

Regulatory code of practice no. 10

Modification of subsisting rights

Consultation report
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Feedback statement

Introduction

Section 67 of the Pensions Act 1995 has been amended by section 262 of the Pensions Act 2004. This allows trustees of pension schemes to modify the rules that will alter any member's subsisting rights. The legislation sets out two routes that apply depending on the type of change or changes and how it or they will affect members' benefits.

The regulator must issue a code of practice that provides practical guidance and sets out standards of conduct for trustees on meeting the requirements. A draft code was issued for consultation. Comments provided during the consultation period have been considered and this statement records how they influenced the final version of the code.

What consultation has taken place?

Pre-consultation

To aid development of the code the working group held discussions with the pensions community through meetings and workshops. In addition a draft version of the code was issued to both the legal and actuarial professions seeking their initial views, to which no substantive comments were received.

Consultation

Together with a press release announcement the regulator published a consultation document containing the draft code of practice on its website on 8 July 2005. The consultation period lasted 12 weeks, closing on 30 September 2005.

The consultation document posed 19 questions in total to assist reaching a consensus on reasonable periods, as well as identifying where guidance would be most helpful and what form it should take.

During this time consultation events were held in London and Manchester. The events were attended by representatives from across the pensions community.

These events provided a forum for discussion and debate and allowed those present to give feedback on the content and structure of the code.

The outcome of the consultation

In general terms the feedback received from participants at the consultation events mirrors that provided in writing by the respondents to the consultation document. Together they provided a number of suggestions that have been used to refine the code of practice.

Responses included those received from seven professional / industry bodies, four insurers, three consultancy practices, two independent trustee companies and two law firms.

Summaries of the 23 written responses, and our replies to them, are contained in the following section of this report.

Summary of responses to consultation

Although the questions raised in the consultation document were designed to seek specific responses, the document also offered an opportunity for general comment.

The section below sets out the questions raised and summarises key points and prevailing themes.

Introduction to the consultation document

Question 1:

Do you have any comments to make on this introductory section?

There was limited feedback received on this. Whilst many did not comment, there was concern over:

- contradictory definitions of subsisting rights;
- the interaction with sections 259-261 of the Pensions Act 2004 (the 'Consultation requirements'); and
- the application of equal treatment.

The code has been redrafted to ensure there is clarity over what constitutes a protected or detrimental but not protected modification.

It is also intended that guidance will illustrate the types of modification that will fall within the ambit of section 67. This should help to identify those changes to members' benefits that may need to follow the consultation requirements.

The issue of equal treatment is one that should be considered before the effect of a proposed modification.

The draft code

Question 2:

Do you have any comments to make on the introduction to the code?

This received a mixed response. Where specific comments were received including the question 'why are there two introductions?' they have been addressed in the redraft of the code.

Question 3:

Do you consider that the information to be given to members if the consent route is followed needs to be more fully specified in the code?

An overwhelming majority of written responses stated that the code should not be too prescriptive and that guidance should provide the necessary level of detail.

It is intended that guidance will illustrate the type of information that could be given to members depending on the type of modification as well as the various ways this might be communicated.

Question 4:

Do you consider that a period of one month is a ‘reasonable opportunity’ for the members to make representations concerning the proposed modification?

A varied response was received to this question. Examples are:

‘Deferreds and pensioners may need longer than four weeks’; the time period ‘should run from the date of issue rather than receipt’; ‘period should be left to trustees discretion’; and ‘longer periods if proposals more complex’.

Having considered all the comments received we have adopted a period of four weeks. However, the redrafted code also acknowledges that this period may vary depending on the complexity of the proposed modification, the number of members and where they are located.

Question 5:

Should ‘reasonable opportunity’ also have regard to access to an individual?

The main theme emerging from the responses to this question is that this should be left to the trustees. The redrafted code now makes no specific reference to this, relying on the trustees to put in place whatever arrangements would best serve their membership.

Question 6:

Do you consider that a period of six months is a ‘reasonable period’ for the implementation of the modification after the first consent has been received from an affected member, or are there grounds for considering a shorter or longer period?

Broadly speaking most of the respondents agreed that six months was adequate. However, a notable few raised concerns over the period starting from the date the first member gave their consent.

We agree that this could prove challenging and, allowing for the period of four weeks for members to make representation, the final version of the code has set a period of seven months. It is also now mentioned in the code that this is likely to vary with the period given for representations, in addition to the consideration of any legal issues or matters connected with implementation.

Question 7:

Do you consider that the information to be given to members if the actuarial equivalence route is followed needs to be more fully specified in the code?

A limited number of respondents sought further prescription in the code itself, whilst one or two others expressed a need for further clarity without prescription. However, the greatest number of respondents asked for this to be provided in guidance.

As with question 3, it is intended to provide further clarity in regulatory guidance. The guidance will give examples of the type of information that could be useful to members in understanding how the proposed modification might affect their benefits.

Question 8:

Do you consider that a period of one month is a ‘reasonable opportunity’ for the members to make representations concerning the proposed modification?

There were strong views that the Consent route should be longer than the Actuarial Equivalence route especially in relation to members being able to take independent financial advice. We have adopted a period of four weeks in the redrafted code. The code also recognises that this period may vary according to the complexity of the proposed modification.

