but instead to comparatively expensive platform Self Invested Personal Pensions (SIPPs)
- 2.1.5 the continuing threat posed by pension scammers who, despite government efforts such as the cold-calling ban, continue to lure members with promises of early access to cash, exotic investments and even more exotic investment returns<sup>11</sup>
- 2.1.6 the recent FCA consultation<sup>12</sup> which proposes a ban on contingent charging for DB transfer advice and changes to the transfer advice regime, together with industry initiatives focusing on improving DB transfer standards.<sup>13</sup>

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*Deciding whether to transfer out of a DB scheme is one of the most complex financial decisions a consumer may have to make and it is vital customers get high quality advice. We have said repeatedly that, when advising on DB transfers, advisers should start from the position that a transfer is not suitable. It is deeply concerning and disappointing to see that transfers are still being recommended at the levels we have seen.*

Megan Butler, Executive Director of Supervision, Wholesale and Specialists at the FCA  
(FCA press release, 19 June 2019)



## A best practice case study – Tesco

Tesco are taking a particularly innovative approach to providing a great service to their members. They have agreed to appoint a panel of two IFA firms to cover all advice relating to retirement savings and choices, following independent advice and due diligence and to appoint a separate independent third party overseer, an IFA governance provider (IGP) to provide ongoing oversight and reporting to the Company and Trustee.

Tesco has a closed DB plan with around 350,000 members and a Retirement Savings Plan, with around 350,000 members, including 220,000 employed members, which is administered by the Legal & General Master Trust.

Many colleagues therefore have both DB pensions and DC retirement savings.

Freedom and choice now means that members have a number of decision points.

Acknowledging the challenges of finding a trusted individual financial adviser, to supplement the guidance they can receive, Tesco are appointing a panel of two IFA firms – to provide choice and to enable a smooth transition of any changes that might need to be made. Tesco took independent advice for the appointment.

The Company and Trustee are in the process of appointing an IGP – a new proposition that has been developed through extensive consultation and research. The purpose of the IGP, which would be different to the consultant that provided advice on the appointment, is to provide reassurance through ongoing due diligence on the key areas that matter most, greater transparency and an ability to identify and manage any issues that might arise.

The IGP will oversee and report on a number of areas including:

- the financial stability and sustainability of the IFA firm
- FCA approvals and, importantly, any changes
- sanctions, fines, non-compliance
- structural corporate or key people changes, and
- the financial products used for transfers and their costs.

Clear and simple communication is being put in place to help members to understand all that they should consider and where support and compensation is available (e.g. Financial Services Compensation Scheme).

The IFA panel is expected to be available in 2020.

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### 3. What are the pros and cons?

3.1 Many trustees and employers hesitate to get involved in recommending, paying for or otherwise facilitating financial advice for members because of:

3.1.1 a fear of going beyond their legal role and obligations as pension trustees, extending their duty of care and inadvertently assuming legal responsibility for financial advice given to members. The more the trustees get involved, the greater the risk they may be found responsible for incorrect advice<sup>14</sup>

3.1.2 a particular concern around assuming liability for advice given in DB transfer cases - transfers are, after all, one of the most common topics of Pensions Ombudsman disputes, and topped the list for new investigations in 2018/19<sup>15</sup>

3.1.1 reputational risk, particularly in a social media world - what if members dissatisfied with their advice point the finger at the trustees publicly for facilitating it?

3.1.4 a fear of breaking the law and incurring criminal sanctions by giving financial advice to members or otherwise undertaking regulated activities without FCA authorisation - this is discussed in more detail in section 5 of this paper

3.1.5 cost – sourcing, paying for or contributing towards good quality IFA advice will not come cheap. An indirect cost – at least to sponsors – could also arise because well advised members may be less likely to transfer out of a DB plan, therefore leading to higher liabilities being retained within the plan.

