

FINANCIAL GUIDANCE AND CLAIMS BILL

Supplementary Memorandum from the Department for Work and Pensions & HM Treasury to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Financial Guidance and Claims Bill (“the Bill”). It supplements the memorandum originally provided to the Committee on 22nd June 2017. The Bill was introduced in the House of Lords on the 22nd June 2017 and completed its Third Reading in the House on 21st November 2017. The Bill was then introduced to the House of Commons on 22nd November 2017 and completed its Second Reading on 22nd January 2018.
2. This memorandum identifies four additional Clauses in the Bill which have been proposed by way of government amendments:
 - a) The first new Clause would require the exercise, in a particular way, of an existing rule-making power by the Financial Conduct Authority (“the FCA”). The memorandum explains the existing rule-making power, why the amendment has been proposed and how the amendment will change the use of the pre-existing power.
 - b) The second new Clause would impose two new regulation-making duties. The first duty would be imposed on the Secretary of State and the second duty on the Department for Communities to make corresponding provision in Northern Ireland. This memorandum explains the proposed duties and why the amendment has been proposed.
 - c) The third clause gives a power to the legal services regulators in Great Britain to impose a cap on fees. Specifically, it allows them to make rules restricting fees charged by persons they regulate for certain claims management. The Law Society of England and Wales has a duty to make such rules where the service concerns claims in relation to financial products or services. This memorandum explains the proposed powers and duty and why the amendment has been proposed.
 - d) The fourth clause gives a power to the Treasury to amend section (Legal services regulators, rules: charges for claims management services) in order

to extend the power of the Law Society of Scotland to make rules imposing a cap on fees charged for claims management services. This memorandum explains the proposed power and why the amendment has been proposed.

B. ADDITIONAL DELEGATED POWERS

Part 1: Single Financial Guidance Body

Additional rule-making duty

3. The government has proposed an amendment which would require the FCA to exercise an existing rule-making power to require the trustees and managers of personal and stakeholder pension schemes to ask members whether they have received guidance from the single financial guidance body (“the SFGB”) or independent financial advice before they can access or transfer their pension savings. Where the member has not received such guidance or advice the amendment requires the FCA to make rules requiring the trustees or managers to recommend the member receive guidance or advice before they access or transfer their pension savings. In this situation the amendment also requires the FCA to make rules requiring the trustees or managers to ask the member if they want to wait until they have received guidance or advice before they decide whether or not to access or transfer their pension savings or if they want to proceed without receiving it.

Amendment to insert a new Clause – “Personal pension schemes: requirements to recommend guidance etc” after Clause 18

Duty conferred on: the FCA

Duty exercised by: general rules made by the FCA

Parliamentary procedure: none

Context and purpose

4. Amendment 11 would insert a new Clause – “Personal pension schemes: requirements to recommend guidance etc” – into Part 1 of the Bill after Clause 19. The new clause would amend section 137FB – “FCA general rules: disclosure of information about the availability of financial guidance” – of the Financial Services and Markets Act 2000 (“the FSMA”).
5. Section 137A – “The FCA’s general rules” – of the FSMA provides that “(1) *The FCA may make such rules applying to authorised persons— (a) with respect to the carrying on by them of regulated activities, or (b) with respect to the carrying on by them of activities which are not regulated activities, as appear to the FCA*

to be necessary or expedient for the purposes of advancing one or more of its operational objectives.” Sub-section (2) provides that “*Rules made under this section are referred to in this Act as the FCA’s general rules.*” An “authorised person” is a person authorised to carry out an activity regulated by the FCA and these activities include establishing, operating or winding up a personal or stakeholder pension scheme.

6. The amendment would require the FCA to make general rules (under section 137A) requiring the trustees and managers of a “relevant pension scheme” to ask a member or their survivor, when they make an application to access or transfer their pension savings, whether they have received guidance from the SFGB about what they can do with their flexible benefits or independent financial advice. The rules must also require that the trustees or managers recommend the member or survivor seeks such guidance or advice if they have not done so. In this situation the amendment also requires the FCA to make rules requiring the trustees or managers to ask the member if they want to wait until they have received guidance or advice before they decide whether or not to access or transfer their pension savings or if they want to proceed without receiving it. A “relevant pension scheme” is a personal or stakeholder pension scheme.
7. There are existing consultation requirements in respect of general rules made under section 137A of the FSMA. Section 138G provides that the power to make general rules is exercisable in writing and that the rules must be published. Section 138I of the FSMA also provides that, before making general rules, the FCA must publish them in draft (accompanied by an explanation of their purpose) and must have regard to any representations received in response (although section 138L provides that this requirement to consult does not apply if the FCA considers that the delay involved in carrying out the consultation would be prejudicial to the interests of consumers). Finally, subsection (4) of the proposed Clause also provides that, before publishing a draft of the rules, the FCA would be required to consult the Secretary of State and the SFGB. As a result, the FCA must consult on the draft rules which will give stakeholders and the public the opportunity to make representations which the FCA must have regard to. It must also publish the rules in writing in order to bring them to the attention of stakeholders and the public.

