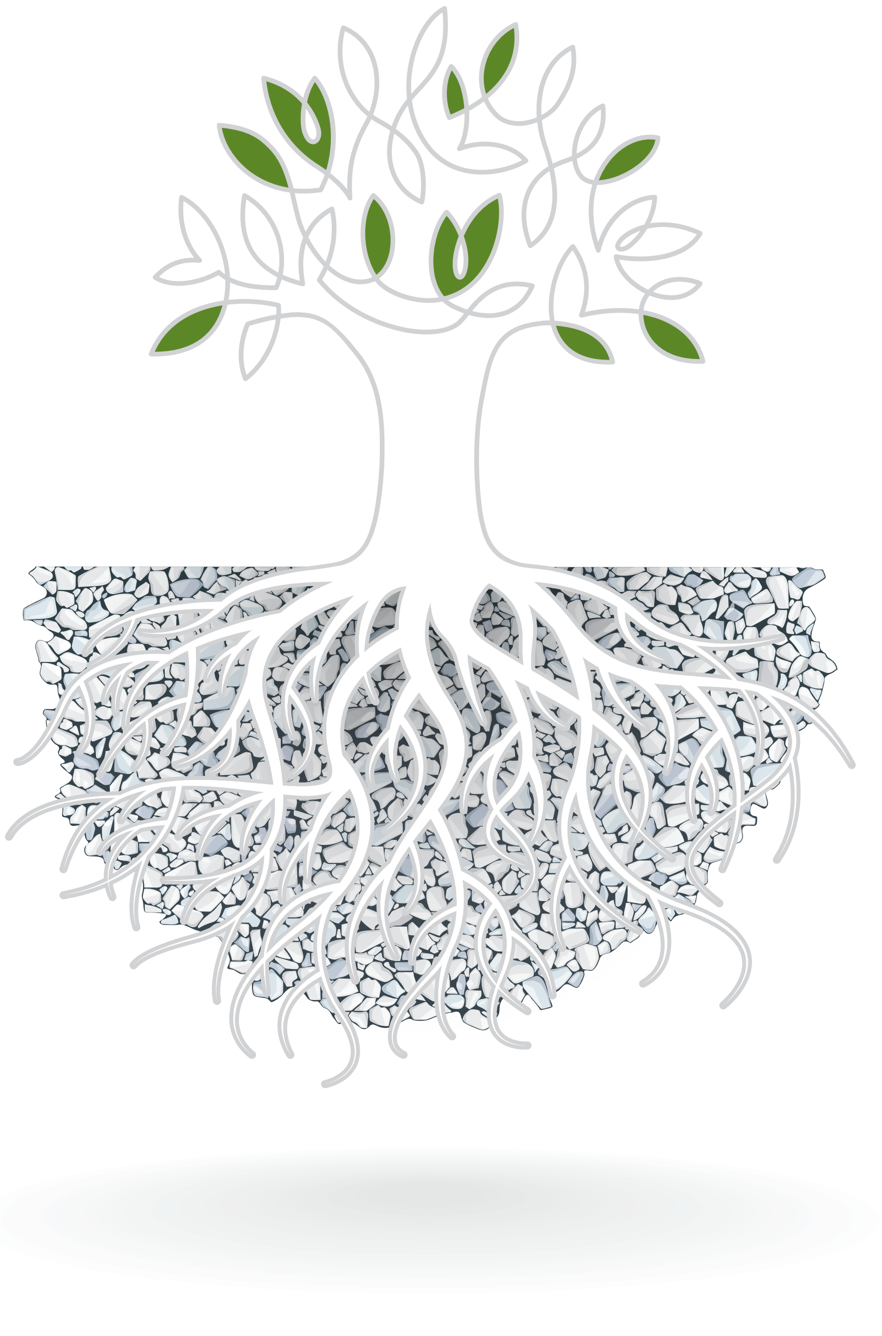
Sackers

Risk transfer

A guide for trustees 2022



Introduction

Welcome to Sackers risk transfer guide.

