Transfer regulations: Tricky points to consider

The change to the statutory transfer regime, enabling trustees to prevent a transfer if red flags occur, has been celebrated as another weapon in the fight against scams but it does also create a number of issues for trustees to navigate, reveal Nicholas Laird and Sruti Banerjee

In November last year, the government introduced changes to the statutory transfer regime that allow trustees to prevent a transfer to another scheme where specified conditions are not satisfied. While these new provisions act as a valuable weapon in the fight against scams, the list of amber and red flags have given rise to a number of nuanced issues for trustees to navigate.

As a brief reminder, pursuant to the Pension Schemes Act 2021, trustees are obliged to ensure that, with respect to a proposed statutory transfer:

- None of the listed red flags are present; and
- Where any of the listed amber flags are present, advice from the Money and Pensions Service (Maps) is sought.

One such red flag is where *'a person without the appropriate regulatory status*

Transfer volumes

DB pension transfers fell to a record low for the second consecutive month in January, falling by a further 6 per cent, according to XPS Pension Group's Transfer Activity Index.

The index revealed an annualised rate of 47 members out of every 10,000 transferring their pensions in January, the lowest rate since the index launched in 2018 and a fall from the previous record low of 50 members out of every 10,000 recorded in December 2021.

However, the XPS Pension Scam Flag Index, which shows red flags for a potential scam or for poor member outcomes, rose to 50 per cent, having stayed below this in the previous four months. The scam index in December 2021 had 41 per cent of transfers showing at least one warning sign of a potential scam. The most prevalent warning flag identified was a lack of member understanding regarding fees to be paid to the receiving scheme.

XPS also reported that its Transfer Value Index fell in January by 2 per cent, to a month-end average of £253,000.

Meanwhile, the average pension transfer time slowed further in Q4 2021, with both overall and simpler transfers recording an increase in the average transfer time over this period, according to figures from the Origo Transfer Index (OTI).

The index showed that the overall average transfer time for the quarter was 13.4 calendar days, compared to 13.2 days in the previous quarter.

Alongside this, the index revealed a 'marginal' increase to 11.3 days for simpler cases, up from 10.9 days in Q3.

However, Origo noted that half of all transfers being undertaken were completed within seven days.

has provided pension transfer advice to the member or carried on some other regulated activity in respect of the transfer'.

This becomes particularly pertinent when members transfer to overseas pension schemes, as there will usually be an overseas firm advising on the transfer into the receiving overseas scheme that may lack authorisation to advise on transfers in the UK.

In such situations, there will often be a UK regulated financial adviser (UKRFA) providing appropriate independent advice as well because where the value of a member's defined benefits exceeds £30,000, members are obliged to provide evidence to their scheme administrator or pension provider that they have taken regulated financial advice about the transfer.

Trustees may wish to consider asking the member to confirm that the UKRFA has also considered the receiving scheme, so that the trustees can get comfortable that there is no such red flag and therefore proceed with the transfer request.

One of the amber flags, namely where 'there are overseas investments included in the receiving scheme', also gives rise to some queries mainly because the regulations do not narrow down the meaning of 'overseas investments'.

Given the number of receiving schemes that may fall within this category, trustees are left wondering whether: (i) Maps will be overloaded with requests, leading to difficulties in providing the required guidance within the six-month statutory deadline to make the transfer; (ii) they are able to fully rely on 'clean lists' (i.e. lists of low-risk receiving schemes) prepared by scheme administrators; and (iii) there is a clear approach in differentiating between the many schemes that will inevitably be caught by this amber flag.

While there are no definitive answers to any of these questions, trustees can take the following steps to minimise risk:

- Be cautious in interpreting which schemes fall into this category: as the scope of what this amber flag means is tested and clarified, trustees will find it easier to apply.
- Monitor 'clean lists': whether through regular review or via a formal protocol, trustees should ensure such lists are accurate.
- Streamline processes: implementing an organised process with clearly delegated roles will allow schemes to deal with transfer requests efficiently.

Distinct to the issues associated with the red and amber flag lists lies broader questions such as the application of the transfer regulations to non-statutory transfers. Although non-statutory transfers are governed by the rules of each particular scheme, and may often be discretionary, The Pensions Regulator has clearly indicated that trustees should still apply the checks described in the regulations to such transfers and in doing so, fulfil their fiduciary obligation to the transferring member.

While a red flag cannot act as a prohibition on a non-statutory transfer, it may form the reasoning in refusing a non-statutory transfer where such a transfer is subject to trustees' discretion. Further care will be required where the member benefits from a unilateral right to transfer.

The transfer regime is due for review in 18 months but until then, trustees are advised to navigate the regulations with care.

Scams and the gender divide

Pension transfers "continue to be a target for fraudsters" as 11 per cent of transfers by men showed serious warning signs of a scam in 2021, compared to 6 per cent amongst women, recent research from XPS Pensions Groups revealed.

Of the cases examined by XPS's Scam Protection Service across the year, 11 per cent of transfer requests from male pension savers demonstrated a red flag, compared to 6 per cent for women.

It also revealed that higher transfer values were more likely to show signs of scams, as while the average size of a pension transfer was £211,000 across 2021, the average size of transfer displaying a red flag was £279,000.

Written by Linklaters counsel, Nicholas Laird, and trainee solicitor in the pensions team, Sruti Banerjee