EVERSHEDS SUTHERLAND

Guiding you through the complexities

Guide to the Pension Schemes Act 2021: Transfers

Practical solutions for trustees and sponsors

October 2021

What we cover

This guide looks at the key changes that the Pension Schemes Act 2021 introduces and the new obligations that it will impose on trustees and sponsors. In each section, we look at what the new legislation requires and then set out some practical steps that trustees and sponsors should be considering now.

The Act became law on 11 February 2021 and the provisions are gradually being brought into force, with most of the key criminal offences and sanctions having come into force on 1 October 2021. Additional detail in relation to most areas has been provided in regulations, draft regulations and statutory guidance. However, there are still some areas, such as the new funding requirements and the dashboards, where more information is required and draft regulations have yet to be issued.

We have updated this guide to take account of the detail which is already available to help trustees and sponsors see what's coming over the horizon and understand what they will need to do to comply with the new requirements. We plan to update this guide regularly as further regulations and statutory guidance are issued.

Click to access our Pension Schemes Act 2021 guides to criminal offences; Pensions Regulator new powers; scheme funding; transfers; dashboards; climate change; and collective money purchase schemes.

If you need any further help, please ask your usual Eversheds Sutherland pensions contact, or speak to one of the team listed at the back of this guide.

Note: *This guide is intended to provide an overview of the issues covered only. It is not intended to provide legal advice and cannot be relied upon. Trustees and employers who have any concerns about the issues raised should seek their own legal advice.*

Transfers

The Act amends the statutory transfer regime in a number of ways to address the risk of pensions liberation and scams.

Draft regulations provide the detail of how the new requirements will work. The regulations are likely to be finalised and come in to force later in 2021.

Restriction on statutory right to transfer

Under the current regime, a member has a statutory right to a transfer payment if the receiving scheme is a registered scheme and the member is in receipt of earnings (from any source). If these conditions are satisfied, trustees are obliged to agree to the member's request for a transfer, even where they have concerns that the receiving scheme might be a liberation vehicle. All they can do is warn the member and report their concerns.

Under the new provisions, members will need to provide trustees with additional information (see below) aimed at proving that the receiving scheme - and their relationship with it - is genuine and the decision to make the transfer is properly informed.

Where members fail to provide this information, they will not have a statutory right to a transfer payment and trustees will not have to comply with a transfer request.

Trustees who make a transfer without ensuring that the new conditions are satisfied will not benefit from a statutory discharge and may be liable to complaints from members.

Additional due diligence

Draft regulations, if finalised in their current form, will require trustees to carry out additional due diligence before making a transfer payment. Trustees will need to ensure that one of four new conditions is satisfied before making a transfer:

- **First Condition**: the transfer is to a specified type of (low risk) scheme. This includes public sector schemes, authorised master trusts and personal pension schemes.
- **Second Condition**: the transfer is into an occupational pension scheme (either in the UK or overseas) and the member has provided specific forms of evidence to demonstrate that there is a genuine employment link between the member and the scheme. In particular, the member will have to demonstrate four things:
  - that their employer is a sponsoring employer in relation to the receiving scheme;
  - that they are and have been employed by that employer for three months;
  - during that time, their earnings have been at or above the national insurance lower earnings limit;
  - they and their employer have both contributed to the scheme within the last three months.
- **Third Condition**: the transfer is into a scheme which is a qualifying recognised overseas pension scheme and the member has provided specific forms of evidence to demonstrate that they have a residency link with the financial jurisdiction in which the scheme is established.
- **Fourth Condition**: there are no "red flag" circumstances in respect of the transfer, and if there are any "amber flag" circumstances, the trustees / managers have received evidence that the member has taken specific guidance on pension scam risks from the Money and Pensions Service (MaPS).

The draft regulations set out an exhaustive list of red and amber flags:

Red flags	Amber flags
– member has failed or refused to provide information about the transfer – an amber flag is present and the member has not provided evidence that they have taken MaPS guidance on pension scams – provision of financial advice on the transfer from an adviser without the necessary FCA regulatory permissions – transfer request was prompted by cold-calling – incentive offered to transfer – pressure to make the transfer quickly	– receiving scheme includes high-risk or unregulated investments – receiving scheme is charging unclear or high fees – receiving scheme's investment structures are unclear, complex or unorthodox – receiving scheme includes overseas investments or an overseas adviser has advised the member on such investments – a high volume of requests to a single receiving scheme or involving a particular adviser / advisory firm

The draft regulations provide some further detail on certain of these flags – for instance, what is meant by "high fees", "high risk" investments or a "high volume" of transfer requests. However, the ultimate test of whether a flag is present will be whether transferring trustees have a reasonable belief that any of the above circumstances is present, based on their knowledge of the financial market, the information provided by the member, and information on volumes of transfers from their own scheme.

These new conditions will apply in addition to, rather than in place of, all existing statutory conditions which must be met before a member has a statutory right to a transfer. However, they will not be mandatory on a non-statutory transfer, since the draft regulations do not override scheme rules.

Information to and from members

The new transfer conditions will (in most cases) require the member to provide substantial additional information in support of a transfer request. To facilitate this, the Government is also proposing that the transferring trustees must provide information to the member on the conditions within one month of a request for a statement of the member's transfer value or for a transfer payment (whichever comes first).

As one of the red flags in the list above is a failure to provide information about the proposed transfer, it will in effect be a condition of a transfer for the member to provide any information requested by the trustees to assess whether there are any red or amber flags. Annex 3 of the consultation document sets out a list of suggested standard questions for trustees to ask members.

Practical implications of changes

Administration and resources

Ensure administrative processes and resources are ready to cope with the new requirements. This may mean asking administrators to confirm what they are doing and whether they have adequate due diligence processes in place. Trustees should develop a policy as part of their approach to complying with the new requirements.

Member communications

Ensure member facing documentation and information requests reflect the new information that they will need to provide to demonstrate that they meet one of the new transfer conditions.

Member guidance

Ensure that trustees and administrators are aware of the circumstances in which members will need to be directed towards additional guidance.

Checklist

Ensure that all parties are aware that transfers will not be made unless the new conditions are satisfied. Again, a trustee policy or checklist covering the new requirements will assist with compliance here.

Statutory timescales

Trustees and administrators should bear in mind that even though there are significant additional due diligence requirements on transfers, the existing statutory timescales will remain unchanged. This means that it will be increasingly important to ensure that smooth and effective transfer processes are in place.

Financial advice

Some trustees may wish to consider facilitating independent financial advice for their members - both to help them and also to manage the risk of future complaints against the trustees. If you are interested in this, our discussion paper explores the main issues.

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