3.2 There are a number of reasons why trustees might consider taking a proactive approach to facilitating financial advice for their members and adopting robust governance and oversight around this:

3.2.1 currently, DB benefits are often one of a member's most valuable assets alongside the home. Members are more vulnerable to losing those benefits now due to pension scams and because pension freedoms mean they have more choice over how to take their pension benefits. Trustees may consider that the right thing to do is to try to help them with those choices even if they are not legally obliged to do so

3.2.2 going forward, as DC savings grow substantially, many members are likely to need advice on how to maximise the value of their pension savings and consolidate their accounts cost-effectively. All of this will need to happen within an auto-enrolment regime built on apathy, where members are unlikely to have the skill set to take sound decisions

3.2.3 members are more likely to get better quality advice and financial outcomes from IFAs identified by trustees who have carried out proper research and ensured their ongoing suitability for their membership

3.2.4 arguably reputational risk is reduced rather than increased by a proactive approach supported by robust governance processes<sup>16</sup>

3.2.5 stories in the national press about members being lured to meetings with dubious financial advisers by the promise of free sausage and chips<sup>17</sup> are surely less likely if a well-managed process is put in place. A more proactive approach (that includes appropriate risk mitigation) may in fact enhance the reputation of the trustees and employer, and help to manage the overall risks

3.2.6 using pre-selected financial advisers should reduce the cost of advice due to economies of scale. In addition, an adviser who is familiar with the benefit structure and processes of the plan will be able to advise more knowledgeably and efficiently, reducing delays and taking up less of the time of administrators in dealing with questions.



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## 4. What is the legal minimum trustees must do?

### Statutory and non-statutory DB transfers

- 4.1 Where a deferred member of a DB occupational plan wishes to transfer the cash equivalent of their accrued benefits to another registered pension<sup>18</sup> at least one year before reaching the plan's "normal pension age", they have a statutory right to do so<sup>19</sup>. Members can transfer of their own volition, without needing the consent of the trustees or employers.
- 4.2 If permitted by the plan rules, they may also make a transfer on a non-statutory basis. Non-statutory transfers are commonly relevant when a member is considering their retirement options close to or after normal pension age, or where plans permit partial transfers. Non-statutory transfers may be subject to other conditions, such as trustee or employer consent.

### Information

- 4.3 When members request a formal quotation, or "statement of entitlement", of their transfer value in the plan, the trustees must also provide certain information. This includes:
- 4.3.1 a statement that the FCA, TPR and the Money and Pensions Service provide information about transfers that may assist the member in deciding whether to transfer, and
- 4.3.2 a recommendation that the member should take financial advice before making decisions about transfers (this applies even where the value of their DB benefits is below the £30,000 threshold where financial advice is required by law).
- 4.4 TPR also encourages trustees to ensure that members receive clear information about the risk

of transferring to a scam vehicle.<sup>20</sup> Note, however, that where a receiving vehicle meets the basic legal requirements (i.e. it is a plan to which a transfer can be made), and the member is an "earner"<sup>21</sup>, trustees currently have a legal duty to carry out the transfer, even where they are not convinced that the receiving plan is a legitimate one.<sup>22</sup>

### Mandatory IFA advice

- 4.5 In addition, where the transfer value of the member's DB<sup>23</sup> benefits under the pension plan is £30,000 or more, the member must get IFA advice in writing on the proposed transfer.<sup>24</sup> Trustees must obtain confirmation that this advice has been provided before making the transfer. The confirmation must be in writing and confirm that the adviser has permission under the Financial Services and Markets Act 2000 (FSMA) to advise on pension transfers.
- 4.6 Trustees are not required to check what the conclusion of the advice was, nor are they required to check the quality of the advice or whether the member followed it<sup>25</sup>. In fact, we would always recommend that trustees do not directly review the advice – particularly as trustees do not typically have the capability or capacity to do this. This could also suggest some shared responsibility for the advice and put the trustees in a difficult position: even if the advice concludes that a transfer out is not in the member's best financial interests, the trustees will nonetheless be obliged to give effect to the member's statutory request.
- 4.7 Trustees must, however, ensure that the adviser providing the advice has permission to carry out the FSMA regulated activity of "advising on the conversion or transfer of pension benefits". This is currently done by checking the FCA's Financial Services Register.<sup>26</sup>
- 4.8 However, save for DB benefits over £30,000, and "incentive" exercises (where members are offered a DB transfer on specially enhanced terms),<sup>27</sup> there is no legal requirement for trustees to recommend particular IFAs for members or to pay for advice.



