



Essential pensions news

Updater

November 2015

Contents

Introduction

Essential Pensions News covers the latest pensions developments each month in an 'at a glance' format.

DWP consults on proposals to implement member-borne commission ban

Of interest to all DC schemes is the Department for Work and Pensions' (DWP's) consultation on how to implement from *April 2016* the ban on member-borne commission payments in occupational pension schemes that provide money purchase benefits and are being used for automatic enrolment. The consultation closes on *November 27, 2015*.

Background

In March 2014, the Government announced that it would introduce a range of measures to protect members automatically enrolled into pension schemes, and included proposals to introduce a ban on commission in all qualifying schemes used for automatic enrolment.

Action has already been taken to ban commission arrangements in personal pension schemes. The Retail Distribution Review (RDR) rules, which came into force on December 31, 2012, banned commission arrangements in new group personal pension (GPP) schemes. The FCA has also introduced rules that require firms to remove existing commission charges from qualifying schemes by April 6, 2016.

Banning member-borne commission in occupational pension schemes

On October 26, 2015 the DWP published [Better workplace pensions: Banning member-borne commission in occupational pension schemes](#), seeking views on its proposals for implementing the ban on commission.

The DWP notes that, due to the nature of commission arrangements, designing regulations to implement the ban will be complex. In particular, trustees may be one step removed from negotiations and agreements in relation to member-borne commission payments between service providers and advisers.

A summary of the DWP's proposals is set out below.

Scope of commission ban

The ban on commission will apply to all occupational pension schemes used as qualifying schemes for automatic enrolment excluding small self-administered schemes, executive pension schemes and schemes with only one member. The Government does not currently intend to extend the scope of the ban to schemes that are not used for automatic enrolment.

The regulations will apply to money purchase occupational pension schemes as well as any money purchase benefits offered by non-money purchase schemes. Commission will be banned from additional voluntary contributions in qualifying occupational schemes, even where these are the only money purchase benefits.

The commission ban will cover:

- bundled and unbundled schemes (bundled arrangements being those which are still trust based but use a single third party provider for both the administration and investment services)
- single and multi-employer schemes (such as master trusts)
- providers who operate 'integrated' services (that is, organisations which offer administration and/or investment services in addition to advisory services)
- where the relevant schemes are being used for automatic enrolment.

Access to advice and services by trustees and employers

Trustees will continue to be able to use member-borne charges to pay for advice that they need, or are legally required to obtain, to run the scheme effectively (the example given by the DWP is the requirement for trustees to seek professional advice when deciding on an investment strategy).

However, employers will not be permitted to use member-borne charges to pay for any advice or service they obtain from an adviser. Employers can still seek advice but must bear the costs of this themselves.

Options for implementation: trustee or service provider duty?

Commission arrangements typically involve the service provider making the commission payment to the adviser and recovering this amount via a member-borne charge. This means there is not a direct flow of funds from the scheme to the adviser. Thus there is a difficulty

in implementing a commission ban, since trustees are not normally involved in agreeing the commission arrangements, and may be unaware that commission is being charged in existing qualifying schemes. Further, they may not have authority to influence the commission arrangement directly.

The consultation paper explores whether the duty to ensure compliance with the commission ban should be imposed on trustees or service providers. Historically, the DWP has placed duties on trustees in relation to occupational pension schemes but, due to the nature of commission arrangements, trustees may be restricted in their ability to comply with the commission ban. Service providers on the other hand, would be aware of commission arrangements and should have the authority to end them. According to the DWP, this suggests that they may be best placed to ensure effective implementation and compliance of the commission ban.

Members affected by the ban

The ban will apply to the following members:

- any current employee of a given employer who has at least one employee using that scheme as a qualifying scheme for automatic enrolment
- any former employees of that employer who made a contribution to that scheme before the date the ban comes into effect, including employees who were not automatically enrolled into the scheme by that employer
- members accessing decumulation products where these are offered in occupational schemes used for automatic enrolment.

