

Sixty second summary

New transfer conditions to tackle scams

In an effort to prevent members from falling victim to scams, new Regulations will prevent trustees or managers of pension schemes from processing statutory transfers unless certain conditions are met.¹ The changes come into effect on 30 November 2021, so scheme administrators have only a little time in which to bring their processes into compliance.

Legislation

Section 125 of the *Pension Schemes Act 2021* allows the Department for Work and Pensions (DWP) to place extra conditions on the exercise of the statutory right to transfer. It will be brought into force on 30 November 2021.² The meat of the matter is contained in the *Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021*, which also come into force on 30 November 2021.³ They apply to any application for a defined benefit (DB) statement of entitlement (guaranteed cash equivalent transfer value), or request to transfer money purchase rights, which is made on or after that date.

Policy developments

The DWP conducted a consultation exercise on draft Regulations from May to June 2021. It has made substantial changes to the arrangement of the legislation in response to the comments garnered. Whereas the preliminary version of the statutory instrument would have required trustees to satisfy themselves that one of four conditions was met before a transfer could proceed, the finalized Regulations establish just two distinct bases: either (1) the transfer destination is in the public sector, or is subject to regulatory oversight; or (2) the transfer circumstances raise no 'red flags'. However, the development has been to the organization of the legislation rather than the underlying policy, as the two surviving conditions cover essentially the same ground as the four that were put forward for consultation.

First Condition: fast-tracked transfer to low-risk scheme

If the transferring trustees can satisfy themselves beyond reasonable doubt either that the receiving scheme is a UK public-service pension scheme, or that it appears on the Pensions Regulator's list of authorized master trust (MT) or collective money purchase (CMP) schemes, the First Condition is met, and the transfer can proceed. The trustees must establish the scheme's credentials themselves; the most they can require from the member are the details necessary to identify the correct receiving scheme.

In the consultation proposals, transfers to schemes (other than MT or CMP schemes) run by authorized insurers would also have been green-lit. The DWP says in its report on the outcome of the consultation exercise that it removed this option after complaints that it would create an uneven playing field for different types of provider authorized by the Financial Conduct Authority (FCA).⁴ All such transfers will now go ahead (or not) under the Second Condition, where the DWP expects that the majority will proceed without additional due diligence.

¹ The *Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021* (SI 2021 No. 1237).

² The *Pension Schemes Act 2021 (Commencement No. 4) Regulations 2021* (SI 2021 No. 1236).

³ SI 2021 No. 1237.

⁴ <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986183/pension-scams-empowering-trustees-and-protecting-members.pdf>.

Second Condition: red and amber flags

Transfers to personal pension schemes, and all occupational schemes not covered by the First Condition, will have to meet the Second Condition, which looks for the presence of some 'red flags' characteristic of scams. The listed red flags are:

- the member failing to provide a '*substantive response*' to requests for evidence or information;
- the member failing to produce the required proof that he or she underwent guidance from Money and Pensions Service (MaPS) when the trustees required it because of the presence of one or more amber flags (see below); and
- the involvement of someone who engaged in regulated activity without having the required permission or exemption, transfer requests in response to unsolicited direct marketing, dangled incentives (such as free pension reviews, promises of early access to funds, savings advances or cashback), and transfers made under pressure.

Trustees must request specified evidence of an employment link when the transfer destination is an occupational scheme (other than those covered by the First Condition), and evidence of a residency link when the destination is a qualifying recognized overseas pension scheme (QROPS). Trustees will have discretion to request other evidence or information about the circumstances of the transfer to enable them to decide whether red or amber flags are present. In most cases, the evidence must be provided directly by the member to the trustees.

If the trustees conclude that an amber flag has been raised, they will have to require that the member undertakes MaPS guidance, and the transfer cannot proceed unless the member provides proof of compliance (the DWP says that the MaPS will supply 'unique identifiers' to members who have completed the guidance). The amber flags are:

- incomplete responses to requests for evidence or information;
- provision of evidence or information that may not be genuine or appears to have been spoon-fed to the member;
- inconclusive evidence of the employment or residency link; and,
- a rag-bag of scam hallmarks, such as high-risk or unregulated investments; unclear or high fees; unclear, complex or unorthodox investment structures; overseas investments; and suspicious transfer activity involving the same receiving scheme or adviser.

Procedure

The Regulations lay out the standards of proof that trustees must apply when making decisions based on the available evidence. They also make it clear that trustees need not restrict their considerations to information supplied by the member: the consultation outcome report suggests, for example, that they could compile and use a list of schemes that due diligence has shown to present a low scam risk.

Trustees will have to inform the member about the conditions for transfer within one month of an application for a DB statement of entitlement or transfer request (unless the transfer is made before that deadline). Notice of a decision that a condition is satisfied must be given no later than the confirmation that the transfer has been made. If the decision is that neither condition is satisfied, notice must be given within seven working days.

Guidance

The Pensions Regulator has published guidance on the new transfer diligence obligations.⁵

The new conditions for transfers should give trustees more discretion to block suspicious requests, but the legislation remains complex, and the lead time afforded for necessary system changes is very short. Varying degrees of certainty are prescribed for different tests—'*beyond reasonable doubt*', '*on the balance of probabilities*', or just '*reason to believe*'—introducing subjectivity and increasing the chances of inconsistent application. The rationale for decisions may need to be carefully documented to reduce the risks of a successful challenge.

⁵ <www.thepensionsregulator.gov.uk/en/pension-scams/dealing-with-transfer-requests>.