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How to support members without straying into advice

The Pensions Regulator and the Financial Conduct Authority have updated their *Guide for Employers and Trustees on Providing Support with Financial Matters Without Needing To Be Subject To FCA Regulation*.[1] It focuses on how to give pensions-related information without crossing the line into giving advice, arranging transactions, or promoting a financial product.

Background

In June 2020 the FCA published a consultation paper on proposed guidance about pension transfers and conversions, focusing on DB-to-DC (defined benefit to defined contribution) transactions.[2] As part of the consultation exercise it sought views on an updated version of the jointly produced FCA – Pensions Regulator factsheet for employers and trustees.

The draft Guide was the subject of much concern given the direction around what could constitute advice and felt counter-intuitive to equipping DB members to make well informed retirement decisions. In particular, it suggested that any illustration of the outcome that a member might achieve by a DB-to-DC transfer was likely to be considered advice, or an inducement. It even went as far as suggesting that providing DB members with an unsolicited transfer value could be considered regulated advice. As drafted, this would have had significant implications for pension scheme members and the retirement processes for many schemes.

The Guide

The revised Guide is much longer than the old version, at around fourteen pages versus four.[3] It is also clearer and more helpful in relation to providing DB members with relevant information than the draft circulated in June 2020.

The main message is that employers and trustees should focus on providing a balanced, factual view of the advantages and disadvantages of, and relative risks, associated with the different options; and that they ought to refrain from making statements that might nudge the member toward a particular outcome (especially a transfer).

[1] <www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/tpr-fca-employers-trustees-financial-matters-guide.ashx>.
[2] *GC20/1: Advising on pension transfers* <www.fca.org.uk/publications/guidance-consultations/gc20-1-advising-pension-transfers>.
[3] <www.fca.org.uk/publication/documents/famr-guide-employers-trustees.pdf>.

The Guide says that with appropriate safeguards trustees and employers can direct members to an industry-wide directory of independent financial advisers (IFAs), provide a list of suitable IFAs, or introduce them to an IFA who will give advice on a broad range of pension products to which they could transfer. The Guide also permits trustees and sponsors to contribute towards the cost of impartial financial advice for their members if they wish to.

Helpfully, employers and trustees can provide unsolicited transfer values subject to certain safeguards. The Guide suggests that contextualizing information about average life expectancies, typical payment periods and the effects of increases in payment might help members understand the relationship between the quoted transfer values and their scheme benefits.

Members can be provided with factual information that is publicly available, such as the income that the transfer value could secure via an open-market annuity, for a member who is eligible to retire immediately. The annuity should be equivalent or at least closely comparable to the DB pension given up, in terms of inflation linkage and survivors' benefits. The Guide suggests that such information be shown alongside a scheme early retirement quotation, to provide a relevant comparison. The employer or trustees should avoid any suggestion that they are endorsing any particular annuity quotation from a named provider, or that any one option is better or good.

The provision of currently available annuity quotes, which the Guide suggests is permissible, is contrasted with the provision of figures that involve the making of assumptions, such as illustrative drawdown values and estimates of future annuity prices, which are likely to cross the line into advice. For the same reason, the information given should also steer clear of presenting options based on a member's attitude to risk.

Retirement modelling tools which use assumptions are a grey area. The Guide is comfortable directing members to balanced and objective annuity-comparisons and drawdown tools (such as those produced under the auspices of the Money and Pensions Service); however, it stresses caution on recommending tools linked to a specific financial products or where the tools go beyond balanced information and could be viewed as steering a DB member towards a course of action.

The Guide concludes with some examples of practice and the sorts of considerations that are important.

Guidance for IFAs

The FCA has also published finalised guidance to help IFAs understand its expectations about advice on DB transfers and conversions.4 It includes as an annex a note of the information that the FCA, the Pensions Regulator and the Pensions

Administration Standards Association agree should be provided automatically by DB schemes with their transfer quotations.

We welcome the FCA's willingness to take onboard feedback from industry and soften its stance on what information and support trustees and sponsors can sensibly provide to DB members without straying into regulated advice. Trustees and companies may wish to review any technology tools they offer members to ensure they remain appropriate. More generally, although some sensible judgement will still be needed, trustees and sponsors who are doing more or wish to do more than the statutory minimum to support DB members will welcome this guidance. Against the backdrop of increased scamming activity seen in 2020, this can only be helpful to protecting DB members' outcomes.