The risk transfer market showed itself to be remarkably resilient through recent years' events. Indeed, our experience having worked on a significant share of market transactions over a number of years, is that an increasingly mature market is continuing to evolve and adapt, particularly in the field of residual risks, due diligence and cover.

This guide reflects our experience of recent market developments, as well as our enduring belief in the value of good preparation for trustees seeking the best outcome. We outline some key initial considerations for trustees embarking on a buy-in or buy-out on pages 4-5, before focusing on residual risks on pages 6-7, models for residual risks cover with insurers on pages 8-9, and trustee protections on wind-up on pages 10-11.

We are delighted to have a guest article from John Baines, Partner in Aon's Risk Settlement Team sharing Aon's perspective on residual risks.

If you would like to speak to anyone about a buy-in, buy-out or longevity solution for your scheme, please contact any of the Sackers specialists listed on page 14 or speak to your usual Sackers adviser.

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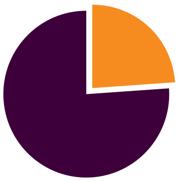
Risk transfer highlights 2021

£4.4bn

Total bulk annuity transactions for 2021



We advised on 24% of the bulk annuity market over the last three years

Five transactions on or above

£300m+

Seven transactions on or above

£100m+

We advised on over

14%

of the bulk annuity market in 2021

We act for

40

of the top 200 pension funds in the UK (source: Pension Funds Online)

Advised on over 55 bulk annuity transactions

totalling over £29bn+

in the last 5yrs

The biggest annuity deal in the market in 2021 and one of the largest single-transaction full scheme buy-outs ever undertaken

£2.2bn

Our biggest bulk annuity transaction

Crown Holdings, Sponsor of The Metal Box Pension Scheme, October 2021, Buy-in to Buy-out, PIC

We advised Crown Holdings on a full scheme buy-out with residual risks moving to buy-out within one month of buy-in. This transaction included numerous innovative solutions to issues that ordinarily bog down a large scheme buy-out including:

- GMP equalisation/conversion
- residual risks cover
- funding structure between the company and pension scheme to manage the realisation of a portfolio of illiquid investments.

We are currently advising trustees on three longevity transactions

Other key transactions of 2021 over £100m on which Sackers advised

£620m

Undisclosed, December 2021, Buy-out

£350m

Air Canada (UK) Pension Trust Fund, December 2021, Buy-in

£310m

Reuters Supplementary Scheme, September 2021, L&G, Buy-in

£300m

Undisclosed, February 2021, Buy-out

£250m

Undisclosed, December 2021, Buy-in

£236m

Signet Group Pension Scheme, July 2021, Rothesay Life, Buy-in

Risk transfer journey: are you ready?

Bulk annuity transactions are booming, and annuity providers continue to have a glut of business and limited capacity. In this market, there are opportunities for the best prepared trustees and company teams.

It is never too late to start preparing. Those schemes which are transaction ready will be better placed to achieve an optimal outcome when approaching insurers and to transact most efficiently. Here we set out five questions for trustees to consider ahead of a risk transfer transaction.

1

Who's in the driving seat?

Risk transfer transactions can be initiated by company or trustee interests, though eventually both parties will be stakeholders in the transaction. Much will depend on whether it's a buy-in or a buy-out and whether a company contribution will be needed to pay the premium.

Whoever is ultimately in the driving seat, a robust and effective governance model is needed to get the right people in place to steer the transaction, co-ordinate advisers and engage the key stakeholders.

2

Where are we going?

Not all transactions are the same.

A partial buy-in transaction secures a portion of (usually) pensioner benefits, with a view to continuing to run the scheme. It is essentially a risk-matching investment decision, putting in place a good quality matching asset. This may be part of a series of transactions over the long term, leading to buy out eventually.

A buy-out secures all of the members' benefits (pensioner and deferred), usually with a view to winding up the scheme within a relatively short period of time. Some buy-outs also include an element of residual risks cover, broadening the scope of the protection and reducing, but not eliminating, transaction risks (see pages 6-7).