*The FSCS [Financial Services Compensation Scheme] paid out compensation of £581 million for these claims [relating to bad advice to transfer from occupational pensions to invest in risky and illiquid assets, usually held within a SIPP] in the five years from 2014/15. That compares with only £80 million in the four preceding years before pension freedoms took effect... It results from a market characterised by a bewildering array of products, by complexity – some deliberate – and by profound information asymmetry.*

Mark Neale, former Chief Executive of the FSCS, speaking in 2019



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## 5. So, isn't it risky for trustees to facilitate IFA advice for members?

- 5.1 It is important to reiterate that there is no risk free approach here. Simply referring members to a register of IFAs for them to choose their own adviser led to significantly poor member outcomes in the British Steel case, and reputational damage for all concerned. Similarly, engaging IFAs to advise members without proper processes in place will also carry significant risk.
- 5.2 In our view, a reasonably low risk approach – and the one most likely to offer members optimal outcomes – is for trustees to vet and select IFAs they consider suitable for their members, backed up by robust monitoring processes to manage the risks. The remaining sections of this paper consider some of the main concerns of trustees, how they can be addressed, and what a sound governance framework for facilitating IFA advice would look like.

### Concern 1: Is this a trustee-like thing to do?

- 5.3 The fact that few trustees have taken this step yet is not a reflection on whether it is an appropriate thing for trustees to do. Trustees have a duty to promote the purposes of the trust<sup>28</sup>, and are expected to help towards good member outcomes in the DC environment.<sup>29</sup> Facilitating IFA advice for members seems consistent with both of these responsibilities.

### Concern 2: Will we be responsible for any poor IFA advice?

- 5.4 This is unlikely if sensible steps are taken by the trustees. The trustees should do due diligence on their chosen IFAs (as they would with any other adviser) and regularly monitor that they remain fit for purpose. The member communications should make it clear that the chosen IFA is not the only option and, if relevant, that there is an independent third party overseer: there should be a disclaimer from the member absolving the trustees from responsibility for any IFA advice, and a clear "hand off" from trustee to IFA. And the terms of engagement between the trustees and the IFA should set out terms covering standards, liability, insurance and co-operation with any trustee monitoring process.
- 5.5 The due diligence on the chosen IFAs done at the outset should be backed up by regular monitoring to ensure that the IFAs remain fit for purpose. Trustees are likely to need the help of a specialist third party to monitor the continued suitability of their chosen IFA in terms of financial standing, people movements, regulatory issues, insurance cover and the suitability of advice through a reasonable sample check.

- 5.6 The idea is that if a member loses out because of poor advice, then the responsibility for this will lie with the IFA or (if the monitoring process was not conducted properly) with the specialist third party, rather than the trustees.

### Concern 3: Will we be breaching FSMA or the FCA rules?

- 5.7 One of the key concerns of trustees in this area is often whether they will inadvertently stray into the territory of carrying out a FSMA "regulated activity". Doing so without obtaining FCA authorisation not only carries financial and reputational risk but is also a criminal offence.
- 5.8 The key difference between providing "guidance" to members (which is not a regulated activity) and regulated "investment advice" is that regulated investment advice requires the provision of a personal recommendation to a specific person. The boundary between the two needs very careful management, but trustees who only provide access to guidance for members will not be caught by FSMA.
- 5.9 In our view, however, even signposting and paying for investment advice from an IFA on behalf of members can be done in a way that does not involve carrying out a FSMA regulated activity. The regulatory analysis will always be fact specific and, in particular, care needs to be taken over the way in which this is organised and communicated. Given the potentially severe repercussions of engaging in regulated activities without the appropriate FCA authorisation, we would recommend taking tailored legal advice on this aspect.