Pension Regulator's climate change strategy

The Pensions Regulator has published details of its Climate change strategy which sets out its strategic response to climate change.[4] It provides an insight on how the Regulator plans to help pension scheme trustees manage the risks and opportunities associated with climate change.

Background

The Regulator's climate change strategy is published against a backdrop of various initiatives aimed at tackling climate change which will affect pension schemes. These include the government's Green Finance Strategy, the reporting requirements introduced in the Pension Schemes Act 2021 and the need for schemes with over 100 members to document their policies on stewardship and on ESG considerations (including climate change) in their Statement of Investment Principles.

The Climate change strategy provides some insight on the Regulator's plans to dovetail with the above developments providing support to pension scheme trustees in meeting upcoming regulatory requirements and more effectively managing the risks and opportunities associated with climate change. There is also a nod to wider environmental risks like biodiversity as a future direction of focus, suggesting we can expect to see the focus broaden over time.

Aims and objectives

The Regulator highlights three aims:

- create better outcomes in later life for workplace savers by driving trustee action on the risks and opportunities from climate change;
- seek to influence debates around pensions and climate change; and
- as a business, take part in the transition to net zero.

It also sets out specific objectives detailing actions they plan to take to deliver these aims. The objectives include:

- ensuring schemes comply with the relevant disclosure requirements (SIP, implementation statement, TCFD disclosures – where applicable);
- publishing guidance to support the new TCFD regulations;
- communications to promote the above;
- collaborating with all key stakeholders to influence debate, align plans and share insights; and
- publishing a climate adaption plan and working towards reporting in line with TCFD recommendations and setting a 2030 net zero target for the Regulator itself.

Regulatory approach

The Strategy goes on to provide an overview of the regulatory approach focussing on four areas and the 'tangible outputs' the Regulator plans to deliver to support each area:

Setting clear expectations

- Guidance on the regulation from the Pension Scheme Act 2021 and how to incorporate climate change in Integrated Risk Management (IRM) with a view to supporting smaller schemes not in scope of the TCFD requirements.
- Sharing best practice TCFD reports (planned as part of the 2023 planned review of the regulations).
- A climate change management plan for superfunds, recognising those targeting a long-term run-off approach which will have significant exposure to the risks and opportunities arising from climate change.
- Climate change and stewardship modules in the new code of practice.
- Updated Trustee Toolkit to include new climate change content.

[4] <www.thepensionsregulator.gov.uk/en/document-library/strategy-and-policy/climate-change-strategy#60207d9f309f49adbfcc45d10fb60029>.

Identifying risk early

- A thematic review on pension scheme resilience to climate-relate scenarios. This will involve reviewing schemes' scenario analyses and publishing the findings.
- Publishing a review on implementation statements, noting the importance of stewardship activities.
- Driving compliance through supervision and enforcement
- Carrying out training on climate change for Regulator staff.
- Adding questions to the scheme return on web addresses of SIP, implementation statement and TCFD report and publish an index of SIP web addresses to identify any non-compliance.

Working with others
Finally, the Regulator sets out a number of actions they will take to collaborate with key stakeholders and influence the debate. This includes plans to increase climate change related communications and participation in various groups and forums.

The Regulator's climate change strategy is a useful insight into what trustees can expect to see by way of regulatory support as they develop their approach to managing the risks and opportunities arising from climate change effectively. It underlines the increasing importance of factoring climate change into financial decisions that drive the security of members' benefits. We expect many trustees' approaches to climate change will evolve substantially over the short to medium term; trustees are advised to waste no time embedding climate risk in their risk management processes.

EU taxonomy for sustainable activities

The European Union (EU) has published a draft taxonomy, or classification, for environmentally sustainable economic activities. It is designed to help assess companies and investments and identify those that have a substantial positive impact on the climate and the environment.[5] Essentially, it aims to clarify what constitutes a 'green' investment.

Background

To meet its goal of becoming the world's first climate-neutral bloc by 2050, the EU needs around €1tn of sustainable investment over the next decade. This investment cannot come solely from governments; private investors have a significant role to play. The taxonomy is intended to help investors identify and channel money towards genuinely 'green' investments.

