

Ombudsman's Determination

Applicant	Mr N and Mr Y
Scheme	Family Suntrust Scheme (the Scheme)
Respondent	AXA Wealth (AXA)

Outcome

1. I do not uphold the Applicants complaints and no further action is required by AXA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. The Applicants have complained that they joined the Scheme largely due to the flexibility option **(the Flex Option)**, which allowed for flexible allocation of funds between members of the Scheme. AXA subsequently withdrew the Flex Option from the Scheme in September 2016.
4. Upon the decision to withdraw the Flex Option, AXA advised the Applicants through their IFA that it was possible to complete an ad-hoc review, to make a final reallocation of funds before the Flex Option was formally withdrawn. It was later confirmed that this was incorrect.

Background information, including submissions from the parties

5. The Applicants are both represented by the same IFA **(the IFA)**, and have identical complaints. The complaints are, therefore, being dealt with as one, and this Determination also covers PO-15307.
6. In April 2015, the IFA attended a seminar, in which AXA was promoting the Scheme. The seminar explained the features of the Scheme, with particular reference to the Flex Option. AXA advised that discussions were ongoing with HM Revenue and Customs **(HMRC)** regarding the details of the Scheme, and features such as the Flex Option were still subject to HMRC approval.

7. AXA explained that members funds would be reviewed on an annual basis, however there were other times when an 'ad-hoc' review could be carried out, including:

"[Upon] Transfer out of the fund"; and

"On request with the Scheme Administrators' agreement"

8. The IFA subsequently recommended the Scheme to the Applicants, who both joined in October 2015, and January 2016 respectively. The Applicants' decision to join the Scheme was influenced by the Flex Option, as it would enable them to reallocate fund growth to other members at their discretion.

9. The Applicants both agreed to the Terms and Conditions for the Scheme. These created the flex option by a revocable variation of Family SunTrust. The Applicants signed the declaration and consent form on page 5 of the Terms and Conditions, which state:

"We, the undersigned, being participants of the Scheme, agree to the variation of terms and conditions set out in the 'Operative Provisions' in Part 3 of this document... The Scheme Administrator will give 30 days' written notice, so far as is practicable to do so, should the Scheme Administrator decide to exercise its rights as set out in the 'Operative Provisions' in Part 3 of this document."

10. Section 10.3 of the Operative Provisions, states the following:

"We have the right to decide that the provisions set out above in this section 10.3 will cease to apply and that the previous provisions will apply in their place. We can exercise this right only if there are changes in, or our interpretation changes of, applicable pensions, tax or other law, legislation, regulation, or industry codes of practice..."

11. The Previous Provisions referred to in section 10.3, state that any net investment gain or loss of the 'pooled fund' will be apportioned on a proportional basis, rather than to be apportioned to [anyone] in the Scheme on instruction by the lead member, which is what the new provisions allow. Section 23.2.2 of the terms and conditions also set out AXA's right to revert to Previous Provisions: The Previous Provisions referred to in section 23.2.2 state that any uncrystallised funds of all members will be proportionately apportioned with the Revenue for '*... either enhanced or any form of fixed protection*', rather than the revenue to be apportioned to one or more uncrystallised funds, on instruction by the lead member. Under the heading 'what are the risks' the terms and conditions explained that the right to revoke the flex option could be exercised if there were changes in or their interpretation changes of applicable pensions, tax or other law, legislation, regulation or industry codes of practice.

12. On 29 July 2016, the IFA received an email from a third party organisation, 'Sense Network', which provides services to IFA firms. It advised the IFA that AXA had taken the decision to withdraw the Flex Option from the Scheme, effective from 2 September 2016. Therefore, if any member wanted to request an ad-hoc review to reallocate funds before the Flex Option was withdrawn, requests must be received by 5pm that day. The IFA immediately communicated this to the Applicants' and requested ad-hoc reviews on their behalf, before the given deadline.
13. On 2 August 2016, AXA wrote to the Applicants to officially announce the withdrawal of the Flex Option from 2 September 2016. AXA stated that a review had concluded that it was no longer appropriate to offer the Flex Option, and cited the relevant section of the Terms and Conditions which allowed it to make such decisions.
14. On 22 August 2016, AXA contacted the IFA to advise that the Scheme Administrator had declined the Applicants' ad-hoc review requests.
15. On 10 October 2016, the IFA complained to AXA. He acknowledged that he was aware of the ongoing discussions with HMRC regarding the Scheme, but argued that the decision to withdraw the Flex Option constituted unfair treatment of the Applicants. This was further compounded when its offer of a final ad-hoc review was rescinded.
16. On 25 October 2016, AXA responded to the complaint. It acknowledged the inconvenience of withdrawing the Flex Option, but advised that the terms and conditions allowed such action. AXA said that there had been a miscommunication regarding the ad-hoc reviews. AXA had decided to exercise their discretion to stop accepting ad-hoc revaluation requests at the time of the announcement but due to internal confusion advisers and clients were incorrectly told that ad hoc requests received by 29 July would be considered. Because of the miscommunication, the Scheme Administrators had reviewed their initial decision, but they had decided to maintain it.
17. On 5 and 6 December 2016 respectively, the IFA submitted complaints to this office, on behalf of the Applicants. He explained that the Applicants would not have joined the Scheme if the Flex Option was not available, and AXA had further compounded the issue by retracting its offer of a final ad-hoc review. The IFA considered that AXA should be required to fulfil its offer to perform a review. Failing that, as the Applicants were now transferring out of the Scheme, AXA should be liable for the costs incurred by the Applicants in joining the Scheme initially.

