

INTRODUCTION

1.1 The Financial Services and Markets Act 2000 (FSMA) contains a prohibition on all persons, in the course of business, communicating an invitation or inducement to engage in investment activity unless they are authorised, or the content of the communication is approved by an authorised person, or they are exempt by way of an order made by the Treasury.

1.2 Under the FSMA regime, whenever a pension is taken up by an employee there should always be an FSA-authorised person involved somewhere in the process. This authorised person would be subject to FSA conduct of business rules and, as a result of their involvement, the employee may also have access to the Financial Ombudsman Service and to the Financial Services Compensation Scheme.

1.3 FSMA includes an exemption covering group personal pension schemes and stakeholder pension schemes which are offered by employers to their employees.

1.4 Such promotions may only be made by employers who, in accordance with Treasury guidance, ensure that those making the promotions are knowledgeable and competent to do so. Treasury guidance also clarifies that employers should aim to avoid straying into providing specific financial advice tailored to the individual circumstances of particular employees, and should instead aim to provide more general information.

1.5 As part of the Treasury's Two-Year Review of FSMA 2000, employers were provided with a new exemption from the FSMA financial promotion regime, enabling them to issue written material and make oral promotions about their pensions to their employees without themselves needing to be authorised by the FSA, and without needing these communications to be issued or approved by persons who have been authorised by the FSA. These changes came into effect on 1 July 2005, when the new FSMA 2000 (Financial Promotion) Order 2005 came into force.

1.6 This new exemption was accompanied by a number of safeguards for employees:

- Employers are required to make a financial contribution to the pensions they are promoting.
- The size and nature of that contribution in respect of the employee in question must be disclosed.
- Employers are not able to receive any direct financial benefit from making promotions, such as a commission.
- Written promotional material needs to include a statement informing the employee of their right to seek advice from an authorised person or appointed representative.

CONSULTATION

1.7 Respondents to the FSMA Two-Year Review consultation suggested a number of further changes to the financial promotion regime:

- The exemption should be extended to cover promotions made by third party pensions administrators because the administration of a number of company pension schemes is outsourced.
- Any exemption for the promotion of employer pensions in the workplace should also cover work-related insurance products.
- Any new exemption relating to the promotion of employer pensions in the workplace should also cover share saver scheme and share incentive plans.

1.8 The latest consultation sought views on these possible changes to the financial promotion regime.

2

SUMMARY OF RESPONSES

EXTENDING THE EXEMPTION FOR WORKPLACE PENSIONS PROMOTIONS TO THIRD PARTIES

2.1 The first question in the consultation sought views on extending the exemption for workplace pensions promotions in article 72 of the Financial Promotion Order to cover third parties.

2.2 The majority of respondents agreed that the current exemption for workplace pensions promotions should be extended in this way.

Should The Third Parties Be Contracted By The Employer To Make Promotions?

2.3 The second question sought views on whether these third parties should be required to be contracted by the employer to make promotions about the employer's group personal pension scheme or stakeholder pension scheme.

2.4 Most respondents considered there should be a contract between the employer and the third party. A number of reasons were given including: ensuring that the employer had some control over the amount & type of information provided; avoiding any misunderstanding about responsibilities of parties involved & marking out the boundaries in which the third party operates. However, some respondents did not consider that the third parties needed to be contracted and one respondent considered employers should be given a choice.

2.5 A number of respondents pointed out that a third party pension administrator may decide to employ another body to undertake a financial promotion.

Third Parties With Contract With Employer

2.6 The third question sought views on whether granting an exemption for all third parties, as long as they have a contract with the employer, was too broad.

2.7 The majority of respondents considered that an exemption for all third parties was not too broad, as long as they have a contract with the employer.

2.8 However, a number of respondents felt that the exemption should be restricted to those third parties who are involved in providing pension services to the employer - e.g. the pension adviser or administrator. Some respondents were concerned that granting an exemption to any third party that has a contract with the employer might result in cleaning companies undertaking financial promotions. One respondent felt that the exemption should be limited to third parties that have no financial interest (direct or indirect) in the outcome of the promotion.

