



Response to:

**Consultation on the Pensions Regulator's
Guidance on Transfer Incentives - Issued July 2010**

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Summary and Positioning of our Feedback

Independent Trustee Services Limited (ITS) is pleased to provide feedback on the consultation document issued in July 2010.

We welcome the approach of the Regulator in seeking to give greater guidance to Employers and Trustees on the considerations around Transfer Incentives. We agree that all parties involved need to understand the potential risks to member benefits and that such exercises need to be carefully considered and executed avoiding conflicts of interest, making appropriate professional advice accessible and ensuring that the terms of any offer do not cloud or over-influence decision making.

Whilst we do share the Regulator's caution absolutely, we recognise that from an employer's perspective, enhanced transfer offers can be a legitimate and effective means of seeking to crystallise and ultimately reduce liabilities regardless of the ongoing funding arrangements.

We also share the need to start from a position of caution as a Trustee, but do not subscribe to the view that these exercises can rarely be for the benefit of individual members. There are many scenarios where there can be a genuine win-win taking into account the member's individual circumstances. We agree that the caution should be heightened even further where cash elements are included in the offer.

We believe it is important to take a balanced view of the circumstances associated with such exercises set in the context that there is no formal regulation prohibiting or constraining transfer incentives. Trustees have a significant but not pivotal role in such exercises.

In that regard, we are supportive of the steps the Regulator is taking to establish best practice but we do have some concerns that large amounts of the guidance are open to the perception that the legal and reputational "threats" identified are difficult to reconcile with our understanding of trustees' duties and current legislation.

The Transfer Value Regulations 1996 and the 2008 amendments must form the basis for any regulatory guidance. As Trustees, we feel it is incumbent on us not to start from any pre-disposition against a legitimate employer offer to members. Even where only a limited number may benefit, provided it is without detriment to the scheme funding as a whole, the exercise may be worthwhile.

It is however difficult to reconcile the scale and scope of the proposed guidance with the content of the Amendments to Schedule 1 of the principle regulations Section 7 (b) 3 (a), (b), and (c).

Consultation questions

General Questions

1. Do you agree that the principles-based approach adopted in this guidance is the right approach to take to protect members' benefits?

We agree with a principles-based approach and the guidance is helpful in setting out the Regulators view of how to interpret the Regulations. However, by the nature and tone, the proposed guidance has taken on more of a Code of Practice approach.

We believe that all parties involved with transfer incentive exercises will use the guidance as a checklist against which to verify their actions and would then seek to rely on this if called upon later to defend or justify those actions.

As they will take comfort in this against the legal and reputational issues raised, this may not be the intention behind the Regulator's guidance.

2. Do you think the guidance will fulfil the purpose of ensuring that offers are made with full appreciation of the risks being taken by all parties, and with the utmost regard for member outcomes?

We have no doubt that the Guidance will alert many to risks they may not have understood and that will ensure greater diligence in the adviser and trustee community. However, the volume and detail of "prescribed" information in the guidance could be counter productive in that beneficiaries who might stand to gain from the offer are overwhelmed by the volume of information and act illogically.

3. Are there any additional messages for trustees and/or employers that you would like to see in the guidance?

No. However in absence of formal regulation constraining Transfer Incentives, we feel that the guidance puts Trustees firmly in the framework of accountability for conduct of these exercises which are not at their instigation.

This is likely to lead to trustees taking legal and other professional advice, which would seem to negate the need for such substantial guidance.

If the Regulator's aim is to discourage these exercises altogether, and that is an inference easily drawn from the guidance as drafted, then a more formal regulatory route would be preferable.

Specific questions on each section

Section 1: Definition

4. Does this section clearly outline the area that this guidance covers, to whom it is intended to apply, and the scope of regulator's expectations with respect to those operating or involved in this area?

Yes as far as Employers and Trustees are concerned. However for most employers their involvement and exposure to such initiatives is more often than not guided by professional corporate advisers, lawyers, accountants and employee benefits advisers. Rather than saying that the guidance "may be of interest to" the advisory community (page 10 Who is the Guidance for?), the Regulator may feel it is advantageous to include a third group with specific guidance addressed to the advisory community so that their part in proposing and shaping such exercises is seen to carry similar accountability.

On a similar note, the front page states that the guidance is for the "trustees and managers of occupational pension schemes". Rather than addressing managers of pensions schemes, it should include Employers more generically, pensions consultants and other professional advisers to Trustees and Employers.

Since publication of the draft there is evidence that some advisers are unilaterally applying it word for word, whilst others are seeking to push through exercises before the guidance comes into force...

Section 2: Understanding the principles.

5. Do you think the principles outlined in the guidance are comprehensive, and encompass what should be considered best practice?

Yes in the main. We have a few specific observations as follows:

Principle 1: Clear fair and not misleading

The requirement that the offer should "outline fully the risks involved in accepting the incentive offer, including investment, longevity and annuity risk" is an onerous duty on trustees and employers and goes far beyond the regulatory requirement.

Principle 2: Open and Transparent

We fully agree with the disclosure of the various parties involved and their commercial interests. However the reason why the exercise is being undertaken and the company's long-term funding objectives for the scheme may not always be known.

A Transfer Incentive may be part of a planned process with a long term objective of buy out. Companies with a significant proportion of deferred members who have left the company may well feel they have no relationship with those individuals and it is sensible to give the member opportunity to move their funds to a new employer's scheme. There is also a real and significant cost to the Scheme in keeping track of these members, many of whom may have moved on several times and may have disproportionately small benefits left in the scheme.