These are different transactions and the long term plan will materially influence the work that needs doing on the scheme benefits and data, as well as the project scope.

3

How do we get there most quickly?

In a word, preparation.

Data is at the heart of these transactions. The process of checking data, assessing quality and taking any remedial steps can take time, but it can all be done in advance. This should both speed up the process and reduce the risks of pricing adjustments further down the line.

Legal work on the benefit specification can, and should, be one of the first areas to tackle. There are material advantages to starting the work of checking the benefit specification well in advance to ensure that the right benefits are ultimately secured, and to optimise the trustees' position in negotiations.

Other areas to consider are resource (trustee, company, adviser), governance and robust project planning.

4

Is there another route?

Buy-ins and buy-outs sit alongside a number of different derisking options in what is a rapidly evolving market.

- Consolidators – a number of providers offer access to economies of scale, high quality governance and professional trustees.
- Superfunds – commercial, regulated consolidators with asset backing, offer a clean split from the scheme sponsor.
- Longevity transactions – we are seeing useful standardisation in the longevity market making targeted longevity hedging an increasingly viable option.
- Other models of governance – professional trustee services, fiduciary management or implemented consulting and an outsourced chief investment officer.

The particulars differ, but all offer solutions to the burdens associated with running a pension scheme.

5

What could slow us down?

This is a busy market. There is more demand than supply, and insurers only have so much bandwidth.

Ask your advisers what they can do to make your scheme attractive to insurers in order to get good quotations.

The preparatory work for a transaction can draw attention to skeletons in the closet, whether in the data or the legal history of a scheme (see pages 6-7). Identifying potential issues early on will prevent them derailing the deal and might lead to better outcomes.

Adequate resource is essential. In addition to your transaction adviser, ensure the right personnel are engaged internally, and check your lawyers and actuary are ready to support in the timescales envisaged.

Administrator teams, in particular, will find themselves in the spotlight for much of the process, particularly for buy-out exercises.

Buy-out, left over risks and rooting out the issues

Bulk annuity transactions inevitably involve “residual risks”; those risks associated with the scheme that are not secured with the bulk annuity provider.

How do these risks arise?

While a bulk annuity contract (whether a buy-in or a buy-out) is intended to track closely the benefits of the scheme being secured, in practice the insurer will only take on the liabilities as a body of administrative data, interpreted by a short benefit specification. The insurer does not agree to administer the benefit in accordance with the scheme’s original documentation (as the trustees are required to do). After buy-in, the insurer will usually not check the trust deed and rules, refer to the original administrative record or look back at other original scheme documentation.

This can mean that for a standard transaction some risks are simply not passed on to the insurer and therefore potentially remain with the trustees.

Examples might be:

- Data errors – the data supplied to the insurer showing, for example, a deferred members’ final salary, is inaccurate.
- Benefit errors – for example, the benefit specification in the bulk purchase annuity has incorrectly recorded some members’ pension increase rate.
- Member claims – for example, a member has a letter or booklet which seems to show they are entitled to a different benefit to the one secured.
- Missing beneficiaries – a member can show they were entitled to a pension from the scheme, but have not been included in the bulk purchase annuity.

How significant is this?

Residual risks are worth considering before embarking on a buy-in or buy-out project, given the age of some UK schemes and the history in which they are rooted. A scheme’s data record may be old and may have passed

A scheme’s history is rooted in decades of documentation and records. When embarking on a bulk annuity transaction, a key consideration will be whether and to what extent these documents should be reviewed as part of the scheme’s end-game planning. If residual risks cover is sought, due diligence on this documentation will be inevitable.

Consolidated rules

Which sets of rules have been reviewed in preparing the specification? Are all members’ benefits checked and documented?

Discretions

Are member discretions fully documented and reflected?

Amendments

Are there any irregularities in the history of amendments?

