

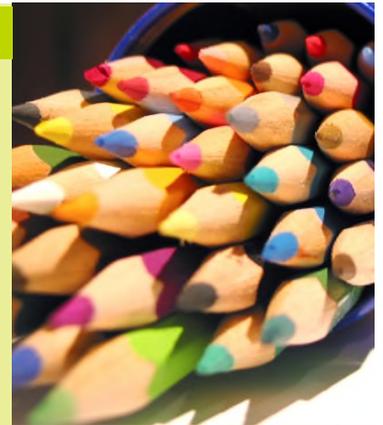
# Stronger nudge to pension guidance: action needed by trustees

March 2022

Pension briefing

## HIGHLIGHTS

- 1 June 2022 will see new requirements for trustees to give members a “stronger nudge” to take appropriate pension guidance (“pension guidance”) before starting to draw flexible benefits or (in certain cases) transferring their flexible benefits. “Flexible benefits” are broadly, money purchase or cash balance benefits.
- Where the requirements apply, trustees must offer to book a pension guidance appointment for the member. The trustees must not proceed with the member’s application to transfer or draw benefits until the member either:
  - confirms that they have received pension guidance; or
  - opts out of taking pension guidance by giving an “opt-out notification”.
- Defined benefit (DB) schemes will be caught by the stronger nudge requirement in relation to any defined contribution (DC) additional voluntary contributions (AVCs).
- The stronger nudge requirements are in addition to (and separate from) the scam protection checks which trustees must carry out from 30 November 2021 before processing a member’s statutory transfer application.



Unfortunately, the drafting of the legislation makes what is a well-intentioned requirement to protect members likely to be unnecessarily complicated in practice. This note explains the new requirements and sets out practical steps trustees (and their administrators) should be taking to ensure compliance.

## INTRODUCTION

The “stronger nudge” requirement is the latest government initiative to improve uptake of free, impartial guidance from Pension Wise by individuals before they start drawing flexible benefits or (in some cases) decide to transfer their flexible benefits. The aim is to present taking guidance as a normal part of the application process. Where an individual does not wish to take guidance, the government wants to ensure that this is an “active and considered” decision.

Previous government trials suggested that nudging people to take guidance “significantly increased” the take up of Pension Wise guidance. The DWP consulted in July last year on draft regulations to require trustees to “nudge” individuals to pension guidance in specified circumstances.

We now have final regulations, alongside the DWP’s response to consultation which explains some of its thinking on how trustees may comply with the new requirements. Given that final regulations were only issued this January, it is helpful that the in force date has been pushed back to 1 June 2022, from 6 April 2022 as originally proposed.

## WHEN DO THE STRONGER NUDGE REQUIREMENTS APPLY?

The new requirements apply where on or after 1 June 2022 pension trustees receive an application (or a communication in relation to an application) from a relevant beneficiary (“B”) to:

- start receiving flexible benefits from the scheme; or

- (in some cases) transfer any of B’s rights to flexible benefits.

The application (or communication) may be given by “any person”, not just by B – though trustees should check that another person is authorised to communicate with them on B’s behalf.

## Glossary

- **“Appropriate pension guidance”** is free, impartial guidance, currently known as [Pension Wise guidance](#), provided by [Money Helper](#).
- **“Flexible benefits”** is defined in section 74 of the Pension Schemes Act 2015 and means, broadly:
  - money purchase benefits; or
  - cash balance benefits.
- **“Relevant beneficiary”** (“B”) is a member, or member’s survivor, who has rights to “flexible benefits”.

## Some transfer applications exempt

There are exceptions for some transfers, meaning that the stronger nudge requirements do not apply to transfer applications if one of the following conditions is met:

- B is aged under 50;

- Receiving flexible benefits is not the purpose (or one of the purposes) of the transfer application<sup>1</sup>;
- B (or an authorised person) has confirmed that either:
  - The trustees of another pension scheme have referred B to pension guidance, and B has either received the guidance or opted-out; or
  - B is transferring to a personal pension scheme which is required by financial services legislation to give information about pension guidance.