### Concern 4: What about the cost and who picks up the bill?

- 5.10 Formulating a plan of action, vetting and engaging IFAs (perhaps also third party overseers and/or pension education and guidance providers) and seeking legal advice will all take time and money. A key concern will be the cost and who bears this.
- 5.11 There are four options here: the employer, the plan, the member or a combination of these. There is no right answer but the more usual approach would probably be a combination approach – with the employer paying the set up costs and the member paying for the actual individual advice costs (sometimes subsidised or contributed to by the employer).<sup>30</sup>
- 5.12 We are also aware of DB plans where the set up costs are paid for from the plan assets. This will require additional thinking and legal advice, including an analysis of the plan rules and consideration of whether this would be a proper use of plan assets.



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**What questions might trustees ask of advice firms?**

How does the firm's existing process for transfer advice work? For example:

- Will the firm work with the trustees to prepare general information about the pros and cons of transfers to be supplied to members as soon as a cash equivalent transfer value is requested, to maximise the time for members to consider a possible transfer in an informed way?
- Is there any further 'triage' process before personalised advice takes place? If so, what proportion of clients who express an initial interest in a transfer do not take matters further?
- How many clients were advised on DB transfers in the last year, and where did those transfers go (workplace plans, or more expensive platform arrangements like SIPPs)?
- What proportion of clients were advised to transfer in the last year?
- What is the firm's policy on 'insistent' clients who wish to transfer despite a recommendation against?
- Does the adviser firm retain responsibility for the client post-transfer in every circumstance?

How does the firm currently charge for transfer advice? If on a 'contingent' basis, how will that change if/when the FCA bans contingent charging?

Where the firm currently provides transfer advice, where do transferred funds generally end up? If the firm is owned by a product provider, what proportion of transferred funds end up with that provider? If the firm owns (or part owns) a fund management business, what proportion of transferred funds end up 'in house'? How do the solutions they currently recommend compare to charging levels in a workplace pension?

What are the typical charges levied on transferred funds, including on-going advice charges, product fees, platform charges and fund management charges?

- Has the firm received any feedback on its processes from the FCA as part of its review of DB transfer advice? Have they ever been asked by the FCA to suspend DB transfer activity?
- How many complaints were made against the firm to the Financial Ombudsman Service in the last year? How many were upheld?
- Have any fines or sanctions been made against the IFA firm?
- Has the firm signed up to the Personal Finance Society 'gold standard' for pension transfer advice?<sup>32</sup> If not, why not?
- Do they outsource any parts of the transfer advice? If so to whom and why? The trustees would also want to have confidence in the outsourcing partner.
- Do they accept introductions from non-regulated introducers? If yes, how do they oversee that process?
- Has the professional indemnity insurer (PI) been consulted about the firm potentially taking on this new role? Does the firm have a cap on the number of DB transfers that they can complete in a year? Such a cap would come from a PI insurer and could cause issues down the line if they can't recommend any more transfers in a year.
- Does the entity you are contracting with (within the IFA organisation) qualify for FSCS protection and does the PI cover apply to it?

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- 5.13 The FCA has estimated the typical cost of non-contingent advice (see Appendix) to be £2,500 to £3,500. Anecdotally, we have heard that £3,000 to £4,000 is perhaps more typical.
- 5.14 IFAs who are appointed as "recommended" IFAs for a plan are likely to charge significantly less, perhaps as little as £500 to £1,000. Savings can be achieved partly due to economies of scale, as it takes less time to advise in relation to a very familiar benefit structure, and partly due to the more reliable work stream such an appointment provides (though figures towards the £500 end of the scale are likely to be a "loss-leader"). IFAs who are appointed as part of a panel may charge more than those who are given a sole appointment.
- 5.15 These costs can be offset partially by a tax exemption of £500 for "relevant pensions advice" provided to employees or former employees. If an employer provides pensions advice or pays or reimburses the costs of pensions advice incurred by the employee, the cost is exempt from income tax up to £500 in a tax year so long as certain conditions are met. Separately, the law also allows members to take £500 tax free from their DC pension pots to fund financial advice in relation to retirement savings. This exemption is not available in relation to DB transfers.
- 5.16 However, trustees need to be mindful not only of the "headline" initial advice cost but also of any other downstream charges that may be payable by the member – such as platform fees and product fees. The idea is to ensure that the IFA's interests are always aligned with the member's to ensure the IFA will not be incentivised to steer the member in a particular direction. It may be that paying a higher initial charge can avoid this dilemma.
- 5.17 The Appendix contains some further analysis on the changing marketplace for advice.
- 5.18 In light of the FCA's proposed ban on contingent charging for DB to DC transfer advice and the inherent conflict of interest with this sort of arrangement, trustees would be well advised not to steer members towards (or to fund) this type of charging structure. The same goes for advice on other issues – the safest approach is for trustees to insist on costs transparency from their chosen IFAs.