Knowledgeable & Competent

2.9 The fourth question sought views on whether the employer should be satisfied that third party administrators are knowledgeable and competent to make the promotion.

2.10 The majority of respondents considered that the employer should still need to be satisfied that third party pensions administrators are knowledgeable and competent to make the promotion.

2.11 The question went on to ask whether the requirement that the employer should be satisfied that third party pensions administrators are knowledgeable and competent to make the promotion should be covered by guidance or by legislation.

2.12 Views on this were mixed. The majority of respondents considered that the requirement should be covered by guidance on the grounds that it was more flexible than legislation. However a some respondents considered that the requirement should be covered by either entirely by legislation or a combination of high level legislation and detailed guidance.

Direct Financial Benefit

2.13 Question five asked for views on whether the legislation should specify that third party administrators should explain to each employee the size of any direct financial benefit that they receive as a result of that employee either taking up a pension or increasing the size of their pension investment.

2.14 The majority of respondents felt that third party pensions administrators should be required to explain to each employee the size of any direct financial benefit that they would receive as a result of that employee either taking up a pension or increasing the size of their pension investment.

Any Other Conditions

2.15 Question six sought views on whether any other conditions should be applied either in the legislation or in guidance. Suggestions included:

- The legislation or guidance should remind administrators of their limitations as regards the nature of financial promotions and the need to ensure that if such promotional services are undertaken they should ensure that they are clear, fair and not misleading.
- When promoting a defined benefit scheme to employees, employers should be required to inform employees that the contributions are not fully protected if their company goes bankrupt.
- With pension auto-enrolment, employers should educate and communicate the advantages and disadvantages of the plan to new members who have been brought in to the scheme.
- Employers should be required to stop promoting their defined benefit plan if the scheme is judged to be in financial difficulty.
- Measures should be imposed on employers to ensure that an adequate record is kept of which third party was used for each communication. There should be some record keeping requirements, with the onus on the employer and the third party administrator, to maintain a record of each promotion for a suitable time period. Robust retrieval systems should be encouraged allowing access to historical promotions for audit purposes.

- As part of any financial promotion employees should be made aware of the availability of independent financial advice and, in that regulated advice includes a suitability test which is not the case with generic promotions.

PROMOTING INSURANCE PRODUCTS

2.16 Question seven sought views on whether employers should be provided with a specific new exemption from the financial promotion regime in relation to any communication which they make to their employees in relation to insurance products

2.17 No respondents objected to the proposed exemption. One respondent suggested that the exemption should be extended to savings products that may be brought with or without advice.

Work-Related Insurance Products

2.18 Question eight sought views on whether this exemption should be limited to work-related insurance products or should apply to any insurance contract .

2.19 Responses on this were finely balanced. A small majority of respondents considered that the exemption should apply to any insurance contract. A number of respondents considered that the exemption should be limited to work-related insurance products on the grounds that widening the range of products could introduce more risk and result in consumer confusion.

2.20 Question nine sought views on whether employers should be prohibited from receiving commission from a provider of insurance in the event that an employee, as an individual, enters into a contract of insurance as a result of a promotion by an employer,

2.21 The majority of respondents considered that employers should be prohibited from receiving commission in these circumstances.

2.22 A small number of respondents noted that some smaller employees used commission to help offset costs of voluntary benefits schemes etc. They suggested that in these circumstances employers should be obliged to say what any commission had been used for.

2.23 Question nine went on to ask whether employers should be required, when writing to employees, to remind them of their right to seek advice from an authorised person or an appointed representative?

2.24 No respondents disagreed that employers should be required act in this way.

Other Conditions

2.25 Question ten sought views on whether any other conditions should apply. The majority did not comment or did not propose any additional conditions. Those that did respond suggested:

- Where an employer or third party provides a financial promotion, a proper audit trail should be maintained and record keeping should be in line with current FSA rules and covered in the guidance.
- Where an employer is promoting a range of individual products, safeguards should be in place which ensures the products are accurately compared, the

content of the promotion is clear and understandable and that the employer has not been unfairly influenced by the insurer to promote their product over a competitor's.