This approach is wider than that taken with the charge cap, but reflects the fact that members could pay commission without realising it. The Government believes that the ban should apply to members accessing decumulation products since the ban will apply at scheme level and cover all members who are current or former employees of the employer who is using the scheme as a qualifying scheme for automatic enrolment, and across all the funds associated with that scheme.

Members may opt-in to adviser services

Members will be able to choose to access and pay for advice. However, a number of safeguards have been proposed, including obtaining the member's express agreement.

TPR responsible for enforcing ban

It is proposed that TPR would be responsible for enforcing the commission ban in occupational schemes, under both of the implementation options presented.

In the event that the duty to implement the ban is imposed on service providers, this would mean that, in the context of the commission ban, TPR would be responsible for directly regulating bodies traditionally regulated by the FCA, such as pension scheme providers and asset managers.

Phased implementation of ban for new and existing arrangements

The DWP proposes that there will be a phased approach to the implementation of the commission ban depending on whether the commission arrangement is new or existing:

New member-borne commission arrangements. Regulations will ban new member-borne commission arrangements from *April 6, 2016* (or the employer's staging date if later).

Existing member-borne commission arrangements. A further consultation will be held on draft regulations to implement a ban on existing member-borne commission arrangements (those entered into before April 6, 2016) later in 2016.

Comment

It is clear from this consultation paper that implementing a ban on member-borne commission effectively will be a complicated process. Trustees are one step removed from the commission arrangements and, as a result, may not be best placed to implement a ban. On the other hand, if service providers become responsible for ensuring compliance with the ban, TPR will then become responsible for regulating bodies traditionally regulated by the FCA.

DWP consults on various amendments to the scheme administration regime

Of interest to all schemes is the DWP's publication of [Better Workplace Pensions: Reducing regulatory burdens, minor regulation changes, and response to consultation on the investment regulations](#).

The document sets out various minor changes to the current scheme administration regime for consultation, as well as asking for responses on possible changes to the way pension schemes disclose investment information to their members. The consultation closes on *December 9, 2015*.

Introduction

The DWP is consulting on minor changes to various aspects of the current scheme administration regime aimed at reducing the 'regulatory burdens' on occupational pension schemes. In the foreword to the publication, pensions minister Baroness Altmann states that the changes reflect that '... pensions law is complex and technical, and that sometimes we need to change it because you tell us it is not doing the job we want it to.'

The document covers the following issues:

DC Governance

Draft amending regulations confirm that multi-employer group schemes are excluded from the additional governance requirements, and apply a statutory override to provisions in trust deeds and rules where they conflict with the trustee requirements for relevant multi-employer schemes to have at least three trustees.

Scheme accounts

The DWP proposes that the current accounting requirement for investment disclosure information is deleted and replaced with a simpler statement from the auditor of compliance with FRS 102 and the pensions SORP noting any material departures.

Investment Regulations

The DWP confirms that no changes will be made to the Investment Regulations (following a consultation in February 2015) and that non-statutory guidance on investment is the government's preferred method of communicating with trustees on this issue.

Disclosure requirements

The DWP is seeking views on the extent to which schemes are currently able to disclose information to members on how the scheme makes investments.

We look at each of these areas in more detail below.

DC Governance

A key part of the proposed changes relates to clarifying the new occupational DC scheme governance requirements that came into effect from *April 6, 2015*. For multi-employer schemes, including master trusts, there are additional requirements for a minimum of three trustees (or three trustee directors where the trustee board is a corporate body) to be appointed and that the majority (including the chair) must be independent from any service providers used by the scheme). The new proposals include:

- Narrowing the definition of a multi-employer scheme so that employers which are part of the same group are excluded. The consultation states that the DWP has received feedback that while the current wording appropriately captures master trusts it might also inadvertently bring ‘ordinary group schemes’ within the scope of the legislation where, for example, a corporate transaction creates a participating employer from outside the group.
- Amending the scheme administration regulations to allow a deputy chair, or acting chair, of a scheme’s trustees to sign the chair’s statement. Where there is no chair in place, trustees have three months in which to appoint one which could lead to an instance of having no chair to sign the annual statement. This amendment is intended to address the situation where there is a delay in making an appointment, as the statement might not otherwise be signed in time.
- Confirmation that where there is a conflict between the statutory requirement for a minimum of three trustees to be appointed, and a scheme’s trust deed and rules, the regulations override the rules. This will assist schemes where the trustees do not have the power to amend the rules to reflect the new requirement.