Booklets

Do the booklets accurately reflect the rules?

through the hands of multiple administrators. The lifespan of a scheme may involve complexity including multiple **consolidated rules**, **amendments**, and legislative change. There may be merged-in sections where the records and institutional memory have been lost to a greater or lesser extent.

When one considers the volume of historic deeds, **booklets**, **member files**, **communications**, any **complaints** etc which are often associated with older schemes, this should give pause for thought. This wealth of documentation and history has potentially significant implications for the confidence trustees may have in the accuracy of the benefit they have asked the insurer to cover.

Careful preparation will mitigate these risks

A decision to buy in or buy out is ordinarily part of a scheme's end-game planning and is therefore a sensible point in the scheme's life cycle to consider any issues around data accuracy or any lingering questions about the scheme's documentary history.

Some schemes will have the benefit of a simple, uniform benefit structure, an uncluttered history of amendments and clean data. Indeed, a well-run scheme, having gone through a sensible process in preparing its data, may have a high degree of confidence that it has minimised residual risks and achieved high levels of accuracy in its data and benefit specification.

Trustees should speak to their advisers and their administrative teams about how best to prepare for a buy-in or buy-out transaction in the context of their scheme's history. It may be time to look again at any skeletons in the closet, but this is not a simple decision, and there are undeniably downsides to embarking on an extensive documentary review, which might ultimately result in expense and delay without an obvious upside for members.

Residual risks cover

Additional cover for some of the residual risks we have identified might also be available from the bulk annuity provider (so called "data", "residual" or sometimes "all" risks cover), though at the moment not all providers offer this, and typically only for the larger transactions. In practice, this will also involve a greatly enhanced due diligence exercise (see pages 8-9). This approach needs careful thought, not least in terms of timing and a full understanding of the limits of any cover that may be achievable.

In any event, annuity policy residual risks cover is never comprehensive and we have therefore set out some further thoughts on trustee protections to address this on pages 10-11.

Mergers and transfers

How much documentary history do you have, and is it worth checking?

Communications

Do member communications create expectations which contradict the insured benefit?

Member files

How much checking will be appropriate, are there known issues?

Complaints

Is there a history of member complaints?

Execution

Are there any irregularities around the execution formalities?

Insuring "all risks" and due diligence

Optional residual risks cover with an annuity provider seems to be an increasing focus, but there are a range of approaches, and outcomes. Where residual risks cover is a priority, trustees may be able to get better cover by proactively engaging.

	Residual risk cover **not** sought from bulk annuity provider	
	Buy-in	**Buy-out**
How are residual risks addressed?	The buy-in policy remains an asset of the scheme, which will be ongoing. Any difference between the insured benefit and the members' legal entitlement remains an issue for the trustees to address.	When the buy-in policy is transferred into individual members' names (buy-out), the scheme is typically wound up. Any risk that incorrect benefits were secured for members will remain with the scheme. The trustees and scheme employer will need to consider what to do with these risks on wind up.
Do residual risks pass to the bulk annuity provider?	The scheme remains ongoing and risks are retained by the scheme.	Bulk annuity provider does not take on residual risks.
How do trustees approach residual risks legal due diligence?	Trustees may be prepared to do less checking of the scheme's historic documentation prior to buy-in on the basis that the scheme remains in place to address differences, and/or in the expectation of further checking at a later stage.	Trustees should be comfortable that they have taken reasonable steps to ensure that the benefit specification is accurate **at buy-out**. The scope on any review differs, but some legal checking is appropriate and may be required to satisfy warranties given by the trustees under the contract with the insurer.
Will their insurers do their own due diligence on legal documents?	Insurers are not taking on legal risk, so will not require specific legal due diligence. However, data cleansing will typically take place in the 12-18 month period after transacting and/or prior to any buy-out.	
What are the commercial considerations?	These transactions can be relatively frictionless and quick to do in practice.	Trustees will need to consider whether they wish to seek a company indemnity or run-off cover to deal with risks not transferred to the insurer on buy-out. This is true in all buy-out models, but the absence of residual risks cover from the bulk annuity provider may increase the trustees' expectations for alternative additional types of cover.