## Understanding the structure of the advice market

Trustees will need to understand that amongst the thousands of advisers who are qualified to give pension transfer advice, there will be a variety of business models, some of which create the potential for conflict of interest. Whichever type (or types) of firm the trustees select, they will need to be convinced that the interests of the member and the adviser are completely in alignment.

The FCA, in its 'Conduct of Business Sourcebook' (COBS) identifies two types of advice – 'independent' and 'restricted'. In defining 'independent' advice, COBS 6.2B.11 says:

*"If a firm informs a client that it provides independent advice, that firm must assess a sufficient range of relevant products available on the market which must:*

- *be sufficiently diverse with regard to their:*
  - *type; and*
  - *issuers or product providers,*
- to ensure that the client's investment objectives can be suitably met; and*
- *not be limited to relevant products issued or provided by:*
  - *the firm itself or by entities having close links with the firm; or*

- *other entities with which the firm has such close legal or economic relationships, including contractual relationships, as to present a risk of impairing the independent basis of the advice provided."*

In other words, independent advisers will be looking across a wide range of products and providers to find the right solution for their client, and this cannot be limited to products or providers where the advice firm has a close commercial connection. Restricted advisers come in two forms – those who are 'restricted, whole of market' advisers, who may only advise on particular products (eg pensions or investments) but search the whole market, and restricted advisers who limit the range of products they consider, often because of a commercial link with the product provider.

In choosing an advice firm to advise members, trustees are likely to want to ensure that advice is independent and not 'restricted' to recommending products or providers who are closely connected to the advice firm. The latter situation can arise either where an advice firm is owned by a product provider or where the advice firm itself owns or has a stake in an investment solution which it routinely recommends to its clients.

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*People spend all their lives saving for their retirement. The choices they make, and how much they pay for them, can have a big influence on their outcomes and their future standard of living.*

*In the last few years there have been some examples where groups of employees or members haven't had the right outcomes from the independent financial advice they received. There are therefore real benefits of appointing an IFA panel to support members in getting the advice they need and to reduce or remove the likelihood of scams. Ongoing independent due diligence of the IFA firms that are appointed is clear best practice governance to make sure that they remain appropriate and to protect and support members – with a reduction in litigation and reputational risk for the employer and trustee.*

*Ruston Smith, Chair of the Tesco PLC Pension Scheme*

”



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*We have a system which allows, and sometimes now demands, that individuals take potentially very difficult and risky decisions about their savings. [S]kimmers and scammers often operate in the grey areas around the boundary of regulation and protection.*

*Poor value products, particularly those with high costs, have a huge impact on people's retirement outcomes. Some firms promote these products through incompetence, some through greed. The moral difference between unscrupulous and exploitative financial firms and financial criminals – between the skimmers and scammers – is, in my opinion, only one of degree.*

*There will always be skimmers and scammers who are attracted to the financial sector, but we must all work together to make their lives as difficult as possible.*

Extracts from a speech by Charles Randell, Chair of the FCA (4 September 2019)



