NORTON ROSE FULBRIGHT

UK Pensions Briefing

New duties to block pension scams: time to act

November 2021

What has happened?

The Department for Work and Pensions (DWP) has finalised its new rules about statutory pensions transfers, which will give trustees significantly greater scope to say no to a member request to transfer their pension to another scheme. This is intended to help protect members from scams.

The revised regulations, which have been significantly updated since the version that was consulted on in the summer, will apply to any statutory transfers which are initiated from November 30, 2021, onwards.

There is no grace period for trustees and administrators to get up to speed, so the pressure is on to get to grips with the new rules and adapt schemes' transfer processes. The Pensions Regulator has published some guidance to help with this.

What are the new requirements?

A statutory transfer initiated on or after November 30, 2021, will only be able to go ahead if it meets one of two new conditions. If neither condition is met, the member will lose their right to the requested transfer.

The First Condition

The member will have a right to transfer and no further scam checks are needed if the receiving scheme is a public sector scheme, an authorised master trust or an authorised collective money purchase scheme. These schemes are considered to be "safe" destinations.

If the member wants to transfer to a "safe" scheme, the trustee has to verify that the scheme is indeed one of these types. It can't ask the member for evidence.

The DWP had originally proposed that personal pension schemes run by FCA- and PRA-authorised insurers would also be on the safe list of schemes. It has dropped this in order to "level the playing field" for firms such as large self-invested personal pension (SIPP) providers which could have been put at a commercial disadvantage by being left off the list.

The Second Condition

If the member wants to transfer to a scheme not on the "safe list", the trustee will need to be satisfied that the transfer does not show certain warning signs of scams – so-called "red and amber flags".

If they identify any red flags (the clearest signs of a scam) they will have to reject the transfer. If they spot amber flags (possible scam indicators) members can still choose to transfer but not until they have taken scams guidance from MoneyHelper.

The confirmed list of flags is as follows:

Red flags
The member has failed to provide a substantive response to a request for evidence or information
The member has not provided evidence (in the form of a unique identifier) of receiving MoneyHelper guidance
Someone carried out a regulated activity without the right regulatory status
The member requested a transfer after unsolicited contact
The member has been offered an incentive to make the transfer
The member has been pressured to make the transfer

Amber flags
The member hasn't provided all of the evidence or information requested
Evidence provided may not be genuine or may not have been provided directly by the member
The member hasn't shown an employment link with a receiving occupational pension scheme or a residency link with an overseas receiving scheme
High-risk or unregulated investments are included in the scheme
The scheme charges are unclear or high
The scheme's investment structure is unclear, complex or unorthodox
Overseas investments are included in the scheme
A sharp, unusual rise in transfers involving the same scheme or adviser

How do trustees look for warning signs?

If the transfer is to an occupational pension scheme, the trustees have to check if there is an employment link with that scheme. If it's to a qualifying recognised overseas pension scheme (QROPS) they must check that the member is tax resident in the same country the QROPS is based in. The regulations contain a fairly prescriptive list of what evidence the trustees will need to see.

The DWP originally proposed that if the trustees established an employment link or residency link (as appropriate), they would not then have to look for red and amber flags. This has changed.

If the member can't demonstrate an employment or residency link, this will be an amber flag.

To check for other red and amber flags, it's up to the trustees to decide what evidence and information to request from the member. The Pensions Regulator's guidance says this should be "reasonable and proportionate to the level of risk" and has included a set of example questions that trustees could ask.

Any evidence or information requested has to be provided to the trustees by the member directly. It can't be provided by someone else on the member's behalf (with limited exceptions).

In some cases trustees may decide that they already have enough information about the receiving scheme from previous checks or from other sources and don't need to trouble the member for more. The Regulator's guidance suggests that trustees keep a "clean list" of personal pension schemes that it considers low risk. Transfers to these schemes may be able to go ahead without additional checks, but trustees will need to "review this list regularly".

How do they reach a decision?

Trustees need to be certain before raising some flags but can be less certain before raising others. The level of certainty needed ranges from knowing "beyond reasonable doubt" to deciding "on the balance of probabilities" to having "reason to believe" flags are present. Trustees should check they are applying the right test for each flag.

Are there risks for the scheme?

The flip side of being empowered to say no to transfers is that the scheme will be more exposed to claims from members – both if a transfer goes ahead to a scam scheme and, conversely, if a blocked transfer results in investment losses.

Trustees will need to make some difficult judgment calls. For example, some of the amber flags rely on trustees using their "reasonable judgement of the current market" to assess whether investments are higher risk than the "normal range", or charges are "not in line with norms". Specialist advice is likely to be needed.

Even deciding what information it would be "reasonable and proportionate" to request from the member may not be easy in all cases.

What should trustees be doing?

There is a lot to work through and digest.
Action points include:

Contact administrators

Get in touch with your administrators as a priority to discuss what they are doing to update the scheme's transfer processes and documentation and to check they are on track to comply with the new regime. Additional member notifications are likely to be needed and specific deadlines apply.

Review governance arrangements

Timings for reaching a decision on red and amber flags will be tight in some cases, for example if members are slow to provide information. Trustees will need to be nimble in their decision-making so consider whether your governance structures need tweaking to achieve this.

Engage with amber flags

Think about how you would assess amber flags requiring a comparison with what is "market" and line up advisers for future support.

Consider data protection

The Regulator says that "you should record all information you have requested and received, and the basis on which you make any decision." Consider the data protection aspects of this data collection and storage exercise, for example how long should records be kept for?

Update your non-statutory transfers policy

The Regulator says trustees should also apply the new checks to non-statutory transfers, so make sure your policy reflects this and discuss with your administrators.

Undertake training

More than ever, trustees will need to keep up to date with scam developments and industry good practice. Consider commissioning training on the new transfer rules and adding a regular refresher to your trustee training programme.

Update risk register

Check you still have the right controls and are reviewing them at the right intervals.

Consider current transfers

Transfers already underway, or initiated between now and 29 November, will not come under the new rules. However, as an immediate step, it may be sensible if you have cases which are causing you concern to strengthen the wording of any member communications or discharge forms to acknowledge the new regime.

What's next?

The DWP has committed to reviewing the regulations within 18 months to ensure they remain effective against scammers.

The Pensions Scams Industry Group (PSIG) is working on a revised version of its scams code, due later this year. Once available, this should be considered alongside the Regulator's new guidance.

Contacts

Lesley Browning
Partner
Tel +44 20 7444 2448 | +44 77 1030 3311
lesley.browning@nortonrosefulbright.com

Shane O'Reilly
Partner
Tel +44 20 7444 3895
shane.o'reilly@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3700 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Law around the world

nortonrosefulbright.com