What is it?

The taxonomy is a classification system developed by the EU. It defines technical, science-based criteria for assessing whether or not specific economic activities make a substantial positive contribution to climate change. As an example, car manufacturing can be labelled as a sustainable investment until the end of 2025 if the vehicles produced emit less than 50g of CO_2 per km. After 2025, only the manufacture of zero-emission cars will be deemed 'green'. The detail runs to over 500 pages.

Why is it needed?

Investors have found it hard to determine which companies are acting responsibly on climate change due to a lack of common standards for disclosing information. By clearly defining what it means to be 'green' in each area, the taxonomy is expected to incentivise and encourage companies to launch new projects, or upgrade existing ones, to meet the assessment criteria.

What is its coverage?

The taxonomy covers '*the economic activities of roughly 40% of listed companies, in sectors responsible for almost 80% of direct greenhouse gas emissions in Europe*.' It does not cover all sectors at this stage – for example, nuclear energy and natural gas are expected to be added at a later date. The taxonomy will evolve over time, with more activities being added, and to reflect technological advances.

[5] <ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en>.

While developed for the EU, the EU is also working with other countries to agree a common set of standards that can be applied more globally. The taxonomy will be formally adopted at the end of May once translations are available in all EU languages.

How will it be used?

The taxonomy has potential to be used in a number of ways:

- Investors: will be better able to identify opportunities and confidently invest in projects and/or companies that have a substantial positive impact on the climate.
- Fund managers: will be able to improve transparency on sustainability risks and opportunities. This links to Sustainable Finance Disclosure Regulation, which will require managers to classify their funds into three categories of sustainability—grey, light green and dark green.
- Development of new sustainable investment opportunities: for example, standardisation introduced by the taxonomy could spur the growth of sustainability-linked debt issuances. These typically link the interest rate paid by borrowers to quantifiable performance targets and have heighted scrutiny of corporate expenditure and management plans with regard to emissions reductions.

What information will companies need to disclose in future?

A key date for EU corporates is 1 January 2022, when the Non-Financial Reporting Directive (NFRD) comes into effect. Under this, companies with more than 500 employees will be required to report what share of their revenue, capital, and operating expenditure is taxonomy-aligned. Some forward-looking criteria, for example capital expenditure and operating expenditure, can be included if a company intends to make an activity taxonomy-compliant within five years (low-carbon research and development for example).

The proposed Corporate Sustainability Reporting Directive (CSRD) is expected to extend these requirements to all large private companies and to all companies listed on EU regulated markets, increasing the number of companies that would need to follow sustainability reporting standards from 11,000 to nearly 50,000.

What does it mean for the UK?

The UK Government has announced it intends to fully implement a ‘Green Taxonomy’ to provide a common standard for measuring firms’ environmental impact. It has also joined the International Platform on Sustainable Finance ‘to ensure standards can operate internationally.’

We welcome the development of the taxonomy as an important step towards providing investors with the consistent and transparent information that they need to make informed decisions on sustainable investments. This should lead to increased confidence, and also provide a catalyst for innovation in a number of areas, including designing funds that can objectively be classed as ‘green’ investments, and the development of investment opportunities supported by the additional level of disclosures that will be required from companies. Further work will be needed to develop and refine the criteria over time, and it’s acknowledged that agreement more globally will also be helpful.

Regulator says ‘How much would you pay to make this go away?’

The Pensions Regulator has outlined its policy on the negotiation and conclusion of settlements with those that are targeted for enforcement action.[6] It is clear that employers, trustees and others who find themselves in that situation are free to make the Regulator an offer in the hope of securing its agreement not to pursue matters further; and that the offer may be accepted if it will save time and money and achieve a positive outcome for the pension scheme and its members.

The Regulator notes that it has wide discretion to reach settlements, but that the policy does not apply to monetary penalties incurred for contravention of pensions legislation, in criminal proceedings, or in connection with applications such as those for clearance, a regulatory apportionment arrangement, or master-trust authorization. It will look for a fair and appropriate outcome in the circumstances of the case. The examples given include

- a cash sum in a contribution-notice case;

[6] *Settlement policy* <www.thepensionsregulator.gov.uk/en/document-library/strategy-and-policy/settlement-policy>.

