Sackers extra

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Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ECJ: European Court of Justice
FAS: Financial Assistance Scheme
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY (EIOPA)

Consultation on the EU Pensions Directive: Responses published

In April 2011, the European Commission asked EIOPA for advice on the EU-wide legislative framework for occupational pensions.

EIOPA has now issued two consultations on its draft response to the Commission. The first sought views on nine aspects of the Directive (of a total of 23 to be covered in its advice to the Commission), including the definition of "cross-border activity", the scope of prudential regulation and the governance of IORPs.

The second part of EIOPA's consultation considered the remaining questions, including what funding requirements should apply to occupational pensions and how these should be measured. In particular, EIOPA proposed the application of Solvency II style funding requirements to occupational pension schemes, including UK schemes, by means of a "holistic balance sheet", comprising:

- *Asset components:* such as financial assets, financial contingent assets and non-financial contingent assets (including the value of the sponsor covenant and possible recourse to a pension protection scheme, such as the PPF in the UK); and

- *Liability components:* including a "best estimate" of liabilities, a risk buffer to cover risks beyond what is determined at "best estimate level", plus additional solvency capital requirements.

This latest consultation closed on 2 January 2012 and a number of responses have been made available. EIOPA's proposals have been widely criticised by the pensions industry as inappropriate for occupational pensions.

EIOPA is due to report to the EU Commission in February 2012. We continue to monitor developments.

Selection of responses:

- Sackers

- Actuarial Profession

- British Private Equity and Venture Capital Association

- European Federation for Retirement Provision
- Financial Reporting Council
- NAPF

FINANCIAL SERVICES AUTHORITY (FSA)

Lawrence Churchill appointed Chairman of Financial Services Compensation Scheme Board

The FSA has today (9 January 2012) announced the appointment of Lawrence Churchill as the new Chairman of the Board of the Financial Services Compensation Scheme (FSCS), the UK's statutory compensation scheme for customers of authorised financial services firms. He is due to commence his three year term of office on 1 April 2012, succeeding David Hall.

Mr Churchill is currently the Chairman of NEST and is the former Chief Executive of UK, Irish & International Life at Zurich Financial.

FSA Press Release

HM REVENUE & CUSTOMS

Revised PAYE guidance for pension and annuity payments

HMRC has revised its PAYE guidance for pension (including annuity) payments to employees. Such payments count as income for payroll purposes. PAYE tax must be deducted from payments made to registered pension schemes but no employer or employee Class 1 National Insurance contributions (NICs) are due.

HMRC's guide sets out the steps to be followed when starting a new pension payment, including online notification of HMRC and use of the correct tax code to deduct PAYE tax from the payment. The revisions to the guidance include information for employers who pay occupational pensions to individuals who are repaying a student loan.

NATIONAL AUDIT OFFICE (NAO)

Review of DC Regulation

The NAO has announced that it is carrying out a review of TPR's regulation of DC schemes to assess whether it addresses effectively the key risks to pension scheme members, while taking account of the overlapping responsibilities of the FSA in relation to contract-based schemes.

The NAO's report is due to be published in spring 2012.

NAO Press Release

CASES

Dalriada Trustees Limited v Faulds and others (High Court)

The High Court has confirmed that pension reciprocation plans (or "unlocking schemes"), which allow early access to pension savings, are invalid.

Background

This case concerns six registered pension schemes that were administered by Ark Business Consulting (known as the "Ark Schemes").

The schemes operated a "Pensions Reciprocation Plan" (PRP), under which members were given early access to their pension savings. The Ark model used loans between schemes as a means of unlocking the pension capital, referred to as a "Maximising Pension Value Arrangement" or "MPVA".

The PRP operated as follows:

- An individual (Member A) with a pension "pot" in another, unrelated pension scheme is introduced to one of the Ark Schemes (Scheme Y).
- Member A obtains a transfer of his benefits from his original pension scheme to Scheme Y.
- A 5% "standard fee" from the transfer sum is paid to the promoters of the PRP, and the remaining 95% of Member A's transfer value is used as follows:
  - Up to 50% of Member A's funds in Scheme Y is "lent" to member (Member B) of one of the other Ark Schemes (Scheme Z) under an MPVA "loan".
  - A reciprocal MPVA "loan" of equal value is then made by Scheme Z to Member A, using Member B's funds.
  - The remaining funds of both schemes are then invested in other assets.

The PRP circumvents the HMRC rules that provide that a payment to a member out of their own pension arrangements would be an unauthorised payment and taxed in a penal manner. By transferring funds in this way, Ark attempted to ensure that all the "loans" to members would be authorised payments.

Owing to concerns over this business model, TPR appointed Dalriada Trustees in May 2011 as independent trustees with exclusive powers to administer the Ark Schemes. Following its appointment, Dalriada commenced a claim in the High Court to ascertain whether the loans were valid exercises of the powers of investment under the schemes.

Decision

The Court held that the loans constituted unauthorised payments under the Finance Act 2004 and were therefore void, as they had been made outside the powers of the schemes' trustees. It was also held that subsequent amendments to the scheme rules which sought to make express provision for the MPVA loans, could not authorise them (either prospectively or retrospectively), as to do so would have breached the overriding requirement in the schemes' rules that nothing would be done to infringe the schemes' status as registered schemes under the Finance Act.

The Court also held that the making of the MPVA loans was a "fraud on the power of investment", as the purpose of these loans was "not investment but disinvestment". It therefore held that TPR's involvement was "plainly justified".

Comment

The outcome of this decision is unsurprising, given the nature of the MPVA loans which were used as a means of facilitating early access to pension savings and the circumventing of HMRC rules. TPR is working with HMRC and the Financial Services Authority to monitor business models with these aims and states that it will use its powers to disrupt them if necessary.

TPR Press Release