

What Is a Bulk Transfer?

A bulk transfer involves the transfer of two or more members from one pension plan to another pension plan. A corresponding payment will be made by the trustees of the transferring plan to the trustees of the receiving plan in respect of the assets and liabilities applicable to the members being transferred. The transferring members cease to be entitled to benefits under the transferring plan and become entitled to benefits under the receiving plan instead. Pension trustees may undertake a bulk transfer of members' accrued rights without their consent provided certain legislative requirements, including those introduced recently by amending legislation, are fulfilled.

Which Types of Plans May Take Advantage of the Amending Legislation?

As a preliminary point, it is important to remember that the trust deed and rules of a plan must permit a bulk transfer before the trustees follow any process to transfer members' accrued rights without consent.

Until 6 April 2018, trustees transferring benefits from any occupational pension plan (whether defined benefit [DB] or defined contribution [DC]) without members' consent were required to obtain an actuarial certificate, which would confirm that the rights to be acquired in the receiving plan would be broadly no less favourable than the rights in the transferring plan. The new amending legislation applies to trustees making a transfer of pure DC benefits, i.e. those without guarantees or promises, to another occupational pension plan. It dispenses with the need to obtain an actuarial certificate, subject to certain other requirements being met (see below).

The new process under the amending legislation cannot be used for the transfer of defined benefits, where the actuarial certificate still plays a vital role.

When Is It Possible to Do a Bulk Transfer Without Consent Under the Amending Legislation?

In order to be compliant with the new process, one of the following conditions must be satisfied:

- The transfer must be to an authorised master trust, or
- The transfer must be between pension plans where the controlling or principal employers of both plans are within the same group of undertakings (e.g. cases arising from corporate restructures), or
- The trustees of the transferring plan must have obtained and considered the written advice of an appropriate adviser whom they have determined to be independent from the proposed receiving plan.

Trustees transferring pure DC benefits without consent will also be able to use the original route of obtaining an actuarial certificate until 30 September 2019. This is to allow any transfer exercises that have commenced on this basis sufficient time to conclude.

If trustees are transferring members to an authorised master trust, legislation does not require them to take professional advice. This is because authorisation can act as reassurance that the plan meets certain minimum quality standards.

Likewise, professional advice is not required (by legislation) to be taken where the transfer is between employers who are within the same group of undertakings. Care is needed where there are orphan liabilities, i.e. liabilities of employers no longer connected with the group, as these may not be covered by the exemption for intragroup transfers.

It is also worth noting that the Department for Work and Pensions Guidance expects trustees to take appropriate advice regardless of the statutory requirements.

Is There Anything Else to Consider?

The original and amending legislation is permissive. Trustees wishing to take advantage of the legislation must have the power to do so under a plan's trust deed and rules. Trustees should, of course, always consider seeking advice as they deem necessary, in order to satisfy their fiduciary duty. Trustees would need to exercise their discretion and should only undertake a bulk transfer without consent if they consider it appropriate to do so in the circumstances – that generally means that trustees think doing so is in the interests of the relevant members. When deciding whether a transfer would be in the best interests of members, trustees should be looking at everything in the round, including a consideration of costs, investment choices and anticipated outcomes. Relevant considerations should also include taking into account whether the transfer might result in any members losing protections under the Finance Act 2004, such as a protected pension age of 50 or an entitlement to a tax-free lump sum that is greater than 25% of the pot value.

Where members benefit from a statutory default arrangement charge cap in the transferring pension plan, charge cap protection must be in place in the receiving plan. Trustees may, however, move a member into a fund without triggering the charge cap if the member has made an active fund choice in the preceding five years.

DWP Guidance, issued in April 2018, should also be considered. While the DWP Guidance is non-statutory and non-binding, it provides useful pointers and recommendations and it is likely that its contents would be taken into account by a court if a trustee decision were ever questioned.

How Do I Select an Appropriate Adviser?

If trustees wish to rely (for the purposes of meeting the statutory requirement) on having considered the written advice of an appropriate adviser they must obtain it from someone who is both independent (see below) and whom they reasonably believe to be qualified to give advice by reason of that person's ability in, and practical experience and knowledge of, pension plan management.

Pension Plan Management

Pension plan management for this purpose could include some or all of the following (non-exhaustive list):

- Advising on the setting of an investment strategy for DC benefits/advising on investments
- Assessing the extent to which a DC plan provides good value for members
- Governing and administering a DC pension plan
- Other relevant areas where additional knowledge might be of value:
 - Powers under the rules, or other legal aspects of the pension plan
 - Detailed understanding of rules and legislation relating to plan wind-up
 - Detailed understanding of benefit structures

Assessing Independence

Trustees always need to verify as far as they are able that any advice they obtain is unbiased. For the purposes of their selection of an appropriate independent adviser, the trustees must consider whether, in the year prior to the advice being received, the adviser has been paid for advisory services, administration services or investment services in connection with the receiving plan. This payment could be from the receiving plan, from a service provider to the receiving plan (or a group undertaking in relation to that service provider) or from the receiving plan employer (or a group undertaking in relation to that employer). If any such payments have been made, this might be an indication that the adviser is not independent and trustees should carefully consider the suitability of any appointment. This does not mean that trustees are not able to appoint the adviser in question, but that they must be satisfied the adviser is independent despite the payments that have been made.

Tip: Trustees who decide that an adviser is independent, despite having received payment within the preceding year from the receiving plan or connected parties, should record their decision in writing, the factors they took into account in reaching that decision, the weight they attributed to each factor and their reasons.

What Documentation Is Required?

A transfer agreement is the means by which the trustees of the transferring plan and receiving plan would effect the transfer. Ordinarily, the sponsoring employers of each plan would also be a party to the transfer agreement. The agreement sets out the contractual terms between the trustees of each plan.

There are a number of documents and assurances that are generally expected to be included in the transfer agreement. For example, the transferring trustees are usually expected to warrant to the receiving trustees that the information provided is accurate and complete and employers often provide costs indemnities to the trustees.

What About Timings?

- A transitional period up to 1 October 2019 will be available for transfers using the original actuarial certification route
- One month's advance notice is required to be given to the transferring members
- Advice regarding a proposed transfer from an appropriate adviser is only valid for one year from the advice being provided
- A blackout period – where members are unable to make changes to their investment options during the transition period – can be applied; the length of a suitable blackout period will vary, depending upon the circumstances of the plan

Some Practical Points

Do	Don't
Do remember that any decision whether or not to undertake a bulk transfer without consent constitutes an exercise of discretion.	Don't accept without question that an adviser constitutes an "appropriate adviser" within the meaning of the legislation – make sure that you consider this issue for yourselves.
Do take advice, whether or not the legislation requires it – this will form an important part of the trustees' decision-making process.	Don't forget to check the position in relation to both tax and default funds.

Contact

Wendy Hunter

Partner, London

T +44 20 7655 1119

E wendy.hunter@quirepb.com