

## **GN16: Retirement Benefit Schemes - Transfers Without Consent**

### ***Classification***

Practice Standard

**MEMBERS ARE REMINDED THAT THEY MUST ALWAYS COMPLY WITH THE PROFESSIONAL CONDUCT STANDARDS (PCS), AND THAT GUIDANCE NOTES IMPOSE ADDITIONAL REQUIREMENTS UNDER SPECIFIC CIRCUMSTANCES**

### ***Application***

Any actuary responsible for signing a certificate on or after 29.11.05 for the purposes of:

- regulation 12(3) of the Preservation Regulations (relating to the transfer of members' accrued rights without consent),
- regulation 9(b) of the Contracting-Out Transfer Regulations (relating to the transfer of Section 9(2B) Rights),
- regulation 3C(8)(b) of the Protected Rights Transfer Regulations (relating to the transfer of Protected Rights), or
- regulation 6(8)(a)(i) of the Deficiency Regulations (relating to withdrawal arrangements).

### ***Legislation or Authority***

Pension Schemes Act 1993. (c.48).

Pensions Act 1995. (c26).

Pensions Act 2004. (c35).

Occupational Pension Schemes (Preservation of Benefit) Regulations 1991. SI 1991/167 ("the Preservation Regulations") as amended.

Contracting-Out (Transfer and Transfer Payment) Regulations 1996. SI1996/1462 (the "Contracting-Out Transfer Regulations") as amended.

Protected Rights (Transfer Payment) Regulations 1996. SI 1996/1461 (the "Protected Rights Transfer Regulations") as amended.

Occupational Pension Schemes (Employer Debt) Regulations 2005. SI 2005/678 (the "Deficiency Regulations") as amended.

Northern Ireland has its own body of law relating to pensions and, in relation to Northern Ireland, references to Great Britain legislation contained in this guidance note should be read as including references to the corresponding Northern Ireland legislation. The Northern Ireland regulations corresponding to the Great Britain regulations are included in Appendix B.

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Pensions Board

### *Status*

Approved under Due Process. Adopted by the Board for Actuarial Standards on 19 May 2006

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1.0	28.02.91
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2.1	01.02.96
3.0	05.04.05
3.1	29.11.05 to midnight on 18.05.06

from which time it ceased to operate (and cannot, with effect from that time, be relied upon) as guidance issued by the Profession. Members needing to comply with professional standards on matters covered by this Guidance Note should in future consult the standards published by the Board for Actuarial Standards.

## **1 Introduction**

- 1.1 The rules of a pension scheme may provide for a transfer to take place without a member's consent. Where the transfer is being provided as an alternative to short service benefits, it must comply with Regulation 12 of the Preservation Regulations.
- 1.2 Regulation 12(3) of the Preservation Regulations requires that an actuarial Certificate must be obtained by the trustees of the transferring scheme before a transfer can take place without a member's consent.
- 1.3 However, the Certificate does not give the trustees authority to make the transfer. There will be matters which are not taken into account when giving the Certificate which the trustees may need to consider before deciding whether or not the transfer should proceed.
- 1.4 The purpose of this Guidance Note is to advise actuaries of the considerations that actuaries must take into account in providing a Certificate and the information that must be given to the trustees before or at the same time as a Certificate is signed in order to alert the trustees to the need to consider wider issues.
- 1.5 The following regulations also either require the conditions set out in Regulation 12(3) of the Preservation Regulations to be met in certain circumstances or mirror part of the requirements of Regulation 12(3) of the Preservation Regulations:
  - regulation 9(b) of the Contracting-Out Transfer Regulations (relating to the transfer of Section 9(2B) Rights),

- regulation 3C(8)(b) of the Protected Rights Transfer Regulations (relating to the transfer of Protected Rights), and
- regulation 6(8)(a)(i) of the Deficiency Regulations (relating to withdrawal arrangements).

The requirements of this Guidance Note should also be followed, with such adjustments as the actuary considers appropriate, when providing a Certificate for the purposes of these regulations.

## 2 Background

2.1 Under Regulation 12(3) of the Preservation Regulations the actuary is required to certify that:

- the transfer credits to be acquired for each member under the receiving scheme are, broadly, no less favourable than the rights to be transferred (Regulation 12(3)(a)); and
- where it is the established custom for discretionary benefits or increases in benefits to be awarded under the transferring scheme, there is good cause to believe that the award of discretionary benefits or increases in benefits under the receiving scheme will (making allowance for any amount by which transfer credits under the receiving scheme are more favourable than the rights to be transferred) be, broadly no less favourable (Regulation 12(3)(b)).