These changes will be included in the Occupational Pension Schemes (Scheme Administration) Regulations 1996 and the Occupational Pension Schemes (Charges and Governance) Regulations 2015.

Audited accounts

For private sector occupational pension schemes, a new pensions Statement of Recommended Practice (SORP 2015) applies to the preparation of scheme accounts for periods commencing on or after *January 1, 2015*. SORP 2015 reflects changes to UK Generally Accepted Accounting Practice due to the implementation of Financial Reporting Standard 102 (The Financial Reporting Standards applicable in the UK and Republic of Ireland) (FRS 102).

The DWP is proposing amendments to the Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996 to bring the current pension scheme reporting requirements in line with the new accounting practices. The DWP proposes different suggested approaches for the new accounting requirements. However, its favoured option is for the current detailed scheme investment disclosure requirements to be replaced by requiring the auditor to provide a statement that the accounts have been prepared in accordance with FRS 102 and the pensions SORP, and to note any material departures from them, specifically:

- concentration of risk
- employer-related investment
- total of investment purchases and sales.

The DWP estimates that the proposed amendments will save schemes £4.25 million annually in reduced audit costs.

In addition, the DWP proposes to exempt multi-employer schemes with at least 20 participating employers from the requirement to obtain a statement from their scheme auditor on whether, in their opinion, contributions have been paid in accordance with the schedule of contributions.

Scheme investment

The document also contains the government's response to the consultation on two potential changes to the Occupational Pension Schemes (Investment) Regulations 2005 (Investment Regulations) consulted on earlier in 2015.

Reflecting the concerns raised by the Law Commission, which recommended a review to ensure that any changes to the Investment Regulations supported trustees in understanding and meeting their duties, the February 2015 consultation focussed on:

- whether the regulations clearly reflect the difference between financial and non-financial factors when taking decisions about investments
- the role that a 'stewardship' approach can play when taking decisions about investments, including whether trustees ought to be required to comply with the Financial Reporting Council's UK Stewardship Code (Stewardship Code).

The Government considers that, overall, amending the Investment Regulations to include a distinction between financial and non-financial factors would not necessarily clarify trustees' understanding of their fiduciary duties. It was also clear from responses that there were concerns among respondents on whether requiring trustees to comply with the Stewardship Code, or explain why they have not done so, was the most appropriate way to encourage trustees to consider how to engage with companies to promote their long-term success.

In addition, the response confirms that the Government is satisfied that pension schemes trustees now have a good awareness of their duty to consider factors that may be financially material to the performance of their investments. The consultation response states:

'This suggests that the Law Commission's conclusions and the subsequent changes to guidance for trustees are having a beneficial impact.'

Based on this, the Government considers that guidance will be more effective than changes to the Investment Regulations, stating that this has the advantage of being easier to amend and keep up to date.

Consultation on disclosure of investment information

In March 2015 the FCA published a discussion paper containing a call for evidence on improving the reporting and disclosure of information about transaction costs in occupational and workplace personal pension schemes. In order to ensure that any changes to introduce greater transparency are introduced 'in a co-ordinated way' the Government is asking for views and evidence on the best methods of disclosure of information about schemes' investments and what issues, if any, will need to be addressed. In particular, it is seeking feedback on the extent to which occupational schemes are currently able to make certain information available to members, prospective members, their spouses, and beneficiaries about how the scheme makes investments, including:

- the selection, monitoring, retention and realisation of investments (this will include information about the companies that funds are invested in)
- the stewardship of investments (this will include how voting rights associated with investments are used)
- the selection, appointment and monitoring of investment managers and other agents to whom powers are delegated.

The Government seeks details of any changes occupational schemes would need to make to ensure this information was made available, and the costs involved.

Comment

The consultation document draws diverse minor changes and addresses several issues at once. This is intentional, as the pensions minister recognises that responding to consultations can itself be an additional ask of an already busy industry.