## 6. What does good look like? Potential safeguards if you choose to go the extra mile

- 6.1 Facilitate access for members only to independent advisers offering “whole of market” advice.** This is for reputational reasons but also to ensure FCA compliance. Whilst it is possible to appoint a single IFA, the benefits of appointing a panel are choice, an ability to compare relative service/outcomes and a simpler transition on changing firms. It will also reduce the risk of relying on a single adviser, particularly in a climate where advisers are leaving the DB transfer advice market.
- 6.2 Carry out (and be able to demonstrate) appropriate initial due diligence and research on the IFAs involved and their charging structures.** This is to ensure that they are reputable, reliable and likely to give appropriate, unbiased advice, and that they have the scale and experience to provide a good service to the members for the foreseeable future.
- 6.3 Ensure ongoing monitoring.** Due diligence should not just stop once the adviser is appointed. We would suggest that trustees consider engaging a specialist third party overseer to carry out the ongoing monitoring – partly because trustee boards are unlikely to possess this skill set, and partly because this will help to insulate the trustees from liability for any poor IFA advice.
- 6.4 Ensure that the facilitation of advice for members does not expose the trustees to carrying out a regulated activity under FSMA.** Some safeguards around operational processes are likely to help in this regard.
- 6.5 Ensure that GDPR issues are addressed properly.** There should be appropriate data protection agreements in place to cover any flows of personal data.
- 6.6 Be careful in how the position is communicated to the membership.** Comprehensive disclaimer wording should be used. It should be made clear that the employer and trustees are merely facilitating the provision of advice, not recommending any particular course of action, and are not responsible for the IFA's advice or any consequences flowing from that. Communications from the trustees/employer should be separate from those of the IFA – for example, co-hosted websites are best avoided.
- 6.7 Ensure that the contractual relationships with the chosen IFAs and any third party monitor are robustly negotiated and clearly documented.**

**Should I stay or should I go?**

A discussion paper on facilitating financial advice for pension plan members seeking to transfer out

## 7. Conclusions

7.1 There is no right answer to the question of whether trustees should go beyond their legal minimum duties and proactively help members to make well informed financial choices by sourcing and vetting IFAs for members to use. Ultimately – like so many trustee decisions – this is a call for each trustee board, taking into account the relevant (and disregarding the irrelevant) factors.

7.2 Some trustees and employers may still believe that doing nothing is inherently safer than doing something. This is often on the basis that assuming a voluntary role in facilitating the provision of financial advice for members is taking on a number of avoidable risks. But this ignores the fact that these risks can be managed via safeguards including the processes described above, and that doing nothing also carries a risk. The stark findings of recent FCA research and the case of the British Steel pensioners shows how things can go wrong when members are left to their own devices with critical financial decisions.

**Eversheds Sutherland (International) LLP  
Royal London  
December 2019**



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## Appendix

### The changing marketplace for advice

1. When the pensions freedoms came into effect in April 2015, there was a sudden boom in demand for pension transfer advice. With that came a boom in supply. Figures from the FCA suggest that, between April 2015 and March 2018, 2,728 firms had applied for pension transfer permissions, with 95% of those being approved.
2. Many firms advised on a contingent charging basis, only getting paid if a transfer proceeded. According to the FCA, this created a conflict of interest which contributed to 69% of customers being advised to transfer out, despite the FCA's stated view that most people would be best advised not to transfer.
3. The days of contingent charging may well be numbered. The FCA has recently consulted on banning it for DB pension transfers, the mandatory disclosure of ongoing advice charges and a requirement to demonstrate why any recommended receiving plan is more suitable than a workplace pension plan.
4. Professional indemnity insurers have started to take a tougher stance as regards DB transfer advice, with some firms now unable to obtain affordable insurance cover or able to get cover only for limited numbers of transfers.
5. These recent developments are likely to lead to a fall in the number of financial advisers offering DB transfer advice. One large provider, LEBC recently agreed voluntarily with the FCA to stop providing DB transfer advice.<sup>31</sup> The contraction in the market could make it even more difficult for members to source good financial advice themselves at a price they can afford; conversely, it could also potentially lead to an increase in the general quality of advice.