The driver may be part of a more urgent need to reduce liabilities, in which case stating this may heighten fears unnecessarily, and unduly influence the take up of the offer. Giving this information may itself be share price sensitive or otherwise hasten the demise of a contributing company, increasing the burden on the PPF

Trustees also have to consider the overall perspective that such exercises may strengthen the overall funding position of remaining beneficiaries.

Principle 3: Manage Conflicts of Interest

No further comments

Principle 4: Trustee Consultation

We would only add that this may trigger consideration for an employer covenant review and should refer to the Regulator's guidance on Managing the Sponsor Covenant.

The timing of the exercise may also be relevant in the scheme valuation cycle. If the impact was projected to be significant, it is likely to trigger the need for an interim valuation. In any event it is frequently the case that the employer will expect to fund the exercise, either wholly or in part, from future deficit contributions on the basis that the liabilities have reduced.

Principle 5 - Independent Financial Advice

Trustees will have a wholly justified reluctance to be part of the "advice" process for individuals in any way and would sensibly steer away from endorsing even the high level materials provided as part of the offer. They would certainly not take responsibility for the illustrations and the calculations on which these are based.

The summary description that you provide for Principle 5 on page 13 however says "in almost all circumstances the structure of the offer should **require** that members take financial advice" This goes beyond the current Regulations which includes a requirement to include a recommendation that the member should take financial advice before making a decision. Given that the member must always be free to choose his own financial adviser it is difficult to see how a requirement could be sustained.

Trustees can seek to ensure that independent advice is accessible as part of the offer process and seek to ensure that offer correspondence encourages the take up of that advice. Trustees cannot insist that this happens.

We think it is also important to have a defined Insistent Customer process to go back to any individuals who may insist on proceeding contrary to the recommendation of the Financial Adviser.

Section 3: Problems and concerns that can arise for members.

6. Does this section achieve its intentions?

Broadly yes, the section provides a summary of useful points.

We are a little concerned by the reference to the PPF. As Trustees we have to put to one side the protection afforded by the PPF. The Ilford case recently tested the principle in the courts, which seems to contradict the requirement in the 2008 amended regulations, which states..." Where information is made available (...under a CETV...) to a member of a salary related scheme, the information to be made available to such member also includes, ...if the scheme is an eligible scheme as defined in section 126 of the 2004 Act.... confirmation that the scheme is so eligible

and that the Board of the Pension Protection Fund exists. We will be exploring this potential issue with the DWP.

It is of course relevant to someone leaving a DB Scheme that they will then be losing that protection. Of course for a higher earner, if they have worries about the company they may be more concerned about benefits being capped and more likely to transfer away. Most importantly, the current protection levels of the PPF may not always be maintained so it could be misleading to overplay the PPF as a benefit being given up if transferring unless the basis of funding of the PPF and the potential for this to change is also explained. This is a difficult issue for a Trustee to resolve. The recent change from RPI to CPI applying to PPF compensation is an example in that it is in effect a reduction from the level of benefits currently on offer

With regard to a member feeling unjustly treated later, we think that trustees, Employers and other bodies called upon subsequently to judge what happened will refer to the guidance at the time in assessing whether the member was treated fairly and the exercise was handled consistent with the existing legislation and the guidance now proposed.

A particular concern for Trustees is that if they did arbitrarily block an offer exercise we might equally be liable to subsequent claims of injustice should the company become insolvent and the protection is either capped or reduced.

7. Are there any points from a member's perspective that need emphasising?

The issue of offer timing can be important, particularly if a cash element is included. Times of financial pressure for families such as immediately pre and post Christmas should be discouraged.

The Employer is usually making a commitment of certain total monetary value for the offer and also for a fixed period otherwise they create an open-ended liability. To avoid creating pressure on members, the timetable should give adequate time for all those who want to respond to do so.

There are of course issues with the validity period for any Transfer Value quoted so this will also need to be emphasised without creating pressure on timetable.

Section 4: Key points of note when considering an incentive offer.

8. Are there any other key considerations that you feel should be included in the guidance?

No additional considerations. We have comments on the points raised as follows:

Employers -

Other than for high earners, where a company might target members with an offer to transfer well above PPF protection levels, we find it difficult to see how an employer could exploit the protection of the PPF to encourage people to take up a transfer offer. Therefore we do not understand the final sentence of the second bullet point. It is not clear what sanctions the Regulator could impose on employers in such circumstances.

Trustees -

Trustees should not start from any pre-disposition that an offer is bad for any or all members. Trustees have to consider the breadth of interests. We agree however that caution and active involvement is imperative.

Page 16 second bullet point. - says that Trustees should request that the employer pays for independent and impartial financial advice for members who wish to take it up. This is inconsistent with the Key Points section of the guidance (bullet point 5) which states that "the structure of the offer should require that members take financial advice". Trustees have no power to insist and regulations provide only for a recommendation.

Page 17 first bullet point - The trustees should not be a party to the offer. It may be appropriate for Trustees to review the communications proposed but they cannot endorse the offer in any way. They have options to correct anything misleading and challenge the Employer if things do not concur with the Trustees understanding, but Trustees should never be party to the offer nor imply any support.

Appendix.

Bullet Point 3 - Our comments above about the role of the PPF are relevant here as this can work both ways to encourage and to discourage transfers.

Bullet point 14 - again it may not always be possible to be too precise on the reason for the offer, as discussed earlier. It would be impossible to quantify the impact of the acceptance by any one member on the company accounts and make this meaningful to an individual member without a huge amount of detail on longer term modelling and generic assumptions which may not be relevant to the individual.

We hope you will find the above comments are overall very supportive to your aims and constructive in helping to shape the ongoing consultation.

We would be very pleased to discuss any aspects of the response with you and help further in the development of the proposals.

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