Justification for delegation

8. The FCA’s general rule-making power in section 137A of the FSMA already gives the FCA a discretionary ability to make rules of this kind and this amendment simply makes particular requirements of the FCA rather than delegates additional powers to that body. The FCA is the appropriate body to make these rules.

Duty to make regulations

9. The government has also proposed an amendment to impose a duty on the Secretary of State to make corresponding regulations which will require the trustees and managers of occupational pension schemes to ask relevant beneficiaries whether they have received the specific pensions guidance the SFGB is required to provide under Clause 5(1) of the Bill, or independent financial advice, before they can access or transfer their pension savings. Where the member has not received such guidance or advice, the amendment requires the regulations to require the trustees or managers to recommend the beneficiary receive such guidance or advice before they access or transfer their pension savings. In this situation the amendment also requires the regulations to require the trustees or managers to ask the beneficiary if they want to wait until they have received guidance or advice before they decide whether or not to access or transfer their pension savings or if they want to proceed without receiving it.

Amendment to insert a new Clause – “Occupational pension schemes: requirements to recommend guidance etc” after Clause 18

Duty conferred on: the Secretary of State and the Department for Communities

Duty exercised by: regulations

Parliamentary procedure: negative procedure

Context and purpose

10. Amendment 12 would insert a new Clause – “Occupational pension schemes: requirements to recommend guidance etc” – into Part 1 of the Bill after Clause 19. The new clause would insert a new section 113B – with the same heading – into the Pension Schemes Act 1993 (“the PSA”).
11. The amendment would require the Secretary of State to make regulations requiring the trustees and managers of occupational pension schemes to ask a “relevant beneficiary”, when they make an application to access or transfer their pension savings, whether they have received guidance from the SFGB about what they can do with their flexible benefits or independent financial advice. A “relevant beneficiary” is a member of the scheme or another person of a prescribed description who has a right or entitlement to flexible benefits under the scheme person. The regulations must also require that the trustees or managers recommend the beneficiary seeks such guidance or advice if they have not done so. In this situation the amendment also requires the regulations to require the trustees or managers to ask the beneficiary if they want to wait until they have received guidance or advice before they decide whether or not to access or transfer their pension savings or if they want to proceed without receiving it.
12. The proposed amendment does not include any requirement for the Secretary of State to carry out a consultation before laying the regulations but it does require the Secretary of State to have regard to any rules made by the FCA under

amendment 11. This is because the expectation is the Secretary of State will lay regulations which will mirror the FCA's rules and the FCA will be required to consult before making their rules. Not including an express consultation requirement therefore means that, while the Secretary of State will still be able to carry out a consultation if it is considered necessary to do, the Secretary of State will not, for example, be required to conduct one where it would simply duplicate work already done by the FCA.

13. The amendment also makes provision for the regulations to provide for the Secretary of State or a prescribed person to issue guidance to which the trustees and managers of occupational pension schemes must have regard when complying with the requirements. The intention would be to use this power to enable the Pensions Regulator ("TPR") to issue guidance on how pension scheme providers should effectively comply with the regulations. It is expected that the FCA will also issue guidance for providers of personal and stakeholder pension schemes to explain how they should comply with rules set by the FCA. This power to enable the Secretary of State or a prescribed person to provide guidance will allow equivalent guidance to be given to providers of occupational pension schemes in respect of details such as particular forms of words which should be included in a recommendation to seek guidance or advice, which it would not be appropriate to include in regulations.

Justification for delegation

14. The government does not have an existing power to make regulations equivalent to those proposed in amendment 11. The proposed amendment is therefore necessary to enable the government to create parity in the requirements on providers of personal, stakeholder and occupational pension schemes.

Justification for procedure

15. It is proposed that the new regulations would be made subject to the negative procedure. This is the same procedure as is provided for in respect of the very similar power for the Secretary of State to require personal and occupational pension schemes to provide members and other prescribed persons with specified information in section 113 of the Pension Schemes Act 1993. The government considers the negative procedure will provide a suitable level of Parliamentary scrutiny as the substance of the requirements to be imposed in the regulations is set out on the face of the Bill and the regulations will therefore only bring this into force and provide some additional detail where necessary, such as in regards to the methods of communication trustees and managers must use and what will constitute "appropriate" independent financial advice (it is noted that "pensions guidance" is defined in the proposed new section 113B(6)). Using the negative procedure will also be a more proportionate procedure if the Secretary of State needs to make amendments to the regulations if, for example, methods

of communication between trustees and managers and beneficiaries, change in the future.

