

Earlier this month, the long awaited *Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021* ([SI 2021/1237](#), "the Regs") were laid. Due to the relatively brief period of adjustment allowed, analysis of the Regs has dominated most pension professionals' Novembers.

After much stroking of chins and scrunching up of balls of paper, we feel we have the measure of them. But that is not to suggest that we are certain of all their meanings. The Regs are beset with inconsistencies, contradictions, and frankly, oversights. This month, we consider a few areas of migraine-inducing frustration.

### The Effective Date

Unfortunately, we will have to read some legalese. It begins easily enough though with [regulation 1 \(2\)](#):

*These Regulations come into force on 30th November 2021.*

Inevitably, this is not the whole story. [Regulation 3](#) then says:

*These Regulations apply to transfers where, in a case where the member applies for a statement of the cash equivalent value of their transferrable rights under section 93A of the 1993 Act (right to statement of entitlement: benefits other than money purchase), the date of the member's application, and in any other case, the date of the member's request to make a transfer, occurs on or after the day that these Regulations come into force.*

Breaking it down, there are two dates to worry about:

- the date of the member's application
- the date of the member's request to make a transfer

The first date applies to transfers in a case where:

*... the member applies for a statement of the cash equivalent value of their transferrable rights under section 93A of the 1993 Act (right to statement of entitlement: benefits other than money purchase) ...*

Put more simply, this is a transfer where a member *applies* (the present tense might be important) for a transfer value quotation (a guaranteed "statement of entitlement") – which the *Pension Schemes Act 1993* entitles them to once a year – for benefits that are not money purchase.

The second date applies to transfers in any other case ie, transfers of money purchase benefits.

It is not immediately clear which 'application' the legislation refers to in the first bullet point. To transfer a non-money purchase pension, members typically make two applications. First for the statement of entitlement and second to transfer their cash equivalent transfer value ("CETV") to another scheme. Which application needs to be on or after 30 November to be in scope?

Instinctively, you might think it is the application regulation 3 mentions: the quote request. After all, that 'applies' is in the present tense.

But what if you are missing something? [Regulation 2 \(3\)](#) says:

*In these Regulations, "transfer" means using the cash equivalent in one of the specified ways, or for one of the authorised purposes, in accordance with the provisions referred to in paragraph (1) ...*

Rather than quoting paragraph (1), we can just explain that (broadly) it refers to transferring a benefit to a scheme that meets certain legal requirements.

That [part of the transfer legislation](#) also refers to members "making an **application** in writing to the trustees or managers of the scheme requiring them to use the cash equivalent in one of the ways specified ..."

In the Regs, 'transfer' refers to the second stage in the process: a member taking their quote and applying for it to be sent to another pension scheme.

This might be a case of overthinking, but the legislation is insufficiently clear about the situation where a member was sent a statement of entitlement before 30 November and applies to actually take their transfer on or after that date.

The Regs come with an Explanatory Memorandum, but this says only that:

"They will apply to transfers initiated on or after 30th November 2021."

and

"The new protections will apply to all transfers initiated from the day the regulations come into force, on 30th November 2021."

We know as much about what is meant by 'initiated' as we do by 'application'.

The Pensions Regulator produced [new guidance](#) to help schemes understand the new rules. It says:

*"From 30 November 2021, trustees and scheme managers must ensure specific checks are made before complying with a member's request to transfer their pension. This should form part of your due diligence process for transfer requests."*

Both statements imply that the Regs apply to any transfer from now on, regardless of whether the quote was sent before 30 November. But we suspect the statements would be more emphatic if either author was aware of this potential ambiguity. And ultimately, these are just guides; it could be a court's interpretation of the word 'application' that matters in the end.

All that said, our interpretation (which seems to be widely shared) is that whether the Regs apply to non-money purchase transfers depends on the date a member requests their statement of entitlement. This is the more obvious reading and avoids some perverse consequences (eg, schemes being in breach of disclosure requirements immediately from the date the Regs come into force). Where there is any doubt about a proposed transfer in this transitional period, schemes might wish to obtain legal advice.

## Overseas Residents

Where a transfer is to a qualifying recognised overseas pension scheme ("QROPS"), [regulation 10 \(1\) \(b\) - \(c\)](#) may require the transferring scheme to establish something called a 'residency link'.

The first inconsistency is found in [regulation 9 \(4\)](#):

*There is an amber flag present where the trustees or managers of the transferring scheme decide that all of the evidence required to be provided by the member in accordance with one of the sub-paragraphs of regulation 10(1) has been provided but the evidence does not demonstrate:*

- (a) the employment link [...]; or*
- (b) the residency link.*

We said that regulation 10 **may** require a 'residency link'. If the QROPS is an occupational pension scheme, regulation 10(1)(c) clearly offers a choice of establishing either the residency or employment link.

But regulation 9 seems to waive an amber flag if – after the member has provided their evidence, which will focus on one of the links – that evidence fails to demonstrate both links. The provision ought to include an "either" for complete clarity.

In this case, the point is probably pedantic. The intent of the regulations is clear. Regulation 9 should be read in conjunction with regulation 10(1). If the member provides evidence of an employment link, the transferring scheme does not need to decide if there is a residency link.

The more interesting inconsistency in this area is between different regulations.

