ask the expert

LEGAL

QROPS

If it transpired that a transfer of scheme benefits from a UK-registered pension scheme to a qualifying recognised overseas pension scheme (QROPS) was an unauthorised member payment, would the transferring trustees be relieved of the associated scheme sanction charge?

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In order to be granted and retain QROPS status (so that it is capable of receiving transfers from a UK registered scheme on a tax-efficient basis), an overseas scheme must at all times satisfy HM Revenue and Customs' (HMRC) strict conditions in relation to how it is regulated, and the benefits it pays. For example, a QROPS must not permit transferred benefits to be paid before normal minimum pension age (usually, age 55) – known as the 'pension age test'.

If it subsequently transpires that the receiving scheme was not in fact a QROPS when benefits were transferred to it, such a transfer will be an unauthorised member payment, and attract significant tax charges for both the member (up to 55% of the value of the transfer) and the trustees (a scheme sanction charge of up to 40% of the value of transfer). However, if the trustees or third party administrators (acting on behalf of the trustees) can evidence that they made the transfer in the reasonable belief that the receiving scheme was a QROPS at the time the member's benefits were transferred, they may apply to HMRC to be discharged from the associated scheme sanction charge.

When considering whether to exercise its discretionary power to grant a discharge in respect of the scheme sanction charge, HMRC will take into consideration whether, in all the circumstances of the case, it would not be just and reasonable for the scheme administrator to be liable to the charge. This is likely to depend on the amount of due diligence undertaken in relation to the transfer.

What constitutes appropriate due diligence?

HMRC's guidance explains that there is no checklist of actions that constitutes appropriate due diligence, because it will depend on the circumstances of each transfer request. As a minimum trustees/administrators are expected to:

1. Check that the receiving scheme appears on HMRC's ROPS list (and repeat this check no more than one day before making the transfer)
2. Ensure the member requesting the transfer has provided the prescribed information and written acknowledgment
3. Keep records as evidence of all due diligence undertaken

These steps are considered only a minimum because, even if a receiving scheme appears on HMRC's ROPS list a day before the transfer and has been given a QROPS reference number by HMRC, not all the information provided by the receiving scheme manager to HMRC has necessarily been verified by HMRC.

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What else can be done?

It is common to see an escalating level of due diligence undertaken in line with the number of 'red flags'. The vast majority this work should be dealt with by the administrator, but some cases may require input from the trustees' legal advisers.

For example, if there are pension scam concerns, an administrator may consider asking the member how they found out about the receiving scheme, and also ask to see copies of the scheme literature and governing documents. This would form part of a 'sense check' rather than a formal legal check, and may highlight whether key requirements such as the 'pension age test' are likely to be met.

One way of undertaking further due diligence is to ask the receiving scheme's administrator for a copy of form APSS251 (by which it applied to HMRC for inclusion on the ROPS list), together with any supporting documents or answers it gave to HMRC's questions concerning the application. Some administrators may also request a statement from the receiving scheme's administrator that everything in the form remains true, complete and accurate, and could consider writing to HMRC (with the QROPS reference number) to ask for confirmation that the scheme's QROPS status is not under review. As a belt and braces approach, it is also possible to ask the scheme manager of the receiving arrangement to provide a legal opinion confirming that the purported QROPS meets the legislative requirements.

Given the potential cost implications of carrying out due diligence, and strict prescribed timeframes within which any transfer should be paid, the scheme's approach to due diligence will always need to be proportionate.