Corresponding provision for Northern Ireland

16. Finally, amendment 12 also includes a corresponding duty on the Department for Communities to make corresponding regulations in respect of Northern Ireland by inserting a new section 109B into the Pension Schemes (Northern Ireland) Act 1993.

Part 2: Claims Management Services

Amendment to insert a new Clause - Legal services regulators' rules: charges for claims management services

Power conferred on: The Law Society of England and Wales, the Law Society of Scotland, the General Council of the Bar and the Chartered Institute of Legal Executives.

Power exercised by: Rules

Parliamentary Procedure: None

Context and purpose

17. Amendment 26 inserting clause (*Legal services regulators' rules, charges for claims management services*) gives the *Law Society of England and Wales, the General Council of the Bar and the Chartered Institute of Legal Executives* a power to make rules restricting fees for certain claims management services charged by persons whom they regulate. The Law Society of England and Wales has a duty to make such rules where the service concerns claims in relation to financial products or services, and the Law Society of Scotland is given a power to make rules in relation to these cases.

18. This mirrors the powers given to the Financial Conduct Authority in clause 25 of the Bill. The purpose of the duty on the Law Society for England and Wales, and the power given to the other legal services regulators, is to ensure that there is parity and equal treatment between providers of claims management services regardless of their regulator. The Bill already provides for an interim fee cap in relation to PPI claims, but this comes to an end in relation to those regulated by the Law Society of England and Wales, when the Law Society makes its own rules, and in other cases on 29 April 2020. Those other legal service regulators will, if appropriate, be able to exercise their power to make similar rules if necessary having considered the nature and extent of any issues in relation to charges and fees that require addressing.

Justification for delegation

19. The legal services regulators, as the market regulators, are the appropriate bodies to develop and make rules regarding fees for claims management services that legal service providers can charge consumers for their services. Those regulators can also provide guidance and supplementary material as to how they consider the rules will operate. This will provide greater clarity for those they regulate and allow rules for charges to adapt should the market change in the future. There will also be greater certainty for the regulator to rely on its rules when taking action by reference to its rules against contraventions.
20. Any rules made by the legal service regulators will be made under the same conditions and safeguards as other rules made by them. For those regulators within England and Wales this will include having to act, so far as is reasonably practicable, in a way which is compatible with the regulatory objectives set out in the Legal Services Act 2007 and obtaining the agreement of the Legal Services Board to their rules.

Justification for procedure

21. The Treasury and, in relation to those legal services regulators within England and Wales, the Lord Chancellor considers that no Parliamentary procedure is required in respect of these powers for legal service regulators to make rules about charges for claims management services. Regulators' rules are subject to their own rule making procedures.

Amendment to insert a new Clause - Extension of power of the Law Society of Scotland to make rules

Power conferred on: Treasury

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and purpose

22. Amendment 27 subsection (1) confers a power on the Treasury to amend section (*Legal services regulators; rules: charges for claims management services*) in order to extend the power of the Law Society of Scotland to make rules imposing a cap on fees charged for claims management services.
23. It provides that the power given to the Law Society of Scotland to make rules in relation to fees charged for claims management services provided in connection with a claim concerning a financial product or service may be extended to apply in relation to claims management services provided in relation to all, or any description of, claim.

Justification for delegation

24. As with the broader power for legal services regulators in England and Wales, this will ensure it is possible for the Law Society of Scotland to act, should fees for claims management services other than for claims concerning financial services and products become an issue. The Scottish Government is currently taking legislation through Scottish Parliament, which is closely related to this issue (see the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill). Taking a power to extend the power of the Law Society to make rules will ensure that if the power is needed, it will interact in the right way with that legislation, provided it is passed by the Scottish Parliament.

Justification for procedure

25. Any regulations made under this power will be subject to the affirmative procedure and require the consent of the Scottish Minister before regulations are made (the consent requirement included is in recognition of the Scottish Government's interest in the Scottish legal profession, and not because the regulation of claims management services is in any way devolved). The Treasury consider this is the appropriate procedure given the power can be used to extend the regulation of legal professions who carry out claims management services in relation to claims which do not concern financial products or services.

Department for Work and Pensions & HM Treasury
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