- a voluntary undertaking not to act as a trustee, in case where it might otherwise make a prohibition order;
- a change of sponsoring employer;
- guarantees from wider-group companies; and
- alternatives to an immediate cash payment, such as a dividend-sharing arrangement, non-cash assets, contingent assets, security over property, or cash in escrow.

Any offer will be weighed against what Regulator might gain by pursuing enforcement. As well as its statutory obligations toward members and the Pension Protection Fund, the Regulator will consider the effects on third parties, the nature and strength of the case for enforcement action and the costs entailed, the longer-term implications of the proposed solution, and any wider behavioural changes that it wishes to encourage.

Parties can approach the Regulator with a settlement offer at any time in the investigation and enforcement process. Discussions will normally be 'without prejudice' (that is, matters disclosed by a person will not be used against them in enforcement proceedings). A settlement offer will need to be submitted in writing, in sufficient detail, and with relevant supporting evidence. The Regulator's investigation or enforcement proceedings (or both) will usually continue in parallel with the settlement negotiations. Third parties can be involved where that is appropriate.

If a settlement is agreed it will have to be documented. The Regulator will take the necessary steps to bring its enforcement action to an end: for example, it may need to seek court approval if civil proceedings have already commenced. Cessation of enforcement will be dependent on adherence to the terms of the agreement; and it could be resumed if new information comes to light or there is a material change of circumstances.

The Regulator could reach settlement with some but not all of those targeted for enforcement action; and it may agree to suspend use of some but not all of its powers.

Details of the investigation and settlement may be published in a 'section 89' report.

Statutory review supports DC chair's statement re-think

A mandatory review of the operation of legal requirements for the governance of defined contribution (DC) schemes has concluded that annual governance ('Chair's') statements are '*not working*' as intended.[7] The Department for Work and Pensions (DWP) and the Pensions Regulator are to undertake further work to clarify the purposes of the statements, their contents, and the lack of discretion that the Regulator has over fines for compliance failures.

Legislation obliges the Secretary of State for Work and Pensions to review the regulations on the governance of '*relevant schemes*'—broadly speaking, private-sector schemes providing money purchase benefits—at least once every five years, and the deadline for the first report was 6 April 2021. There was no public call for evidence.

The outcome of the review of the minimum governance standards is, generally, that no changes are required. However, responses were focused on the provisions about the Chair's statement, on which participants had '*strong views*'.

In answer to those criticisms, the DWP acknowledges that its policy objectives are not being achieved. The statement is being used for two separate purposes: as a governance-compliance document and as a communications tool for members. The DWP has admitted that this multiple-purposes approach '*does not work*' (a conclusion held unanimously among those who responded to the review) and says that the statement should be re-focused on the goal of improving scheme governance. '*Very few scheme members look at it.*' Respondents were especially critical of the mandatory fine for non-compliances, and the effect that it has had on the Pensions Regulator's approach. The upshot is that statements are '*very long*', '*extremely technical*', time-consuming and costly to produce. There are also concerns about duplication with the supervisory return required from authorized master-trust schemes.

Suggested solutions included splitting the statement to produce a compliance tool and a ('*very short*') document for members. The idea of linking to other relevant information, as a strategy for keeping the length to a minimum, was raised, and the pros and cons of such an approach noted. It was felt that a principles-based attitude would give greater flexibility.

[7] <www.legislation.gov.uk/uksi/2016/427/pdfs/uksiod_20160427_en.pdf>.

The DWP says that work is required to address the concerns that have been raised. In conjunction with the Regulator, and in consultation with industry representatives, it will reconsider the intended audience for the statement and its role in governance and communication. The information contained in the statement will be revisited too. Lastly, although the mandatory fining provision is not within the scope of the review, the DWP is to take another look at it, '*with the aim of introducing a more risk-based approach*'.

We participated in the review and raised many of the points outlined above. We are also a founding member of the industry-wide DC Governance Group, which provided insights to the DWP. Timing-wise, it seems unlikely that changes following the review will affect statements for schemes with 31 March or 5 April 2021 year-ends (which comprise the majority); we warned against making precipitous changes that might force eleventh-hour amendments to work that is already in train.

