

Burges Salmon Pensions Law Summary Transfer Check Requirements

This note provides a practical summary of some key aspects relating to transfer check requirements as at February 2022.

On 30 November 2021, the Government passed the long awaited Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 (the “Regulations”), which give trustees and scheme managers power to prevent or pause a statutory transfer request if they see evidence of red or amber flags which may indicate an increased risk of a scam. In this summary, we look at the new requirements and what trustees / scheme managers must do when presented with a request to take a statutory transfer.



Takeaway points include:

- The Regulations require trustees/scheme managers of occupational and personal schemes to ensure that at least one of two conditions is met before processing a statutory transfer request. The Regulations operate so that trustees cannot process a transfer request and members lose their right to a statutory transfer if the conditions are not met. Meeting the conditions as drafted exactly is not necessarily straightforward and trustees/scheme managers need to weigh up how cautious an approach to take.
- If an ‘Amber flag’ is identified, the member must be referred for guidance. If a ‘Red flag’ is identified, the statutory transfer right is lost.
- For DB transfers, the Regulations apply where the member requests a transfer quote on or after 30 November. For DC transfers, it applies where a member makes a written application to transfer to a selected arrangement on or after 30 November.
- The Regulations apply to all statutory transfers even where the member has taken IFA advice (a requirement when transferring DB benefits worth more than £30,000).
- Whilst the Regulations do not apply to non-statutory transfers, such as partial transfers or transfers of DB benefits within a year of or after normal pension age, the Pensions Regulator’s (TPR) guidance makes it clear that trustees should not look to circumnavigate the Regulations by making a non-statutory rules-based transfer.
- Trustees who process a transfer request without satisfying themselves that the requisite conditions are met are unlikely to receive a statutory discharge of liability under section 99 of the Pension Schemes Act 1993 as they will not “have done what is needed to carry out what the member requires”. However, they may still receive a discharge under the scheme’s rules. In addition, members who suffer loss as a result of the transfer taking place e.g. because the receiving scheme is a scam, are likely to succeed in a complaint before the Pensions Ombudsman.
- On the other hand, if trustees refuse a transfer where the conditions are met or process a transfer unreasonably slowly, members who suffer lost investment returns may also be able to bring successful complaints before the Pensions Ombudsman. Furthermore, trustees who fail to process a valid statutory transfer within the required timescales may face civil penalties under section 10 of the Pensions Act 1995 (up to a £5,000 fine for individuals and £50,000 in the case of a corporate trustee).

New transfer check requirements

The Regulations provide for three broad types of transfer: those under the First Condition and two types of transfer under the Second Condition. The table below sets out what information trustees must and may request from members for each of these types of transfer along with the tests they must satisfy before proceeding. References to CMP in the table is to a collective money purchase scheme, OPS is to an occupational pension scheme and a QROPS is to a qualifying recognised overseas pension scheme.

Type of transfer	Type of receiving scheme	Information trustees must and may request from member	Test trustees must satisfy before proceeding with transfer
First Condition	<ul style="list-style-type: none"> Public service pension scheme Authorised master trust on TPR list Authorised CMP on TPR list 	<p>Necessary details for trustees to identify correct receiving scheme only.</p> <p>Trustees do not have discretion to request further evidence or information.</p>	Satisfied beyond reasonable doubt receiving scheme is established public service pension scheme or listed as authorised by TPR.
Second Condition (Type 1)	<ul style="list-style-type: none"> Scheme not falling within First Condition above; and Scheme not an OPS; or Scheme not a QROPS 	<p>None required. Trustees may decide to proceed on basis of all other relevant evidence including:</p> <ul style="list-style-type: none"> information provided by member or another party to the transfer other than in response to a formal request for information from the trustees; or evidence or information obtained by the trustees or managers of the transferring scheme including in the course of carrying out their duties in relation to that, or another, pension scheme. <p>However, trustees may request such evidence or information concerning the circumstances relating to the transfer as they consider relevant in order to decide if a red or amber flag is present.</p>	<ul style="list-style-type: none"> Where no information is requested trustees must decide on balance of probabilities that none of red flags A apply and none of amber flags A apply. Where information is requested, the Type 2 test below applies. <p>(See red and amber flag table below).</p>
Second Condition (Type 2)	<ul style="list-style-type: none"> OPS QROPS (may or may not be an OPS) 	<ul style="list-style-type: none"> where scheme is an OPS, evidence of employment link; where scheme is a QROPS that is not an OPS, evidence of residency link; where scheme is an QROPS that is an OPS, evidence of <u>either</u> 	<p>In deciding whether to block a transfer due to the presence of a red flag the trustees must decide:</p> <ul style="list-style-type: none"> beyond reasonable doubt that either of red flags B is present; whether they have reason to believe that any of red flags A are present.