2.2 The term ‘broadly no less favourable’ is not defined in the legislation. In the absence of case law it is for the actuary to decide what tests are carried out to determine whether the requirements of the Preservation Regulations are satisfied, taking into account all relevant circumstances. However, the actuary must note points 2.2.1 to 2.2.5 below.

2.2.1 It is expected that the factors considered would normally include:

- a) the value of the member’s transfer credit in the receiving scheme compared with the value of the rights to be transferred from the transferring scheme;
- b) the values of any discretionary benefits or increases in benefits in the transferring and receiving schemes which, in accordance with the Preservation Regulations, the actuary considers appropriate to take into account;
- c) any differences between the member’s transfer credit in the receiving scheme and the rights to be transferred from the transferring scheme which will not be adequately reflected in the value referred to in a) above; and

- d) any differences between the discretionary benefits or increases in benefits in the transferring and receiving schemes which, in accordance with the Preservation Regulations, the actuary considers appropriate to take into account but which will not be adequately reflected in the value referred to in b) above.
- 2.2.2 The Faculty and Institute have received legal advice that, as it is the overall benefits represented by the transfer credits for each member that must be ‘broadly no less favourable’, the separate elements of the benefits do not each have to be ‘broadly no less favourable’.
- 2.2.3 Although a categorical statement is not possible, the Faculty and Institute have received legal advice that the better view (and the view that a court is likely to take) is that a consideration of the extent to which the relevant rights allowed under the rules of the receiving scheme and the rights to be transferred might be satisfied in practice is not relevant to the assessment of the ‘broadly no less favourable’ requirement of Regulation 12(3)(a). On this footing a winding up test is not necessary when deciding whether or not a Certificate can be given and, when considering values, it is the rights as contained in the respective rules which are to be valued and not the benefits (if different) that might actually be delivered.
- 2.2.4 For the purposes of Regulation 12(3)(b), the actuary may need to consider both the financial strength of the receiving scheme and the commitment and ability of the employers of the receiving scheme to fund discretionary benefits or discretionary increases in benefits in the future. The Faculty and Institute have received legal advice that, as the comparison required is between future awards under the receiving scheme and established custom under the transferring scheme, the future funding position of the transferring scheme and the future commitment or ability of the employers of the transferring scheme to provide any necessary funding are not relevant considerations.
- 2.2.5 Particular care is needed in relation to proposed transfers between schemes with different risk characteristics. For example, as a transfer from a defined benefit scheme to a defined contribution scheme (or vice versa) would represent a major change in the nature of the benefits it is unlikely that a Certificate could be given in the case of a conversion from defined benefits to defined contribution (or vice versa), save in exceptional circumstances.
- 2.3 In paragraphs 2.2.2, 2.2.3 and 2.2.4 above reference is made to legal advice that the Faculty and Institute have received. It must be noted that this legal advice must not be relied upon as being legal advice to individual actuaries or their firms. Each actuary must consider the extent to which it may be necessary to take his or her own legal advice on the meaning of the Regulations.
- 3 Information that must be given to the trustees before or at the same time as a Certificate is signed**

- 3.1 When considering whether a Certificate can be signed, the actuary will need to decide:
- a) which elements of the benefits and options provided by the transferring scheme for service covered by the transfer must be taken into account as:
    - ‘rights to be transferred’ under Regulation 12(3)(a), or
    - ‘an established custom for discretionary benefits or increases in benefits’ under Regulation 12(3)(b), and
  - b) what tests must be carried out in order to determine whether the ‘broadly no less favourable’ requirements of the Regulations are satisfied (see Section 2 above).
- 3.2 There may be:
- a) some elements of the benefits and options provided by the transferring scheme for service to the transfer date which are not taken into account under either Regulation 12(3)(a) or Regulation 12(3)(b), and/or
  - b) matters relating to the benefits or options of members (or their contingent beneficiaries) who are to be covered by the Certificate, which are not relevant to the actuary’s assessment of the ‘broadly no less favourable’ tests, but which, in his or her opinion, might be relevant to the trustees’ decision on whether or not the transfer should proceed.
- 3.3 The actuary must draw to the attention of the trustees any elements of the benefits and options provided by the transferring scheme which fall under paragraph 3.2 a) above, if, in his or her opinion, any possible differences between the transferring and receiving schemes in relation to those elements might be relevant to the trustees’ decision.
- 3.4 The actuary must also provide the trustees with a list briefly stating any matters which fall under paragraph 3.2 b) above. It is for the actuary to decide what items to include on the list. However, the actuary must consider, in particular, whether (to the extent that they are not taken into account when giving the Certificate) possible differences between the benefits, in respect of service covered by the transfer, available in the event of a wind up, might be relevant to the trustees’ decision.
- 3.5 In providing the information referred to in paragraphs 3.3 and 3.4 above the actuary is not expected to carry out any investigations into the potential effect on individual members (or their contingent beneficiaries) of the differences referred to in paragraph 3.3 or the matters referred to in paragraph 3.4. However, when providing the information the actuary must advise the trustees whether any such investigations should, in his or her opinion, be

