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from the Pensions and Employee Incentives Division

Pension Scheme Controls, Internal Dispute Resolution Procedures and Conflicts of Interest.



The Pensions Regulator, as part of its statutory requirements, has published a series of codes of practices to which occupational schemes are subject. It is important that all scheme trustees are aware of these codes.

It's your duty as a trustee to be aware of them and to ensure your scheme complies with the codes.

Recently the regulator has issued a new code dealing specifically with Internal Dispute Resolution Procedure. The regulator has also recently issued a consultation document on the issue of conflict of interest within schemes.

Regulatory Code of Practice Number 9 – Internal Controls

Code number 9 is the original code dealing with internal scheme controls, there is now a new code, 11, which deals with Internal Dispute Resolution Procedure (“IDRP”).

There is no specific requirement to report failures to comply with this code, however, failure to comply will be taken into account in any subsequent Ombudsman or Court Case and it will weaken the trustees' position if they have not complied.

This code does not stand alone and trustees should also be aware of the reporting breaches of the law code, the notifiable events code, the funding defined benefits code, the reporting late payment of contributions to occupational money purchase schemes code and the trustee knowledge and understanding code amongst others.

The code does not just apply to trustees, it also applies to scheme advisers, participating employers, service providers and others involved in the management and administration of occupational schemes.

Internal controls are quite simply the way your scheme should be run, they are the administrative requirements for running a well managed pensions scheme. It is the trustee's responsibility to satisfy themselves that the controls in place for the scheme are adequate, they must always take a proportionate approach as to the level of controls required. Clearly different approaches are appropriate for a £1 million pound scheme from a £500 million pound scheme.

Given the regulators increasing focus on risk and conflict of interest in occupational schemes it is highly advisable for scheme trustees to assess whether they need to take any action or review any of their current procedures.

New Code 11 – Dispute Resolution – Reasonable periods.

This new code, which was laid before parliament at the beginning of April, will come into force, barring any last minute issues, within 40 days.

The intention of the code is simply to remove the rigidity of existing internal complaints procedures, hopefully speeding up the settlement of complaints and negating the need for third party involvement, except where necessary.

Under the old IDRP regime there was a two stage complaints process. The chief change will be that schemes can switch to a one stage process should they wish. This change has been under consideration for some time.

The one stage process can only be instigated if the determination is by the scheme trustees or managers. If there is a preference for the dispute to be decided initially by another specified person then this must remain the first stage in a two stage process. The second stage and

final stage must be a decision by the trustees or scheme managers.

Another advantage of the new code is that less prescriptive time limits have been introduced. Now a scheme's IDRPs simply need to issue decisions and notify these to the applicant within a "reasonable time". The trustees or managers can decide this time period for themselves. It is also open for them to set time limits for receiving complaints from those who have left the scheme.

While this appears to give carte blanche to trustees and managers the regulator has made clear what it considers reasonable time periods to be in the code. It is anticipated disputes will be resolved within four months of an application being made, if schemes retain a two stage process the four month period should apply separately to each stage.

The regulator has also indicated that it anticipates applicants will be informed of decisions no later than 15 days after they are made.

For those who have ceased to have interest in the scheme then the regulator suggests any application should be made within six months of the interest ceasing. A get out clause remains in that the trustees or managers can agree to receive complaints out with this proposed six month cut off point, should they so wish.

One new duty incumbent on trustees and managers is that they must inform the applicant of the existence of TPAS as soon as is possible. This in effect means as soon as possible after the date the application is received. In addition, details of the Pensions Ombudsman must be passed to the applicant along with the decision to allow them to take matters further should they so wish.

Conflict of Interest

The actuarial and legal professions have long been aware of the issue of conflict within occupational schemes. The difficult position many trustees find themselves and the persistence of using the same set of advisers for both the company and the trustees has long resulted in conflicts developing. While the trustees should always insist on separate legal and actuarial advice from that received by the employer this does not always happen.

The issue is simple, trustees of pensions schemes owe a fiduciary duty to the scheme and the scheme members. They are duty bound not to place themselves knowingly in conflict situations. The trustees must act in the scheme's members best interests at all times, clearly if you are also the director of a company which is in financial difficulty or which wishes to sell to a purchaser this could prove a difficulty.

Recently many finance directors, who were trustees, have resigned from their position as trustee as they had information from their "day job" which they did not wish to tell the other trustees. You may not think this matters however imagine a situation where the finance director knows that something is about to happen to the company which will seriously weaken its ability to contribute to the pensions

scheme. The financial director may feel he has no choice but to resign as a trustee to avoid being conflicted himself, which is bound to get the other trustees worried.

Consultation

The regulator has now published guidance for consultation on the issue of pensions scheme and conflicts. Comments are invited on the consultation by the 30th of May. The guidance is likely to come into force thereafter unless any objections are lodged or any counter proposals received.

Trustees of occupational schemes should therefore be aware of the fact it is likely they may need to take action.

The draft guidance suggests a three stage process.

1. Identification that there is a conflict.
2. Monitoring how events progress
3. Managing the conflict in the most effective way.

It is clearly the third of these which is likely to cause the most difficulty. To assist the regulator is proposing five principles which should be at the root of the trustees approach to potential conflict.

- a. Understanding the importance of conflicts of interest.
- b. Adopting a conflicts policy
- c. Identifying conflicts
- d. Evaluating and monitoring conflicts
- e. Managing Adviser conflicts

One thing that should no longer be in doubt is that the regulator considers conflict to be a serious issue and intends to take steps to deal with it. This is guidance only and therefore not enforceable as such, however it is likely the regulator and the courts would find failure to follow it highly significant when considering any matters before them. We will keep you advised of the outcome of the consultation.

Conclusion

Scheme Trustees, Managers and the other referred to above should consider their internal controls to ensure they are compliant, they should also review their existing IDRPs arrangements to ensure they comply with the new code and they should start considering now what action they may need to take regarding conflict of interest. If in doubt take legal advice.

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