Restrictions on statutory transfers out

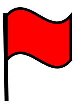
Another new set of obligations for trustees

Trustees should be aware that they will have new obligations with respect to statutory transfers out from **30 November 2021.** The Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 will provide trustees with new obligations in a bid to protect members from transfers to scam arrangements. The regulations will require further transfer due diligence checks from trustees before a transfer can be made and will prevent transfers where 'red flags' are present. The regulations also require trustees to ensure that members receive scam advice from the Money and Pensions Service (**MaPs**) where certain warning signs are present.

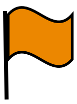
In recognition of the fact that scammers continually evolve, the government will be reviewing the regulations within the next 18 months to ensure they remain fit for purpose.

Red flags and amber flags

The regulations require trustees to take actions where certain 'red flags' or 'amber flags' are present.



The regulations do not allow trustees to make statutory pension transfers where 'red flags' are present.



The regulations require trustees to refer members to MaPs where 'amber flags' are present.

With these powers come additional due diligence requirements and procedural steps. Whilst the government has said that the new regulations should not require additional processes for trustees where there are no suspicions surrounding the transfer (which is estimated to be the case in approximately 95% of transfers), in practice trustees will have to follow a new process when considering most transfers out and scheme administrators will need to develop their approach to transfers.

The Pensions Regulator (**Regulator**) has issued guidance to assist trustees in navigating these new obligations (the **Guidance**).

Can trustees agree to the transfer?

A transfer can proceed without any further checks to:

- A public service pension scheme.
- An authorised master trust on the Regulator's published list.
- A collective defined contribution (**CDC**) scheme that has obtained authorisation.

Is there a red or an amber flag?

This question is applicable to all transfers other than transfers to public service pension schemes, authorised master trusts and authorised CDC schemes. Where amber flags are present, members must take advice from MaPs before the transfer can occur. Where red flags are present, the transfer must be refused. A list of the amber and red flags are set out below.

Amber flags **Member must take advice from MaPS before transfer can occur**	**Red flags** **Transfer must be refused**
The information provided by the member is incomplete or hasn't shown an employment link (in respect of an occupational pension scheme) or a residency link (in respect of a transfer to a QROPS)	The member has failed to provide a substantive response with the required information This is where the member refuses or fails to respond or provides only partial information which is insufficient to decide if the employment link or overseas residency can be demonstrated or if any red or amber flags are present. This will occur after one month of the second request for information
The trustees decide that some of the information provided may not be genuine or may not have been provided directly by the member	The member has not provided evidence of receiving MaPS guidance where required
The trustees decide that there are high-risk or unregulated investments included in the scheme	Someone carried out a regulated activity without the appropriate regulatory status
The trustees decide that the scheme charges are unclear or high	The member requested a transfer after unsolicited contact for the purpose of direct marketing the transfer
The trustees decide that the scheme's investment structure is unclear, complex or unorthodox	The member has been offered an incentive to make the transfer
The trustees decide that overseas investments are included in the scheme	The member has been pressured to make the transfer
The trustees decide that there has been a sharp, unusual rise in transfers involving the same scheme or adviser (or both)	

The Guidance includes examples of situations trustees should consider when assessing the presence of these flags.

There was concern when these proposals were first consulted upon that trustees would be under considerable further burden with regards to the due diligence they must carry out and evidence they must request before making a statutory transfer out. In its consultation response, the DWP stressed that this was not necessarily the case.

> *"if [trustees]…consider they hold sufficient evidence already to show there are not likely to be flags, there is no obligation to seek more evidence about potential flags…It is not DWP's policy to prescribe how the evidence and information to determine the presence of flags is obtained."*
>
> *Department for Work and Pensions*

Under the final regulations, the Trustees are able to request from the member such evidence or information concerning the circumstances relating to the transfer as they consider relevant in order to determine if red or amber flags are present.

New procedures to follow

In addition to the new due diligence process to follow when deciding whether a statutory transfer can proceed, trustees will also need to take some additional administrative steps, as follows:

- Within one month of a member's application for a statement of the cash equivalent or transfer, the trustee must notify the member that their application will be assessed against the new requirements (unless the transfer is made within that period).
- Trustees will now need to process member data for a new purpose and may obtain new information to establish if a red or amber flag exists. Trustees will need to ensure that they comply with UK GDPR requirements and that members are aware of the additional data being collected, as well as the purpose for which their data is used.
- Trustees should be aware of member vulnerability and whether some people need more support to avoid scams from the trustees than others.
- Members must be informed of the progress of the application throughout the transfer process.
- Members must be notified of the trustees' decision. The Guidance sets out additional information regarding timescales for this.

What about non-statutory transfers?

Although the new regulations are aimed at the statutory transfer process, the Regulator makes clear in its Guidance that Trustees should not use non-statutory transfer out processes to try and circumvent the due diligence required by the new legislation.

The Regulator recommends that trustees should consider the checks set out in the Guidance even when assessing whether to grant a non-statutory transfer out.

Comment

"More legal powers for trustees to help prevent members falling for pension scams are very welcome. However, with greater power comes greater responsibility. Trustees and their administrators will need to take care to ensure that no amber flag or red flag is missed. This will inevitably increase workload in all but the most straightforward of transfers"

Stephen Richards, Pensions Partner

There is no doubt that the policy intention behind these new regulations is admirable; any steps taken to reduce the risk to members of scammers should be encouraged and applauded. It is perhaps inevitable that these additional protections come at the cost of additional work for trustees. Whilst the DWP has made clear that its intention is not, on the whole, to increase the due diligence burden on trustees, in reality it is difficult to see how this will not be the outcome.

The regulations do give trustees the flexibility to decide whether they need to request additional information to make this assessment, however trustees may feel pressure to do so given their obligations to members and the potential liability if they get it wrong. The Guidance also emphasises that MaPS advice should not be used by trustees as a substitute for their own due diligence.

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