carried out before a decision is made on whether or not the transfer should proceed.

- 3.6 The information referred to in paragraphs 3.3 and 3.4 above does not have to be provided to the trustees at the same time as the information referred to in paragraph 3.5 above. However, all such information must be provided no later than the date on which the Certificate is signed. As a matter of good practice it should, if possible, be provided before that date.
- 3.7 The actuary must ensure that the trustees are aware of the need to take legal advice before a decision is made on whether or not the transfer should proceed.
- 3.8 If the actuary believes that the trustees are wrongfully refusing to consider properly the matters advised to them in accordance with paragraphs 3.3 to 3.5 above, the actuary must consider whether or not he or she should refuse to provide a Certificate and/or what other actions it would be appropriate to take. Depending on the circumstances, appropriate actions might include making a report to the Pensions Regulator under Section 70 of the Pensions Act 2004 or resigning his or her appointment.

#### **4 Certification**

- 4.1 The actuary must take instructions from the trustees as to which categories of member are to be included in the Certificate.
- 4.2 The actuary must obtain such information concerning both the transferring and receiving schemes (including information about benefits, terms, practices and funding levels) and the employers as he or she considers necessary in order to determine whether a Certificate can be given. If, in the opinion of the actuary, insufficient information has been provided to permit a proper assessment to be carried out, the actuary must not give the Certificate. In signing the Certificate, the actuary, having taken reasonable steps to obtain the necessary information, will only be able to accept responsibility for the Certificate based on the information that has been provided, the nature of which must be summarised on the Certificate (see paragraph 4.5).
- 4.3 In giving the Certificate, the actuary must not consider the terms and conditions for future service benefits under the receiving scheme compared with those under the transferring scheme.
- 4.4 A Certificate must be provided on the basis that it is valid for transfers in a stated period (which must not exceed three months) following the date of signature and so long as there are no changes to the benefits or the other terms of the transfer as described in the Certificate.
- 4.5 The Certificate should normally be in the form shown in Appendix A and must include:

- a) a brief explanation of the different categories of members that have been taken into account;
- b) a list of the documents that have been taken into account;
- c) if not described in the documents referred to in b) above, a description of the elements of the benefits and options under the transferring scheme taken into account for the purposes of Regulation 12(3)(a) and of the transfer credits under the receiving scheme;
- d) if not included in the documents referred to in b) above, the data on which the Certificate has been based;
- e) a description of any customary practice of discretionary benefits or discretionary increases in benefits under the transferring scheme that has been taken into account for the purposes of Regulation 12(3)(b)
- f) any assumptions made regarding future discretionary benefits or discretionary increases in benefits in the receiving scheme; and
- g) if applicable, the key actuarial assumptions that have been used to value the rights, transfer credits and any discretionary benefits or discretionary increases in benefits.

4.6 In the Certificate the actuary must also explain to the trustees that:

- a) it is their decision to make a transfer without a member's consent and that the Certificate should be taken neither as giving them authority to do so nor as a recommendation to do so;
- b) they have to satisfy themselves that making the transfer is consistent with their responsibilities and powers under trust law and their duties to both the transferring and remaining members;
- c) in giving the Certificate, the actuary is not expressing an opinion as to the reasonableness or otherwise of the amount of the transfer value;
- d) the actuary has taken no account of any differences between the terms and conditions for future service benefits under the transferring scheme and the receiving scheme; and
- e) the Certificate is only valid for transfers in a stated period (not exceeding three months) following the date of signature and so long as there are no changes in the benefits or the other terms of the transfer as described in the Certificate.