Residual risk cover sought from bulk annuity provider

Buy-out

Some insurers will take on elements of residual risk cover (eg errors in data, missing beneficiaries, some types of legal risk) for larger transactions. Where insurers take on risk, they will carry out detailed due diligence, which will also require input from the trustees, sponsoring employer and their advisers.

The market is evolving in terms of what cover can be obtained, the models for due diligence and the timing for residual risks cover.

Residual risks cover added at a later stage

Residual risks cover applies either at the end of a data cleanse period or at buy-out.

This model retains the post buy-in data cleanse exercise, which can lead to pricing adjustments. As the cover is negotiated after transacting, elements of competitive tension are lost which may affect the cover that is ultimately secured.

Residual risks cover sought from buy-in

Due diligence must be front-ended, prior to the buy-in. This may involve a "mini" data cleanse for specific items.

Residual risks at point of buy-in should minimise the risk of later pricing adjustments which may otherwise arise following the data cleanse. This is sometimes referred to as the "single premium" approach and may be attractive where the trustees/company are targeting a clean break from the pension scheme on a tight timescale.

There are a range of options for trustees

reactive ········· proactive

Trustees' role is reactionary, responding to the detailed insurer enquiries.	Trustees commission a law firm to prepare a report for interested insurers, on a reliance basis.	Prior to selecting an insurer, the trustees carry out their own legal due diligence
Having been selected, the insurer leads the due diligence process, with full disclosure of scheme documentation by the trustees. This is the more traditional model and will frequently be carried out during data cleanse (ie as a post buy-in activity if residual risks cover is not sought from buy-in).	Will depend on the model, but potentially the winning insurer will be able to rely on the legal report prepared prior to exclusivity.	If insurer is not relying on the trustees' report, it will do its own due diligence. However, work done by the trustees on the scheme documentation should facilitate the due diligence exercise. And reduce the risk of unwelcome surprises in the heat of the transaction.
Insurers control the legal due diligence, which takes place during data cleanse if residual risks cover is not sought until after buy-in (or during exclusivity if sought from buy-in). The element of commercial tension is therefore lost. Trustees will still bear substantial legal costs in responding to insurer due diligence process.	Different models are possible. Generally, the legal report is commissioned by the trustees, but for the benefit of insurers. May offer fewer opportunities to control the narrative with the market, depending on timescales. Cost of report may be born by insurer rather than the trustees.	Trustees can go to market with a wish list for residual risk cover, including in relation to a particular known issue, whilst preserving competitive tension. This model may offer the best opportunity to push insurers to offer better residual risks cover. Trustees bear legal cost of initial report.