Transfers to an overseas scheme and transfers of small pots also fall within the new requirements.

In practice, working out whether an exception applies (other than on a transfer when B is under age 50) is likely to cause added complexity. Administrators may find it simpler to include stronger nudge information in their standard responses to queries from individuals over 50 about transferring flexible benefits. If the individual responds that s/he has already received or opted out of guidance, the administrator can then proceed with the application without further regard to the stronger nudge requirements.

### What about transfer applications / retirements already in progress at 1 June 2022?

Unhelpfully, there are no transitional provisions in the legislation. Any relevant communication received after 1 June 2022 may trigger the new requirements.

For example, consider an application to transfer flexible benefits for the purpose of taking benefits from the receiving scheme, where the transferring trustees receive the application on 1 May 2022. If the member follows up the application with a chasing email on 1 June this year, the new requirements will apply and the transfer process will be suspended until the member either takes appropriate pension guidance or opts out.

### What about defined benefit (DB) arrangements?

A member or survivor will only be a relevant beneficiary for the purposes of the new requirements if they have rights to flexible benefits. A member whose rights are solely to defined benefit (DB) benefits will therefore not fall within the new requirements.

However, defined contribution (DC) additional voluntary contribution (AVC) arrangements are “flexible benefits” and therefore within scope of the requirements when the AVCs are drawn or (in some cases) transferred.

## STRONGER NUDGE: WHAT MUST TRUSTEES DO?

### Following receipt of B’s application (or communication about an application)

When the stronger nudge requirement is triggered, trustees must:

- Offer to book a pension guidance appointment at a date and time suitable for B and, if B accepts the offer, take reasonable steps to book the appointment;

- Tell B how B can book an appointment if:
  - It is not possible for the trustees to book the appointment for B despite taking reasonable steps to do so; or
  - B declines the offer for the trustees to book an appointment on B’s behalf;
- Explain to B that they may only proceed with B’s application to draw (or transfer) flexible benefits if B either:
  - Notifies the trustees that s/he has received pension guidance; or
  - opts out of pension guidance by giving the trustees an “opt-out notification” (please see below).

The trustees are expected not to take additional steps to proceed with the application until B provides one of these notifications.

### Action on subsequent contact from B

The trustees must repeat the above steps whenever B subsequently contacts them about the application to draw (or transfer) flexible benefits, unless and until:

- B confirms that s/he has received pension guidance in connection with the application; or
- B opts out of taking guidance by providing an “opt-out notification” (please see below).

### How will booking an appointment for B work in practice?

Not surprisingly, concerns have been raised that booking an appointment for B will be impractical, especially as it would seem to require access to (or at least knowledge about) B’s diary.

The DWP has explained that where B’s application is proceeding purely online or by post, trustees will not be required to organise the booking of an appointment and coordinate diaries. Instead, the DWP suggests that trustees could meet the requirements when communicating online or by post, by including a telephone number for B to call if B wishes the trustees to book an appointment on their behalf. In the course of a phone call from B the administrator could try to book an appointment using the Pension Wise online booking system.

### WHAT IS AN “OPT-OUT NOTIFICATION”?

B may opt out of receiving pension guidance by giving verbal or written notification to the trustees.

The government is concerned that B should not be able to opt out by simply ticking a box on a retirement choices form – and so requires that in some circumstances B may only opt out in a communication “solely for the purpose of opting out”. For more details please see the box below.

While different forms of opt out are allowed (for example, a separate phone call, digital form or postal form), the DWP recognises that it may be appropriate for trustees to take a

<sup>1</sup> According to the DWP, this exception is intended to cover consolidation of an individual’s pension pots into a single pension arrangement. In practice, for an individual over normal minimum pension age it may be difficult to ascertain whether taking benefits is one of the purposes of the transfer. It is also reasonable to assume that all transferring beneficiaries will choose to access their benefits at some point (unless their pension pot

is being used for inheritance planning, in which case they will presumably intend the pot to be accessed by their survivors). It is not clear how far into the future the intended taking of benefits must be for the exception to apply.

consistent approach – for example, directing beneficiaries to an online opt out form.