The DC governance changes reflect specific concerns raised by the pensions industry and it seems the Government is making a positive attempt to ensure the compliance regime remains practical and flexible. Similarly, the audited accounts changes address concerns voiced by many trustee boards faced with a long list of information to compile for annual accounts which may only be read by a limited audience.

Finally, schemes will welcome confirmation that, rather than further amendments to the Investment Regulations, the Government will seek to use guidance to inform and direct trustees on how best to fulfil their duties. The consultation states that this reflects evidence of how trustees are managing their schemes' investments and feedback from the Pensions and Lifetime Savings Association that all respondents to their most recent annual engagement survey agreed that active consideration of risks to a company's long-term sustainability was compatible with fiduciary duty.

View the [consultation paper](#).

DWP consults on proposed amendments relating to pension flexibilities and the valuation of pensions with guaranteed annuity rates

Of general interest is the DWP's further addition to its tally of consultation papers published in recent weeks, with its most recent being the Occupational and Personal Pension Schemes and the Pension Protection Fund (Miscellaneous Amendments) Regulations 2016 consultation and call for evidence on the valuation of pensions with a Guaranteed Annuity Rate. The consultation closes on *January 11, 2016*.

This consultation seeks views on proposed minor and technical regulatory changes to 4 areas of pensions legislation, to ensure that the new pension flexibilities operate as intended:

- pension sharing on divorce, including a requirement that, where an attachment order exists, schemes will have to write out to the former spouse at the point the member applies to take their flexible benefits
- the final technical changes needed to reflect the pension flexibilities to operate in specific situations (for example, where a scheme is winding up)

- the PPF, including amendments to the PPF (Entry Rules) Regulations around schemes whose sponsoring employer cannot have an insolvency event
- disclosure of information, to place an obligation on trustees of occupational pension schemes to give generic risk warnings to scheme members who wish to take their benefits flexibly.

The consultation also seeks views on how the Government should simplify the valuation process for the purposes of the new advice requirement for pensions which include a GAR.

View the [consultation paper](#).

Abolition of DB contracting-out: HMRC issues Countdown Bulletin no. 11

Of interest to DB schemes is the latest edition of HMRC's Countdown bulletin. It announces that, following feedback at its pensions conferences earlier in the year, smaller pensions forums will be held across the country to discuss the end of DB contracting-out and the impact on current processes. These will cover the new GMP micro service but not the scheme reconciliation service (SRS). HMRC will invite views on whether separate forums should be held on the SRS.

In addition, there is a repeated request to scheme administrators for volunteers to test the new GMP micro service, which from April 2016 will allow schemes to request GMP calculations on a self-service basis, to ensure a wide range of user feedback. There is also a reminder about the 'closure scan survey' regarding HMRC's plans to close its records in December 2016 of individuals in contracted-out employment as at *April 5, 2016* (the survey will close on *November 30, 2015*).

The bulletin also includes practical information about contacting HMRC on related enquiries, including a new customer-relations designated email address.

View the [Countdown Bulletin](#).

Finance (No. 2) Bill 2015 receives Royal Assent

The Finance (No. 2) Bill 2015 received Royal Assent on 18 November 2015 and is known as the Finance (No. 2) Act 2015. There are minor alterations only from the draft issued in July 2015.

In summary, the pensions tax aspects are:

- The complex new tapered annual allowance will apply to high earners with effect from *April 6, 2016*. This means that individuals with a taxable income above £110,000 and an 'adjustable income' (essentially income plus employer pension input) above £150,000 will have their annual allowance of £40,000 reduced on a sliding scale, subject to a minimum of £10,000.
- Pension input periods will be changed for all tax years from 2016/17 to bring them in line with the tax year.

- Changes are made to the tax rates on taxable death lump sums. The 45 per cent special lump sum death benefits charge is removed so that a pension can be inherited tax free where death is before age 75, or at the recipient's marginal rate if death is on or after the late member's 75th birthday.

For further detail on these changes, please see our [July 2015](#) update.