Question 9:

Should ‘reasonable opportunity’ also have regard to access to a contact address?

The responses received were similar to those given in question 5. The redrafted code now makes no specific reference to this relying on the trustees to put in place whatever arrangements would best serve their membership.

Question 10:

Do you consider that a period of one month is a ‘reasonable period’ for obtaining the actuarial equivalence statement?

The Association of Consulting Actuaries expressed the view that it was difficult to understand the process without the relevant Regulations. They also consider that providing a statement after the change has taken place has little value as circumstances may be different following a rule change. Others expressed similar views.

Whilst some thought a period of three months would be more acceptable, others identified the possibility of obtaining a statement beforehand and being ‘guaranteed for six months’.

Many accepted that, as the primary legislation sets out that the statement is to be obtained after the modification takes place, a period of one month would be reasonable.

We have amended the code to reflect a period of one month for obtaining the statement. Additionally, reference has been made to the period being extended should this be necessary in scheme specific circumstances.

Question 11:

Do you consider that a difference in a material respect to a modification needs to be more fully specified in the code?

This question raised a number of interesting comments. Primarily these were associated with the need to recommence the process especially where the revised modification resulted from representations and was an improvement to the original proposal. Several respondents sought further clarity in the code itself. The picture emerged that respondents would have preferred the code to offer some examples of what would constitute material amendments to a modification, and that they would have preferred not to have to rely on guidance for this point.

However, we were concerned that examples set out in the code would rapidly become out of date, and would necessitate the code being revised as and when circumstances changed.

Accordingly while we propose to give further consideration to this subject in our guidance, the code reflects the legal position without offering examples of materiality.

We have removed references to ‘minor’ amendments to avoid any debate on the difference between a ‘minor’ and a ‘material’ amendment.

Question 12:

Do you consider that a maximum of six months is a ‘reasonable period’ to exercise the amendment power following receipt of the first consent given by an affected member?

Most respondents linked this question to question 6, and most agreed that a period of six months was reasonable. There were few disagreements; one respondent thought this period too long, and two considered that a time period should not be specified.

We have retained the period as it was in the draft code, but have added wording to allow for some variation of this period.

Question 13:

Do you consider that the contents of the notice to members of the trustees’ determination to make (or consent to making) a modification needs to be set more fully in the code?

Respondents in general, with a few exceptions, either thought that no further detail was needed, or that any further detail should be set out in guidance rather than in the code itself.

As this notice will follow information already given to members, we have not amended the code to give further details of it, but consideration will be given to including further details on the content of the notice in guidance.

Question 14:

Do you consider that a period of one month is a reasonable period for the production of this notice, keeping in mind that it must be provided to affected members before the modification takes effect?

With very few exceptions this period was seen as reasonable, and so it has been retained in the re-drafted code.

Question 15:

Do you consider that more guidance for employers in respect of the modification of members' subsisting rights needs to be set out in the code?

The respondents were split almost equally between those who considered that no further guidance was needed, and those who indicated that further guidance would be helpful. The majority of those requesting further guidance expressed the view that it should be in the form of guidance rather than in the code itself. Accordingly, the regulator will have due regard to providing further details on the employers' responsibilities in guidance when this is drafted.

Wording relating to the employer exercising undue influence was seen as problematical and has been removed. The regulator would expect the trustees, acting in the best interests of the members, to respond to any such undue influence in any event.

Question 16:

Do you consider that the role of a scheme's professional advisers in relation to the modification of members' subsisting rights needs to be set out more fully in the code?

Those who responded to this question were of the opinion that any further clarity should be in the form of guidance rather than in the code itself. The regulator will give due consideration to the inclusion of further detail on the role of advisers when drafting its guidance.

Wording relating to 'whistleblowing' reports was seen as unduly onerous and not supported by legislation, and so this has been amended to show that trustees should expect professional advisers to alert them to any concerns the professional advisers might have.

Question 17:

Do you have any comments to make on the terms in this glossary?

A large number of respondents commented that there was a reference in the code to 'Information requirement' being defined in the glossary, without it appearing there. This was an error in the code, which has been amended.

Some respondents requested simplification of the terms in the glossary. We have reviewed these terms and made them as simple as possible without compromising their meaning.

A small number of respondents felt that the actuarial basis for equivalence should be set out, either in the glossary or in the main body of the code. However, the actuarial profession have produced their own guidance on this (GN51) and we do not feel it is appropriate that the regulator should reproduce such guidance in the code.

Guidance

Question 18:

Do you have any comments to make on the items listed for guidance?

Without exception all respondents had no comments to make.

Question 19:

Are there further items which you would like to see included in this list?

As well as the items for possible inclusion in the code or guidance which we mentioned in the consultation document, some respondents felt that a comprehensive guidance note including example scenarios and documents would be helpful.

In addition the following comments were made:

- It would be helpful for the guidance to contain those circumstances when it would be appropriate for the trustees not to provide individual illustrations.
- Can the regulator provide guidance to explain the relationship between the consent requirements and section 91 of the Pensions Act 1995?
- Further guidance on how the regulator will determine that sufficient information has been provided to an affected member.

The regulator will be issuing guidance to cover those matters set out in this code.