		<p>employment link <u>or</u> residency link</p> <p>Trustees may also request such evidence or information concerning the circumstances relating to the transfer as they consider relevant in order to decide if a red or amber flag is present. All the above evidence must in most circumstances be provided directly by the member and not a representative.</p>	<p>In deciding whether to refer a member for guidance due to the presence of an amber flag the trustees must decide:</p> <ul style="list-style-type: none"> • beyond reasonable doubt that amber flag B is present; • whether they have reason to believe that any of amber flags A or C are present. <p>(See red and amber flag table below)</p>
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Red and Amber Flags

	RED FLAG – where trustees or managers decide a red flag is present transfer cannot proceed	AMBER FLAG – where trustees or managers decide one or more amber flag is present, must require member to take specified guidance and provide them with evidence confirming the member has taken such guidance
A	<ul style="list-style-type: none"> • A person without the appropriate regulatory status has carried on a regulated activity for the member in respect of the transfer; • The member’s request to make the transfer has been made further to unsolicited contact for the purpose of direct marketing of the transfer; • The member has been offered an incentive to make the transfer; or • The member has been, or consider that they have felt, pressured to make the transfer. 	<ul style="list-style-type: none"> • There are any high risk or unregulated investments included in the receiving scheme; • There are any unclear or high fees being charged by the receiving scheme; • The structure of investments included in the receiving scheme is unclear, complex or unorthodox; • There are any overseas investments included in the receiving scheme; or • There has been a sharp or unusual rise in the volume of requests to make a transfer from the transferring scheme, either to the same receiving scheme as that to which the current request to make a transfer is made, or involving the same adviser or firm of advisers (or both).
B	<ul style="list-style-type: none"> • The member has failed to provide a substantive response to a formal request for evidence or information requested by trustees; • The member has not provided evidence that specified guidance has been taken due to presence of one or more amber flags in respect of the transfer. 	<ul style="list-style-type: none"> • The member has provided a substantive response to a formal request for evidence or information requested by the trustees but the response is incomplete.
C		<ul style="list-style-type: none"> • The trustees decide that some or all of the evidence provided in response to a formal request for evidence or information requested by the trustees may not be genuine or may not have been provided directly by the member. • The trustees decide that all of the information required to be provided by the member in order to demonstrate the employment or residency link has been provided but the evidence does not demonstrate such employment or residency link.

Types of transfer and information required

Transfers covered by the First Condition are the most straightforward and simply require trustees or scheme managers to confirm that the receiving scheme is an established public sector scheme or an authorised CMP or master trust. Trustees and scheme managers cannot make requests for evidence or information other than that necessary to identify the correct receiving scheme.

The Second Condition applies to all other transfers. These break down into two types of transfers as shown in the table. Type 1 will largely consist of transfers to contract based schemes and are estimated by the Pension Scams Industry Group (PSIG) to amount to about 95% of current transfers. The Government envisages that for this type of receiving scheme, trustees or scheme managers will have already carried out sufficient due diligence to decide that the substantive red flags and amber flags are unlikely to be present – so called “clean lists”. Therefore, the member is not required to provide any evidence or information but trustees do have discretion to request such evidence or information concerning the circumstances relating to the transfer as they consider relevant in order to decide if a red or amber flag is present.

Professional trustees should note that in deciding whether to process a transfer under the Second Condition, the Regulations require them to take account of any information they may have as a result of carrying out their duties in relation to their other schemes, as well as any information provided by the member and the scheme’s advisers. Therefore, if a professional trustee is aware of a potential scam receiving scheme from their work on another scheme in their portfolio, they should share this with the third party administrator to ensure it is placed on any red or watch list. For further information see [our blog of 26 November](#).

Type 2 Second Condition transfers are those to an OPS or a QROPS, for which trustees must ask members to provide evidence to demonstrate the employment link or residency link, depending on the type of receiving scheme. Again, trustees may request such further evidence or information concerning the circumstances relating to the transfer as they consider relevant in order to decide if a red or amber flag is present. PSIG estimates these amount to around 5% of current transfers.

TPR has produced guidance for trustees and scheme managers processing statutory transfers which gives examples of the types of evidence required from members. For the employment link, this includes a letter from the member’s employers confirming their continuous employment, three months of payslips and copies of bank statements showing receipt of salary. For the residency link, requested evidence may include utility bills, an overseas address registered on the member’s driving licence, evidence of local tax being paid and bank account and credit card statements.

Industry concern regarding amber flags

Concerns have been raised by the industry regarding the way in which some of the amber flags are drafted in the Regulations. In particular, the amber flag of whether “there are any overseas investments included in the receiving scheme” may catch many personal pension arrangements including GPPPs and SIPPS irrespective of whether the member decides to invest in an overseas investment fund. TPR’s Guidance states “*The specific concern here is not whether the investment is in, for example, a global equity fund but whether the investment is in assets or funds where there is a lax, or non-existent, regulatory environment or in jurisdictions which allow opaque corporate structures*”. However, until there is clarity as to whether the Pensions Ombudsman (and ultimately the courts) will favour TPR’s Guidance over a literal interpretation of the Regulations, trustees and scheme administrators will have to decide whether to refer members to MoneyHelper or take a pragmatic but potentially more risky approach and proceed with the transfer to schemes if they have been vetted and are on their clean list.