4.7 The actuary may, if he or she considers it appropriate, include a statement on the Certificate to communicate what other matters have, or have not, been taken into account when giving the Certificate.

## **5 Review**

- 5.1 The actuary must advise the trustees of the transferring scheme that he or she will review the continuing validity of the Certificate, and consider whether further information or investigations are required in accordance with paragraphs 5.2 below, in the light of any events of which he or she is advised, or becomes aware, of before the date the transfer is made.
- 5.2 If, before the transfer is made, the actuary is advised, or becomes aware, of any event which would mean that, in his or her opinion:
- a) the Certificate would no longer be valid, or
  - b) the information provided in accordance with paragraphs 3.3 and 3.4 above would no longer be complete, or
  - c) the results of any investigations already carried out into the differences referred to in paragraph 3.3 above or the matters referred to in paragraph 3.4 above might then be materially different, or
  - d) there are additional differences or matters which should be investigated
- this must be drawn to the attention of the trustees of the transferring scheme.
- 5.3 If the actuary believes that the trustees are wrongfully refusing to consider properly the additional differences or matters which the actuary has indicated might now be relevant to their decision as to whether or not a transfer should be made without the members' consents the actuary must consider what actions it would be appropriate to take (see paragraph 3.8 above).

**Appendix A**  
**Actuarial Certificate for the purposes of Regulation 12 of the**  
**Occupational Pension Schemes (Preservation of Benefit) Regulations**  
**1991**

To: The Trustees of the Transferring Scheme

Name of Transferring Scheme .....

HM Revenue and Customs Reference Number (if any) .....

Name of Receiving Scheme .....

HM Revenue and Customs Reference Number (if any) .....

I hereby certify that, in my opinion:

- (a) the transfer credits to be acquired for each member under the receiving scheme are, broadly, no less favourable than the rights to be transferred; and
- (b) where it is the established custom for discretionary benefits or increases in benefits to be awarded under the transferring scheme, there is good cause to believe that the award of discretionary benefits or increases in benefits under the receiving scheme will (making allowance for any amount by which transfer credits under the receiving scheme are more favourable than the rights to be transferred) be, broadly, no less favourable.

This Certificate is given in accordance with the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 as amended dealing with transfers without members' consents. It has been prepared taking account of Guidance Note GN16 issued jointly by the Faculty of Actuaries and the Institute of Actuaries and must be read taking account of the notes and information listed overleaf.

This Certificate is valid only in respect of the above Regulations and so long as:

- (a) there are no changes in the benefits or the other terms of the transfer described overleaf, and
- (b) the said transfer takes place within ..... of the date of signing of this Certificate.

Signature .....Date.....

Name .....Qualification.....

Address .....Name of Employer (if applicable).....

## **Notes**

1. This Certificate must not be taken by the trustees as their authority to make a transfer without members' consents. It must also not be taken as a recommendation to make a transfer without members' consents. The trustees will need to satisfy themselves that making the transfer is consistent with their responsibilities and powers under trust law and their duties to both the transferring and the remaining members.
2. In giving this Certificate, the actuary is not expressing an opinion as to the reasonableness or otherwise of the amount of the transfer value.
3. In giving this Certificate, no account has been taken of any differences between the terms and conditions for future service benefits under the transferring scheme and the receiving scheme.

## **Categories of Members**

The following categories of members are covered by this Certificate:

## **Documents**

This Certificate has been based on the documents listed below:

## **Benefits**

## **Data**

## **Actuarial Assumptions**

The key actuarial assumptions that have been used to value the rights, transfer credits and any discretionary benefits or discretionary increases in benefits are as follows:

## Appendix B: Regulations\*

	<b>GB Reference</b>	<b>NI Reference</b>
Occupational Pension Schemes (Preservation of Benefit) Regulations 1991	SI 1991/167	SR 1991 No 37
Contracting-Out (Transfer and Transfer Payment) Regulations 1996	SI 1996/1462	SR 1996 No 618
Protected Rights (Transfer Payment) Regulations 1996	SI 1996/1461	SR 1996 No 509
Occupational Pension Schemes (Employer Debt) Regulations 2005	SI 2005/678	SR 2005 No 168

\* The titles of the Northern Ireland Regulations are identical to those for Great Britain save for the insertion of '(Northern Ireland)' after the word 'Regulations'