Deciding whether or not the “solely for the purpose of opting out” requirement applies is likely to add unnecessary complexity in practice. We suggest that including a separate online or postal form with all stronger nudge information would be a simpler approach.

### When does an opt-out notification NOT need to be in a communication “solely for the purpose of opting out”?

An opt-out notification does not need to be in a communication “solely for the purpose of opting out” if B (or a person authorised by B) has confirmed that one of following applies:

- In the previous 12 months B received pension guidance or regulated financial advice in connection with the application;
- B qualifies for a serious ill health lump sum; or
- The application is solely to transfer any of B’s rights to flexible benefits, rather than starting to draw benefits<sup>2</sup>.

### Record keeping

The regulations require trustees to keep records of:

- Receipt by B of pension guidance;
- Provision by B of an opt-out notification; and
- Receipt of confirmation that B meets one of the conditions for not having to opt-out in a communication “solely for the purpose of opting out” (please see the box above).

The DWP has clarified that B’s confirmation of having received guidance (or opted out) will be sufficient – further evidence is not needed.

In practice, trustees will want to keep records of compliance with each step in the process, including:

- Where they decide that the new requirements do not apply (and why);
- Steps taken to comply with the new requirements;
- Where the trustees provide the information required but the application does not proceed (for example, because B fails to confirm receipt of pension guidance or provide an opt-out notification).

### INTERACTION WITH OTHER DISCLOSURE OBLIGATIONS

Trustees are already required to give members with flexible benefits certain information about options to take benefits and the availability of pension guidance at various trigger points, including:

- when the member is approaching their retirement date; or
- when the member has reached normal minimum pension age and has the opportunity to transfer their flexible benefits.

Where the stronger nudge requirements apply, trustees do not also need to provide information about pension guidance under certain of the other disclosure requirements.

In practice, however, it may be simpler for administrators to continue using existing disclosure packs (including information about pension guidance) in all relevant cases, rather than adding additional complexity by removing pension guidance information from packs for certain members. Where the new requirements are triggered, the stronger nudge information can then be given in addition to existing information.

### WHAT ABOUT SCAM PROTECTION GUIDANCE?

Trustees and administrators are already grappling with the new scam protection measures which came into force on 30 November 2021. These measures require trustees to check for red and amber “flags” before giving effect to a member’s statutory right to transfer. Where an amber flag is found, the transfer may not proceed until the member provides evidence of having taken free scam protection guidance. Unlike the “stronger nudge” requirements, taking scam protection guidance is mandatory before a transfer which raises an amber flag may proceed.

The DWP has rejected calls to combine stronger nudge and scam protection guidance into a single appointment. Instead, trustees are expected to give clear explanations of the purpose of each type of guidance.

### WHAT ABOUT MEMBERS’ RIGHTS?

New section 113B of the Pension Schemes Act 1993 provides that, where the new regulations apply, trustees must ensure that B has received guidance or opted out before proceeding with B’s application to transfer or start drawing benefits – so, effectively, overriding B’s rights under statute or the scheme rules.

On an individual statutory transfer, the trustees’ duty to transfer B’s rights to money purchase benefits within six months of B’s application will only apply if B confirms receipt of guidance (or opts out) within the six month period.

### PRACTICALITIES

Trustees should ensure that their administrator’s processes are updated to include:

- Recognising when the new requirements may be triggered;
- Assessment of whether the new requirements apply;
- Communication with B to give the required information and explanations;

<sup>2</sup> In this case, the stronger nudge requirement would not apply anyway – please see the paragraph on transfer exceptions above.

- Repetition of the information whenever B subsequently makes contact with the trustees (before B opts out or confirms receipt of guidance);
- Appropriate record keeping to demonstrate compliance with the new requirements.

While the legislation permits various confirmations to be given verbally, we recommend that trustees insist that the required confirmations (or opt-outs) be given in writing. Evidence of B's decisions will be especially important to counter "regret risk", especially claims that the trustees did not take all required steps before actioning B's application.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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