Adjudicator's Opinion

18. The Applicants' complaints were considered by one of our Adjudicators who concluded that no further action was required by AXA. The Adjudicator's findings are summarised briefly below:
- AXA complied with its 30 day notice period regarding the withdrawal of the Flex Option, and the terms and conditions confirm that it can revert to the Previous Provisions if there *are* changes in applicable regulations, legislation, or law or if *its interpretation of* applicable regulations, legislation, or law changes.
 - Whilst it may not be the IFA's view that the regulations or legislation has changed, this is not needed to satisfy the criteria for reverting to the previous provisions. The test, is whether AXA's interpretation has changed.
 - The acceptance of an ad-hoc review is at the discretion of the Scheme Administrator, and requests can be refused at any time. It is agreed that AXA should not have advised this option was available, however, its decision to not allow ad-hoc reviews of the Applicants' accounts was not unreasonable.
 - The IFA was aware when recommending the Scheme to the Applicants that talks with HMRC were ongoing, and features of the Scheme could be subject to change. It was always, therefore, a risk that the Flex Option could be withdrawn.
19. The Applicants did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Applicants' IFA provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will only respond to the key points made by the IFA for completeness.

Ombudsman's decision

20. The IFA has, in my view, produced no new evidence to support the Applicants' cases. Reference has been made to existing points and these are summarised below:
- The IFA considers that the Operative Provisions of the Scheme imply, whether at the discretion of the Administrator or not, the ability to request an ad-hoc review was a feature of the Scheme. Since AXA decided to provide 30 days' notice regarding withdrawal of the Flex Option, it is illogical that it does not provide the same notice regarding a request for ad-hoc reviews.
 - The IFA fails to see how it is possible to differentiate between the rights of those members who had an annual review due within the 30 day notice period, which would still be conducted, and members such as the Applicants, who may legitimately have elected for an ad-hoc review.

- Further, the IFA believes AXA has acted disingenuously in its retraction of the ad-hoc review offer. He argues that, whilst AXA said there was a miscommunication and the Applicants simply were not eligible, the fact that a number of AXA consultants communicated this offer confirms that it was not a mistake. The IFA considers that the reason for retracting the offer, was the result of a significantly higher volume of requests than expected.
- The terms and conditions of the Scheme allow members an automatic right to an ad-hoc review if they are transferring out. The Applicants should have had the opportunity to exercise this right, but no notice was given to inform them of this.
- The IFA considers that the Applicants have been financially disadvantaged as a result of AXA's errors. Had AXA confirmed immediately that it was unable to conduct the ad-hoc reviews, the IFA could have initiated a transfer, to ensure the Applicants were able to take advantage of the Flex Option before it was withdrawn.

21. The IFA is correct in saying that the Applicants have a right to request an ad-hoc review at any time. However acceptance of these requests remains discretionary. Whilst a member can make a request, there is no guarantee it will be accepted. The right to request an ad-hoc review does not confer a promise to carry out the review.
22. The IFA says he does not understand how AXA was able to differentiate the rights of members with an annual review due, and those requesting an ad-hoc review. I, again, refer to the fact that ad-hoc reviews were discretionary. Annual reviews were a guaranteed feature of the Scheme, and AXA had no discretion in completing these. Ad-hoc reviews, however, were never guaranteed. I do not consider it unreasonable for AXA to comply with its duty to carry out any of the guaranteed annual reviews during the notice period, whilst rejecting ad-hoc requests.
23. The IFA asserts that the reason for retracting the ad-hoc review offer was not, as AXA advised, due to ineligibility of the Applicants, but due to the sheer volume of requests it received. There is no evidence to confirm the IFA's suspicions. In any event, given the breadth of the discretion included in the contract terms, I do not consider that the Administrators application of that discretion to refuse the Applicants' requests amounts to maladministration.
24. The IFA believes that AXA is responsible for not advising the Applicants of their right to a review in the event of a transfer-out, during the notice period. However, the IFA had been made aware of the occasions where a member could request a review, outside of the annual review process, so was already on notice of that option.
25. The IFA further contends that the Applicants have been financially disadvantaged due to the length of time AXA took to inform him the ad-hoc reviews could not be completed. As this was not communicated until 22 August 2016, there was no time

PO-15306

PO-15307

for the IFA to arrange a transfer and thus enable a review to take place. I do not agree. It was open to the IFA to request a transfer out when the withdrawal of the option was announced if that was the Applicants' preference. No such request was made and I do not consider that AXA should have been , aware of the Applicants desire to transfer out when they had not been told about it.

26. Whilst the IFA has suggested a financial loss has occurred, that loss has never been quantified with evidence, and I am satisfied that there has been no financial loss caused by maladministration by AXA Further, given that the terms and conditions allow for a withdrawal of the Flex Option, and there was no requirement to agree to an ad-hoc review, I do not consider the Applicants to have suffered any non-financial injustice as a consequence of its refusal.

27. Therefore, I do not uphold the Applicants' complaints.

Karen Johnston

Deputy Pensions Ombudsman

11 May 2017