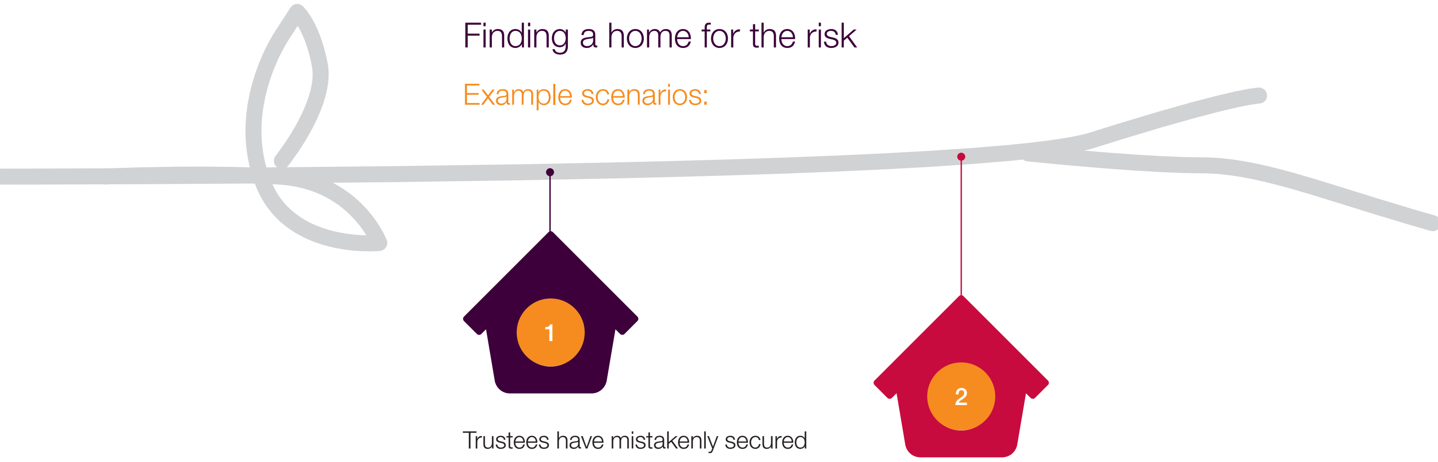
Trustee protections

The trustee position

In the context of a buy-out and winding-up of a scheme, the trustees' obligation is primarily to the members, and ensuring their members' benefits are secured correctly. However, it is a nearly inevitable consequence of this process that the trustees will transition from a situation where their actions are indemnified out of the assets of the scheme (underwritten by a sponsoring employer), to one where the scheme has divested itself of all its assets and is wound up. If a member were to complain, the trustees would have no assets to pay for professional advisers to meet the claim or, ultimately, to put the member right if the claim is valid. Trustees will therefore need to decide how any residual risks will be covered once the buy-out completes. Trustees should plan ahead.

Finding a home for the risk

Example scenarios:



Trustees have mistakenly secured members' benefits which do not match the member's legal entitlement. For example, perhaps a former executive member was promised an uplift to their pension which wasn't reflected in the policy terms.

A complaint by a member about the trustees' conduct. Perhaps the trustees have worked with the sponsor on a PIE exercise, which the member has chosen now to challenge.

Under a bulk purchase annuity

The starting position is that a buy-out policy will only cover the benefit described in the policy. In the above scenarios, the members' complaints have arisen because they believe the policy does not correctly reflect their benefit. So, by definition, the insurer is not going to be on the hook for what each member believes they are entitled to.

If the trustees have negotiated residual risks cover from their bulk annuity provider, the question becomes whether the terms of that additional cover would capture these particular complaints. It will, of course, depend on the circumstances, but there is a good chance that the two types of complaint described would not be caught.

In the case of the former executive claiming an uplift (scenario one), if this offer was evidenced in documentation provided to the insurer as part of the residual risks' due diligence process, they might be prepared to adjust the benefit. However, in those circumstances, you would think that both the trustees and the insurer would have identified the mismatch when reviewing the documents and adjusted the benefit accordingly. It may be more likely that such a complaint arises because records have been misplaced, in which case they would not have been disclosed to the insurers. Insurers will generally seek to exclude liability arising from the documents they have not seen and might therefore exclude this complaint.

The second scenario relates to a complaint about the way in which the trustees have handled a pension increase exchange exercise. This is a very standard exclusion from residual risks cover.

In both examples, it is important to stress that in neither case would a typical residual risks policy provide cover for the trustees' own legal costs and expenses. This is because bulk annuity policies cover member benefits, not the cost and expenses of the trustees.

Other options

Company indemnity

Trustees on the road to buy out should always seek to make a broad company indemnity a pre-condition. The indemnity should be from a substantial company, uncapped and of unlimited duration. Of course, an indemnity is only as good as the company offering it, and not all trustees have the luxury of this option. It is also very difficult to address the risk of a company's circumstances changing, either through declining fortunes or corporate activity. The indemnity might be rock solid on day one, but what about five or ten years down the road?