Regulator annual report on DB & hybrid schemes

The Pensions Regulator has published its annual report on the landscape of defined benefit (DB) and hybrid pensions, effective at 31 March 2020.[8]

The findings include the following:

- Of the 5,604 schemes covered by the report, 2,608 are closed to future accrual, 2,235 are closed to new members but open to future accrual, only 567 remain open to both new members and future accrual (down from 771 schemes in the last report), and the balance is in the process of winding up;
- Schemes with fewer than 1,000 members make up approximately 80 per cent of the total number of schemes but only around 10 per cent of total assets, liabilities and members. Schemes with 5,000 or more members make up account for almost 75 per cent of assets, liabilities and members, but only make up 7 per cent of the total number of schemes;
- The public sector accounts for over 16 million members in total, compared to 10.6 million in private sector DB schemes.

Viral news- April 2021

Treasury Direction & Updated TPR guidance

The Pensions Regulator has updated its COVID related defined contribution (DC) and auto-enrolment guidance to reflect the latest extension to the Coronavirus Job Retention Scheme (CJRS) and wider Government support available until the end of September.[9]

Following the Budget announcement that the CRJS would be extended to the end of September (rather than ending at the on 31 May 2021), the Treasury has published a seventh Treasury direction on the CJRS, covering the period 1 May to 30 September 2021.[10] The CJRS rules are largely unchanged by this latest direction, which contains the same purpose, written agreement requirements and TUPE provisions.

The Regulator's guidance contains minor updates to note the extension and that in addition to meeting the cost of National Insurance Contributions and pension contributions, employers will be required to meet 10 per cent of the cost of the payment to furloughed employees in July and 20 per cent in August.

[8] <www.thepensionsregulator.gov.uk/en/document-library/research-and-analysis/db-pensions-landscape-2020>.
[9] <www.thepensionsregulator.gov.uk/en/covid-19-coronavirus-what-you-need-to-consider/automatic-enrolment-and-pension-contributions-covid-19-guidance-for-employers#9b93698e7d704cc088f5d5a74fe0c69d>.
[10] <www.gov.uk/government/publications/treasury-direction-made-under-sections-71-and-76-of-the-coronavirus-act-2020>.

HMRC newsletter

Her Majesty's Revenue and Customs (HMRC) has published *Pensions Schemes Newsletter 129*.[11] It includes the following items:

- first-quarter 2021 flexible payments statistics;
- enrolment guidance for scheme administrators (trustees) whose schemes will migrate to the new online Managing Pension Schemes service;
- the annual allowance calculator has been updated to include the 2021/22 tax year, so that those who make their contributions early in the year can work out their charges; and
- a note about the *Pension (Non-Taxable Payments Following Death) (Real Time Information) Regulations 2021*[12], which (when they come into force in April 2022) will require those paying pensions to use Real Time Information to report certain non-taxable payments made to beneficiaries following a member's death.

[11] <www.gov.uk/government/publications/pension-schemes-newsletter-129-april-2021/pension-schemes-newsletter-129-april-2021>.

[12] SI 2021 No. 506, <www.legislation.gov.uk/uksi/2021/506/made>.

And Finally…

In March's edition we highlighted a determination in which the Pensions Ombudsman rejected a member's claimed entitlement to the minutes of a meeting during which an exercise of discretion was discussed. Our summary left out a notable feature of the case. In his correspondence with the trustees, the member cited a provision in the *Disclosure of Information Regulations* in support of his assertion, with an asterisk leading to a note saying that '*This is set out in the Appendix.*' The response from the scheme administrator counter-cited another provision from the same legislation that, it argued, undermined the member's claim—with an asterisk leading to a note saying that '*This is set out in the Appendix.*'

This is the first instance that *AF* can recall seeing of tit-for-tat retaliatory passive-aggressive footnoting in pensions. The Ombudsman also set out relevant extracts from the *Disclosure of Information Regulations* in an appendix, but with marvellous restraint eschewed deployment of the same asterisk and direction…

And Finally (to coin a phrase), some breaking news on a subject entirely unrelated to the foregoing (or anything else for that matter). As conclusive proof—and without further commentary, which *AF* feels to be rather redundant—that people be crazy, we enter into evidence: the newly minted *Botulinum Toxin and Cosmetic Fillers (Children) Act 2021*…

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