*Financial advisers charging on a contingent basis typically charged 2% to 3% (but sometimes higher) of the transfer value - £7,000 to £10,500 on an average £350,000 transfer value. A typical non-contingent charge was £2,500-£3,500.*

*Many advisers also benefitted from ongoing advice arrangements, with charges payable throughout the customer's retirement (only if they transferred out), at a typical rate of 0.5% (or more) a year of the transferred amount. An annual charge of 0.75% equates to £2,625 a year based on a £350,000 transfer value. However, 36% of those who transferred invested in a product costing more than 1.5% a year.*

*Figures taken from the FCA consultation paper "Pension transfer advice: contingent charging and other proposed changes" (July 2019)*

## Endnotes

- 1 See Royal London's guide "Five good reasons to transfer out of your company pension...and five good reasons not to" (April 2019).
- 2 Information published on Royal London website, 24 July 2019, following a Freedom of Information Act 2000 request by Steve Webb to TPR. Note that the average transfer value figure in the FCA's recent pension transfer advice consultation is over £350,000 – but this is over a different period, between April 2015 and September 2018 and only covers transfers above the £30,000 threshold where advice was required.
- 3 This paper looks at routine transfer activity but not incentivised exercises such as enhanced transfer value exercises, pension increase exchanges etc, where different considerations will apply and the employer will often be obliged to pay for advice. This paper is also not directly relevant to unfunded public sector schemes, where members do not have the same rights to transfer out benefits. We have assumed throughout that a transfer of DB benefits will be used to acquire money purchase benefits (as that is what happens in the vast majority of cases).
- 4 How much should you tell them? A discussion paper for DB plan trustees, Eversheds Sutherland and Royal London (September 2018) <https://www.eversheds-sutherland.com/documents/services/employment/Eversheds-Sutherland-Royal-London-how-much-should-you-tell-them.pdf>
- 5 See also press coverage with examples of other plans recommending IFAs including the BBC (see Pensions Expert, 28 August 2015) and the Sony UK Pension Scheme (see Pension Expert, 15 July 2019).
- 6 Work and Pensions Select Committee report on the British Steel Pension Scheme (9 February 2018).
- 7 Caroline Rookes, Independent Review of communications and support given to British Steel Pension Scheme members (January 2019).
- 8 FCA research on defined benefit pension transfers – market-wide data results (June 2019). Note also that 60% of firms had recommended 75% or more of their clients to transfer. However, when triage services are taken into account, the FCA estimates that 55% clients are recommended to transfer. This is still far higher than the FCA's rough estimate of those for whom a transfer out may be suitable – between 35% and 42% of those who request a transfer value (see page 58 of the FCA consultation on pension transfer advice, CP19/25, July 2019).
- 9 See note 2 above for information on the contrast between this figure and that at paragraph 1.5.
- 10 [https://www.xpsgroup.com/media/1999/xps-pensions-group-member-outcomes-report\\_may-2019.pdf](https://www.xpsgroup.com/media/1999/xps-pensions-group-member-outcomes-report_may-2019.pdf).
- 11 Recent research by the Pensions Regulator (TPR) shows that 42% of UK pension savers, over five million people - including those who consider themselves financially savvy - could be at risk of falling for common tactics used by scammers. See TPR press release, 7 August 2019 <https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/five-million-pension-savers-could-put-their-retirement-savings-at-risk-to-scammers>.
- 12 FCA consultation "Pension transfer advice: contingent charging and other proposed changes" (July 2019).
- 13 See for example PASA DB transfers guidance (Part 1 published in July 2019): <http://www.pasa-uk.com/publications/db-transfer-guidance-part-1#> and The Pension Transfer Gold Standard, Personal Finance Society: <https://www.thepfs.org/about-us/initiatives/the-pension-transfer-gold-standard/>.
- 14 See, for example, NHS Pensions Agency v Beechinor [1997] PLR 95 in which the High Court suggested that an administrator that voluntarily assumed the duty to provide additional information beyond the legal minimum assumed responsibility to take reasonable care that the information was correct. See also Musawi v Bevis Trustees [2009] EWHC 1915 (Ch).