Run-off cover

Many trustees often also seek run-off cover from a third party general insurer. Importantly this is a different and additional insurance policy to the bulk annuity contract, written by a general insurance provider specialising in this sort of business. The buy-out policy will ultimately be in members' names; the run-off policy will be for the benefit of the trustees specifically.

Run-off cover is not mutually exclusive with a company indemnity. In an ideal world the trustees will have both and indeed, from the corporate perspective this may be the more desirable arrangement because the run-off cover mitigates the risk of a company indemnity being called upon.

For many years, run-off cover was a standard and fairly predictable product. In recent years, the market has been in a state of considerable flux and policies of this sort are currently harder to obtain, more expensive and on more restrictive terms. Trustees can now expect to see hard caps on cover and term limits as standard.

How material is the risk, really?

Whilst it is easy to become alarmed, it is very important to keep the scope of these left-over risks in perspective. Schemes that buy out are typically mature and will have had many pensions in payment over decades. For a well-run scheme, the reality is that any likely claims should have been flushed out. Pensioners tend to focus on the value of their benefit most acutely when they first come into payment, and the passage of time tends to diminish the likelihood of a claim.

Similarly, the process of buying in, and then buying out, usually involves extensive checks on the scheme data and, to some extent, the documentation. Schemes can mitigate their risk by focusing on this checking process, particularly in terms of the legal documentation which is often a secondary focus as compared to the data.

There are also material obstacles to successfully prosecuting a claim once the scheme is wound up. Trustees are typically the subject of broad exonerations and discharges, both statutory and under deed. Additionally, many trustees are incorporated and will therefore benefit from the considerable protections afforded by a corporate structure. These factors should be of real comfort because, if a claim were brought, its chances of success may be low or very low. Of course, a claim does not need to be a strong one to be made, and the trustees will want to consider how they would meet the costs and expenses associated with a claim, even one unlikely to succeed.

Aon’s perspective on residual risks

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Residual risks cover for bulk annuities

Residual risks cover is sometimes available as an insurance policy which attaches to a bulk annuity. In principle, the cover means that the insurer takes on residual risks associated with the secured liabilities, though in practice this is subject to exclusions.

If it emerged that a benefit has not been correctly secured, then residual risks cover may apply. Subject to the terms of the cover, and providing satisfactory evidence of the correct benefit, the bulk annuity provider would amend the terms of insurance, at no additional premium.

The precise terms of residual risks cover vary, but typically the cover is uncapped and does not expire. Usually the cost, which is covered by the insurer, includes any arrears payments associated with the benefit adjustment. Furthermore, if an issue is identified as systemic, the insurer is usually obliged to investigate this further, correcting other benefits as necessary.

Residual risks cover in operation

Clearly residual risks cover has many advantages for trustees and sponsors: primarily transferring responsibility for data and benefit accuracy to the bulk annuity provider. Moreover, it offers a more natural way to address any emerging issues; the insurer is the obvious recipient of any queries once they have taken on administration after buy-out (in contrast the trustees and/or sponsor may have been dissolved).

Residual risk cover is normally only available as part of a buy-out (rather than a partial buy-in). Even then it’s only offered by some bulk annuity insurers, and typically on transactions of around £250m or above. The cost of cover varies but is usually 0.5%-1.5% of the bulk annuity premium (above the cost to resolve any issues identified during the insurer’s due diligence). That may be viewed as expensive, relative to other forms of insurance (such as run-off cover), but bulk annuity residual risks policies provide a more complete solution than some other options.

Preparing for insurer due diligence

Given the transfer of risk to the bulk annuity provider, it not surprising that residual risks cover involves the insurer undertaking significant due diligence of the scheme’s records. This includes data audits, testing benefit calculations and administration processes, and review against scheme documents (eg the trust deed and rules). This is a significant exercise for the scheme advisers and administrators, so the trustees and sponsor should carefully consider their appetite for residual risks cover.