Concerns have also been raised as to the levels of enquiry expected of trustees and scheme managers in relation to the amber flag where there are unclear or high fees being charged by the receiving scheme and the amber flag where the structure of investments in the receiving scheme is unclear, complex or unorthodox. TPR’s Guidance offers some comfort – with regard to charges it states “*This does not include all situations where a member is unaware of the charges*

on their product. You should use your judgement and knowledge of the market to assess whether the charges are not in line with norms for comparable products. There may be additional charges for which the purpose is unclear, exit penalties associated with lock-in periods or performance bonuses that start at low levels of return. Charges may also be unclear if they are layered so that the member is paying several charges to associated parties which together add up to an excessive amount”.

On investment structure, it states “You may decide that this flag is present, for example, where:

- *there is direct investment into a specific asset or assets such as the unregulated investments listed in amber flag three;*
- *there is no clear fund wrapper or regulatory body involved in the investment;*
- *the receiving scheme or investments in it appear to be designed to avoid regulation or exploit loopholes”.*

However, it is difficult to see how trustees or in-house administrators will have the requisite market knowledge to make these judgements on their own meaning external advice may be required. The Government has confirmed that the Regulations will be reviewed within 18 months “to ensure they remain effective in targeting the evolving methods used by scammers” although some in the industry are calling for an earlier review to clarify the drafting in relation to the above amber flags in particular. PSIG’s Code of Good Practice on Combating Pension Scams which is a key resource to help better protect members from pension scams is also expected to be updated to reflect the Regulations in early 2022.

Practical steps for trustees and administrators

Inevitably, trustees will look to their administrators and investment advisers to implement the new procedures, particularly for the creation of any clean lists and in assessing whether an investment in a receiving scheme is outside the market norm for comparable products. However, trustees are ultimately responsible for complying with the Regulations and will be the ones facing complaints from members if things go wrong. They should, therefore, speak to their administrator to:

- understand if they operate a clean list and, if so, ask for an explanation as to how it is compiled and how regularly it is reviewed;
- agree how any ambiguities in the Regulations regarding when an amber flag has been triggered will be dealt with – will members be referred to MoneyHelper in those cases or not;
- find out what changes the administrator has made to their internal processes to ensure compliance with the Regulations. Explore in particular how and when they will communicate with members regarding requests for information and evidence as well as how they will keep members updated on the progress of any request to transfer – will all members be required to speak to a member of the team;
- agree how any non-statutory transfers will be dealt with – will they be subject to the same checks as statutory transfers? Where members have been denied a statutory transfer due to the presence of a red flag and subsequently request a non-statutory transfer, should these also be refused and/or referred to the trustees for a decision?
- check and agree the scope of any delegated authority given to their administrators to process statutory and non-statutory transfers and ensure it is appropriate for the new requirements. Ensure it is clear as to when matters should be escalated to the trustee board;
- produce reports at least quarterly on how many transfer requests are being referred to MoneyHelper and the reasons for those referrals, along with any complaints or concerns raised by members regarding the new transfer check process;

- ensure there is a clear audit trail of the checks undertaken for each transfer so that if a member proceeds with a transfer to a fraudulent scheme having taken advice from MoneyHelper and makes a complaint, the trustees can evidence they complied with their statutory duties; and
- ensure any suspected scams are reported to Action Fraud, TPR or the FCA.

In addition, trustees should:

- check scheme rules to ensure they do not give members a unilateral right to a transfer. The statutory right to a transfer overrides any inconsistent provisions in a scheme's rules, but a scheme's transfer provisions may be more generous. If members do have the right to transfer their benefits out of the scheme without consent, seek legal advice as to whether the rules can be amended to remove that right where the statutory conditions are not met and the trustees are not permitted to make the transfer under the Pension Schemes Act 1993;
- inform members in member newsletters and updates to member booklets of the new checks required in relation to transfers; and
- consider signing up to TPRs [pledge to combat pension scams](#).

Please contact us if you would like further information or advice on anything in this note.

This practical summary is not intended to be a full statement of the law on this topic and is not legal advice. It does not take account of any developments since it was written or last updated.

www.burges-salmon.com

One Glass Wharf, Bristol BS2 0ZX T +44 (0) 117 939 2000 F +44 (0) 117 902 4400
Atria One, 144 Morrison Street, Edinburgh EH3 8EX T +44 (0)131 314 2112 F +44 (0)131 777 2604
6 New Street Square, London EC4A 3BF T +44 (0) 20 7685 1200 F +44 (0) 20 7980 4966

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