- 15 Pensions Ombudsman and Pension Protection Fund Ombudsman Annual Report and Accounts 2018/19. And according to press reports, the number of DB transfer complaints received by the Financial Ombudsman rose by 44% (to 798) in 2018/19 compared with the previous year and 39% were upheld – see "Pension transfer complaints up 44%", FT Adviser, 9 October 2019.
- 16 It is worth noting here the difference between a "business as usual" situation versus a situation where the employer is in financial distress. In the latter case, DB transfers are likely to be a time limited offer as part of a restructuring (as was the case in British Steel) and in both the DB and DC context there will often be a need to take key decisions in a short period. The impending deadlines, fears about the imminent collapse of the employer (and, with it, the covenant) and increased risk of unscrupulous advisers preying on large groups of worried employees in our view make arguments for facilitating advice even stronger in the context of in a severely distressed employer.
- 17 See for example "UK steelworkers were 'bamboozled' over pensions", Financial Times, 14 February 2018 and "Factory gate 'vultures' feast on British Steel pensions", The Times, 15 February 2018.
- 18 Transfers may also be made to an "overseas scheme" or annuity.
- 19 See sections 93 to 101 of the Pension Schemes Act 1993.
- 20 See TPR guidance on DB to DC transfers and conversions (April 2015, updated November 2019). A (non-binding) industry Code of Good Practice on Combating Pension Scams (last updated in June 2019) has also been published to help trustees and their administrators navigate this difficult area.
- 21 For an analysis of transfer conditions, see Hughes v Royal London [2016] EWHC 319 (Ch) and, for example, the August 2019 Pensions Ombudsman determination in relation to Mrs H (PO-21489). Note that under section 124 of the Pension Schemes Bill 2019, the trustees may not have to carry out the transfer if conditions relating to the member's employment or place of residence have not been met. It is unclear at the time of writing when (and whether) this section and the necessary underlying regulations will make it onto the statute book.
- 22 See TPR's Avoid Pension Scams: <https://www.thepensionsregulator.gov.uk/en/pension-scams>. Trustees should, however, warn the member of their suspicions and consider applying to TPR for an extension of the six month deadline.
- 23 Technically, the advice requirement applies to "safeguarded benefits", which are benefits that are not money purchase or cash balance - they include not only pure DB benefits but also money purchase benefits with an in-built guarantee or underpin. The £30,000 limit applies to all the member's safeguarded benefits under the plan, even where they are only transferring part of those benefits. Note that the requirement also applies to survivors and, in most cases, pension credit members.
- 24 It seems that some plans also insist on IFA advice in relation to smaller DB benefits. Of interest is a recent Pensions Ombudsman determination, Mr R [PO-23938]. A personal pension provider insisted that members with benefits worth less than £30,000 took independent financial advice. Mr R claimed that he should be allowed to transfer his small pension without advice and this was an unreasonable post sale barrier, contrary to the FCA's Treating Customers Fairly guidelines. The Ombudsman dismissed the claim.
- 25 TPR echoes this in its DB to DC transfers and conversions guidance (April 2015, updated November 2019).
- 26 The FCA will start reforming the Financial Services Register from 9 December 2019 to introduce an updated directory in 2020. TPR has said (in November 2019 updates to its DB to DC transfers and conversions guidance) that trustees should continue to check the Register for firm details but they will then need to contact firms to confirm that the relevant individual works for that firm or check an appropriate third-party directory.
- 27 Where the initiating party (typically the employer but sometimes the trustees) will routinely be expected to provide and pay for IFA advice. See the industry Code of Good Practice on Incentive Exercises for Pensions (2016): [www.incentiveexercises.org.uk](http://www.incentiveexercises.org.uk).
- 28 See in particular Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd [2015] EWHC 448 (Ch).
- 29 Highlighted in the various TPR publications including its "value for members" guidance and Trustee Toolkit.
- 30 Note that the day-to-day ongoing transfer scenario we discuss in this paper is not to be confused with specific employer instigated transfer exercises. See further note 3 above.
- 31 "LEBC gives up DB transfer permissions after FCA review", FT Adviser, 2 September 2019.
- 32 Personal Finance Society "Pension Transfer Gold Standard." See [www.thepfs.org](http://www.thepfs.org).

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