- Good idea to be clear on why the company is promoting something. Therefore, requiring the company to state that the company is not getting anything out of it, and that taking out a particular cover is purely voluntary, would seem sensible.
- Lots of voluntary groups have premiums deducted via payroll deduction. It is helpful to have some documentation that states when this starts, ends and what happens when someone leaves the company's employ. If not payroll deduction, it would be good to say so.

EMPLOYEE SHARE SCHEMES AND PLANS

2.26 Finally question eleven invited views on whether the existing exemptions from the financial promotion regime for share saver schemes and share incentive plans as set out in article 60 of the Financial Promotion Order need to be amended or expanded.

2.27 None of the respondents supported amending/expanding these exemptions.

3

CONCLUSIONS AND NEXT STEPS

Extending The Exemption For Workplace Pensions Promotions To Third Parties

3.1 The current exemption applies only to employers. However, many companies outsource the administration of their pension schemes and are likely to turn to staff from the outsourced company to provide information about the pension.

3.2 The current exemption aims to tap into the trust which exists between employer and employee, which in turn relates to employers' general duties of care towards their employees. Our aim is to ensure that the any extension of the current exemption to third parties is consistent with the intention behind the existing regulations.

3.3 Our conclusions are that it is sensible to extend to the current exemption to cover communications made by or on behalf of a contracted third-party to an employee in relation to a group personal pension scheme or a stakeholder pension scheme, subject to the following conditions:

- The communication relates to a group personal pension scheme or stakeholder pension scheme offered to the employee by the employer or the contracted third party;
- The employer will make a contribution to the group personal pension scheme or stakeholder pension scheme in the event of the employee becoming a member of the scheme and the communication contains a statement informing the employee of this;
- The employer does not receive any direct financial benefit from the scheme;
- The employer notifies the employee, before the employee becomes a member of the scheme, of the amount of contribution the employer will make in respect of that employee;
- The contracted third party notifies the employee in writing, before the employee becomes a member of the scheme, of any remuneration the contracted third party will receive as a result of either the employee joining the scheme or the employee making an increase to the amount of his contribution to the scheme;
- In the case of a non-real time communication, the communication includes a statement informing the employee of his right to seek advice from an authorised person or an appointed representative;
- In the case of a communication made on behalf of a contracted third party, the contracted third party and the person making the communication have entered into a contract specifying the terms on which the communication may be made;
- The following requirements should be covered by guidance on the grounds that it was more flexible than legislation, or by the existing regulatory framework:

- The employer should be required to take reasonable steps to satisfy himself that the third party administrators are knowledgeable and competent to make the promotion;
- Safeguards, such as the prohibition limiting advice to generic advice, should continue.
- Employees should be informed that taking out a particular cover is purely voluntary;
- Any sale should be via an FSA-authorized individual where appropriate. These safeguards will offer strong protection to consumer interests.

Promoting Insurance Products

3.4 Our conclusions are that employers should be provided with a specific new exemption from the financial promotion regime in relation to any communication which they make to their employees in relation to insurance products, subject to the following conditions:

- Employers should be prohibited from receiving commission from a provider of insurance in the event that an employee, as an individual, enters into a contract of insurance as a result of a promotion by an employer; and
- The exemption should be limited to: permanent health insurance; life assurance and critical illness cover; and
- Employers should be required, when writing to employees, to remind them of their right to seek advice from statement informing the employee of his right to seek advice from an authorised person or an appointed representative.

Employee Share Schemes And Plans

3.5 Finally, we do not propose to make any changes the existing exemptions from the financial promotion regime for share saver schemes and share incentive plans as set out in article 60 of the Financial Promotion Order need to be amended or expanded.

4

LIST OF CONSULTATION RESPONDENTS

Aegon UK
Association of British Insurers
Association of Independent Financial Advisers
Association of Pension Lawyers
Business Services Association
Capita
Chartered Institute of Personnel & Development
Financial Services Authority
Financial Services Consumer Panel
Freshfields Bruckhaus
Friends Provident
GriD (Group Risk Development Group)
HBOS
IfsProShare
Legal & General
National Association of Pension Funds
Norwich Union
Prudential
Royal London Group
Scottish Financial Enterprise
Scottish Widows
Society of Pension Consultants
Threadneedle Investment Services Ltd
Unum Provident