There are various actions a scheme can take to prepare for due diligence, covering both data and benefit workstreams. Partly this is about planning adviser and administrator resource (given the insurer investigation might be undertaken alongside a bulk annuity auction process when there are other competing workstreams). Partly this is to ensure that the trustees and sponsor understand the benefit entitlement as fully as possible before any bulk annuity project begins. That provides greater certainty about the ultimate cost and terms of insurance, allowing the scheme to be on the front foot for any known issues, and improves insurer engagement.

Timing of insurer due diligence

A scheme has the option to run an insurer due diligence exercise at different phases of a transaction process. This could be before or during the auction, during exclusivity, or post-transaction.

The insurer costs involved in conducting a due diligence exercise are material, given the level of investigation and the legal and actuarial resource requirements. Therefore, insurers have a preference to carry out their due diligence during exclusivity (and ideally post-transaction). This would reduce the risk of "sunk costs" associated with bidding for a transaction and later being unsuccessful.

Conversely, the scheme will have more leverage over insurers if residual risks and due diligence is considered earlier in the process. During these phases, there is some competitive tension among bidders. Insurers may be more likely to take a pragmatic view on residual risks cover, delivering compelling pricing and terms, in a bid to secure the transaction. That said, some trustees are cautious about multiple insurers each performing forensic investigation of scheme records.

Interaction with multiple bulk annuity policies

It has become increasingly common for schemes to hold bulk annuities with multiple providers, following a series of partial buy-in transactions on the way to a buy-out. This increases operational complexity versus a model where all benefits are secured with a single insurer. But the benefits of securing each tranche of liability at the most opportune time in the market may be material.

Similarly, it is more complicated to secure residual risks insurance which covers bulk annuity policies for multiple providers, but this isn't insurmountable. The obvious solution is to purchase a residual risks policy which attaches to each bulk annuity, but that relies on each insurer being able to offer this cover, as well creating multiple due diligence investigations, some of which will be in an uncompetitive environment.

Another solution is to purchase "wraparound" cover from one of the insurers in the syndicate. In this scenario, the chosen provider would undertake due diligence for the full scheme, and provide residual risks cover which attaches to all the policies. Should a successful claim emerge, the wraparound provider would cover the cost of adjusting the benefit and have a mechanism in place with each insurer to implement the change.

Contact

Sackers is the UK's leading commercial law firm for pension scheme trustees and employers. Over sixty lawyers focus on pensions and its related areas, including Sackers risk transfer team. Our specialist lawyers provide cutting edge advice on buy-ins, buy-outs and longevity transactions.

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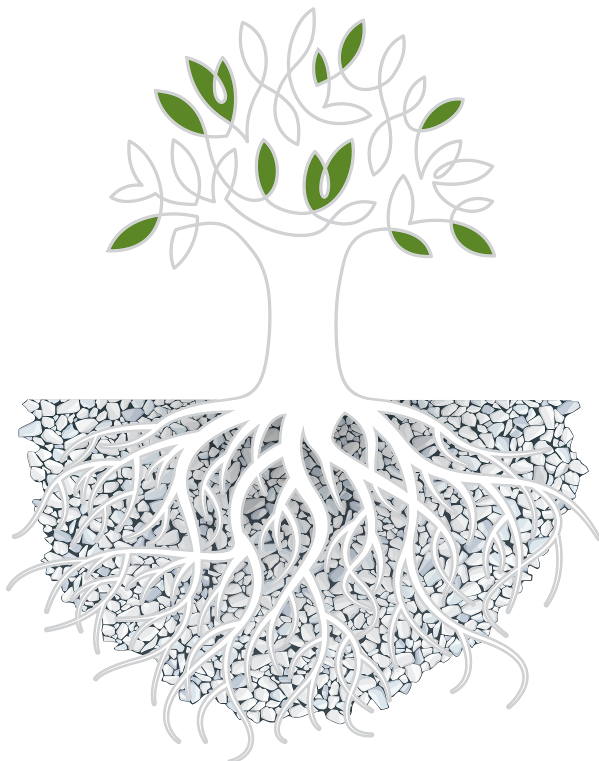

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