PPF Ombudsman rejects TTG referral on waiver of interest for late payment of risk-based levy

Of interest to DB schemes is the rejection by the PPF Ombudsman (PPFO) of a referral by the trustees of a scheme against the PPF's decision to charge interest on late payment of the scheme's risk-based levy for the 2011/12 levy year.

The Pension Protection Fund (PPF) has the power to charge interest where the pension protection levy has not been paid within 28 days of the date on which the PPF sent the levy notification.

In certain limited circumstances, the PPF may decide to waive interest. One of these circumstances is where the PPF is satisfied that 'it is reasonable not to charge interest'. The PPF must have regard to certain specified matters, if relevant, when considering whether it is reasonable not to charge interest. These include any review, reconsideration or reference to the PPFO or appeal against any determination or direction of the PPFO.

The 2011/12 levy calculation had previously been unsuccessfully challenged by the trustee of the TT Group (1993) Pension Scheme. This related to the refusal of the PPF to take into account a contingent asset agreement submitted in 2011 on the basis of historic information about the identity of the scheme's employers. Following the conclusion of those proceedings in the High Court in 2014, the trustee paid the outstanding risk-based levy and the PPF then considered whether to waive the interest due on late payment. Concluding that it was reasonable for the trustee to appeal the Deputy PPFO's determination, the PPF exercised its discretion to waive interest from the date of that determination. The PPF's review committee subsequently decided to waive interest for a further period of three months to take into account the delay by the PPF in providing the original review decision.

The trustee referred the PPF's decision to charge interest for the remaining periods to the PPFO who rejected the complaint. The PPFO found that the PPF had reached its decision with regard to waiving interest for late payment of the risk-based levy in a proper manner. Among other points, the PPFO did not agree that there was an absolute deadline of 28 days to respond to a review application.

Comment

The PPFO's determination confirms that the power to waive interest on late payment of the risk-based levy is a discretionary one. Although the PPF must, if relevant, have regard to any application for review or reconsideration, a referral to the PPFO and any appeal against the PPFO's determination, this does not require it to waive interest for those periods. Schemes will need to take this into account if they contest the PPF's risk-based levy calculations.

Contacts

If you would like further information
please contact:



Peter Ford
Partner, London
Tel +44 20 7444 2711
peter.ford@nortonrosefulbright.com



Lesley Browning
Partner, London
Tel +44 20 7444 2448
lesley.browning@nortonrosefulbright.com



Lesley Harrold
Senior knowledge lawyer
Tel +44 20 7444 5271
lesley.harrold@nortonrosefulbright.com

Global resources



Our office locations

People worldwide

7400

Legal staff worldwide

3800+

Offices

50+

Key industry strengths

Financial institutions

Energy

Infrastructure, mining and commodities

Transport

Technology and innovation

Life sciences and healthcare

Europe

Amsterdam

Athens

Brussels

Frankfurt

Hamburg

London

Milan

Moscow

Munich

Paris

Piraeus

Warsaw

United States

Austin

Dallas

Denver

Houston

Los Angeles

Minneapolis

New York

Pittsburgh-Southpointe

St Louis

San Antonio

Washington DC

Canada

Calgary

Montréal

Ottawa

Québec

Toronto

Latin America

Bogotá

Caracas

Rio de Janeiro

Asia

Bangkok

Beijing

Hong Kong

Jakarta¹

Shanghai

Singapore

Tokyo

Australia

Brisbane

Melbourne

Perth

Sydney

Africa

Bujumbura³

Cape Town

Casablanca

Dar es Salaam

Durban

Harare³

Johannesburg

Kampala³

Middle East

Abu Dhabi

Bahrain

Dubai

Riyadh²

Central Asia

Almaty

¹ Susandarini & Partners in association with Norton Rose Fulbright Australia

² Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP

³ Alliances

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3800 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

Norton Rose Fulbright US LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP and Norton Rose Fulbright South Africa Inc are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to 'Norton Rose Fulbright', 'the law firm', and 'legal practice' are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together 'Norton Rose Fulbright entity/entities'). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a 'partner') accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity. The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.