[Regulation 12 \(1\)](#) says:

*There is a residency link between the member and the receiving scheme where the trustees or managers of the transferring scheme decide that the member is **resident in the country or territory in which the QROPS is established**.*

The highlighted segment is defined by 12 (4):

*"resident in the country or territory in which the QROPS is established" has the same meaning as in section 244B(1)(a) of the 2004 Act (exclusion from overseas transfer charge: member and receiving scheme in same country).*

'2004 Act' refers to Finance Act 2004. Section 244B (1) (a) ([as inserted](#)) says:

*the member is resident in the country or territory in which the QROPS is established*

On the face of it, it would have been easy to copy and paste this definition into the Regs and save us opening another document. But this kind of cross-referencing allows any provisions that qualify or alter the 2004 Act's definition to have the same effect in the Regs' definition. However, for now at least, the provisions that qualify the 2004 Act's definition all relate quite specifically to the overseas transfer charge ("OTC").

The interesting difference is that the Regs do not copy and paste the specific exclusion to the residency condition provided by section 244C ([as inserted](#)) of the 2004 Act as well. This effectively

treats the [European Economic Area](#) ("EEA"), plus Gibraltar, like a single country for the purpose of the OTC. The member and the QROPS just have to be resident in the same territory, not necessarily the same country.

This is not the case for the residency link in the transfer Regs. That link cannot be established, for example, where the member lives in Latvia and their QROPS is in Cyprus. Of course, if the scheme is occupational and their employer's pension scheme is in Cyprus, they may be able to evidence an employment link instead.

In this case, there is no question of incoherence or oversight. Regulation 12 (3) makes the point explicitly:

*Where the QROPS is established in an EEA state, for the purposes of paragraph (1) being resident in the same country or territory means being resident in that EEA state.*

The UK introduced the OTC before it had left the EEA. At the time, the OTC probably could not discriminate between EEA states in this way. Legislating post-Brexit, the UK government has decided against respecting the oneness of the EEA.

It is tempting to see this as the Government thumbing its nose at the Great European Project. There are genuine questions to be asked about why a member living in Latvia might be moving their pension to Cyprus, which has been the base of some scam activity. But a Latvian hoping to consolidate benefits in their exciting new pan-European personal pension might be frustrated to find they need, without exception, to speak to the UK Money and Pensions Service before doing so.

## Overseas Investments

One aspect of the new Regs that has attracted much attention and has caused much concern is that [Regulation 9 \(5\)](#) says that there is an amber flag where there are any overseas investments "included in" the receiving scheme. It really comes to something when the powers that be feel the need to actually define the expression "included in", however in broad terms there will be an amber flag where the receiving scheme:

- will make any overseas investments with the member's funds immediately after the transfer is made, or
- is already making any overseas investments in respect of any existing members of the scheme.

In the large majority of cases, of course, receiving schemes will indeed be making overseas investments, so a strict interpretation here would mean that almost all transfer requests will result in the member being required to take guidance on pension scams from the Money and Pensions Service ("MaPS").

Consider a member who wishes to transfer to a Group Personal Pension ("GPP") provided by a well-respected, reputable, insurer and who has no intention at all of investing any of their transfer value in an 'overseas fund', but other existing members of the GPP do have such investments. Will the transferring scheme really have to require that the member takes the MaPS guidance? From a strict reading of the Regs, the answer is clearly "yes", however we foresee some serious push-back from such members. There is also the question of whether MaPS could actually cope if almost every

transfer request involved the member obtaining MaPS guidance.

Whilst this may not have been the intention behind the Regs, transferring schemes will find themselves between a rock and a hard place here.

## Transfer Confirmation

For most transfers, the transferring scheme's trustees or managers will ultimately decide that one of the two new conditions is met. The Regs seem to require the scheme to inform the member when this decision is reached. [Regulation 5 \(3\)](#) says:

*The trustees or managers of the transferring scheme must ensure that the member is sent notification of their decision that:*

*(a) either the First Condition or the Second Condition is satisfied, by no later than the date on which the member is sent confirmation that the transfer to the receiving scheme has been made...*

There are two potential problems.

First, there is no legal requirement for the transferring scheme to send confirmation that the transfer has been made. This means they might not need to send this notification either. The regulation just stops the scheme confirming settlement first.

However, the scheme has to look out for any other goody-two-shoes who might tell the member the transfer is complete. This is a risk when the legislator uses the passive voice (or should we say: the passive voice is used). The transferring scheme

misses the deadline from the date the member "is sent confirmation that the transfer to the receiving scheme has been made". It does not specify who must have done the sending.

The most likely candidates are the member's financial adviser and the receiving scheme. Arguably, it has to be somebody who is certain of its completion, or they cannot 'confirm' the transfer, only speculate. But be careful about a receiving scheme noticing the money in their bank account and sending an (automated?) email.

It might be wise to send a confirmation before sending payment. If the confirmation is by snail mail, and the payment is instant, you might want to leave a few days in between. Or hope that common sense prevails. About that...

### **Common-sense Interpretations**

From the date that the Regulations come into force, schemes are expected to put the Regs into practice. Where inconsistencies exist, a judgment call will be needed. In truth, most of the time, there will be a common-sense interpretation that schemes are likely to take.

But it is worth remembering the impetus for the Regs to exist. A Ms. Hughes appealed in the High Court against a decision to refuse her transfer to a 'suspicious' scheme. The Pension Ombudsman [had determined](#) that she did not have a statutory right to the transfer because she was not an earner in relation to the scheme employer; quite clearly the intention of that particularly provision.

Unfortunately, for many since, the provision did not achieve this explicitly. Ms Hughes only had to be an earner in the general sense: she was earning money from employment. Many trustees since have felt compelled to allow transfers despite suspicions about a scam.

We just hope that we do not find ourselves, a few years and a few thousand scam victims later, adjusting to more hastily drafted regulations.

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**Aries Insight - November 2021**

