

Banning new member-borne commission: guidance for service providers and trustees or managers of occupational pension schemes

March 2016

About this guidance

1. This guidance relates to the Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2016 (the “Regulations”), which come into force on 6 April 2016. The Regulations amend the Occupational Pension Schemes (Charges and Governance) Regulations 2015¹ and primarily prevent service providers from levying a charge on members of certain occupational pension schemes used for automatic enrolment to recover the cost of commission paid to advisers in new commission arrangements.

Who this guidance applies to

2. This guidance is aimed at service providers and trustees or managers² of certain occupational pension schemes that provide money purchase benefits and which are used for automatic enrolment.
3. This non-statutory guidance provides an overview of how the Regulations are intended to apply. In particular, it seeks to provide further clarity on areas some stakeholders were unclear about and which were raised during the engagement and consultation process that helped develop these Regulations.
4. This guidance is not intended as a substitute for legal advice. The Department for Work and Pensions cannot provide a definitive interpretation of legislation, as that is a matter for the courts. Service providers and trustees should consider the Regulations to determine whether the new requirements apply to them, taking further advice where necessary.

Scope of the Regulations

5. The Regulations apply to specified occupational pension schemes providing money purchase benefits and which are used for automatic enrolment. A specified scheme is defined in the Regulations as a relevant scheme that is being used by an employer as a qualifying scheme for automatic enrolment in relation to at least one jobholder.
6. The Regulations do not apply to schemes that meet one or more of the following conditions:
 - schemes which are not used for automatic enrolment by an employer in relation to any jobholders;
 - schemes that do not provide any money purchase benefits;
 - relevant small schemes and executive pension schemes³; and

¹ http://www.legislation.gov.uk/ukxi/2015/879/pdfs/ukxi_20150879_en.pdf

² The term ‘trustees’ will be used throughout this consultation document for simplicity, but this should be understood to also include managers in the case of the small number of occupational schemes that are not trust-based.

³ Defined in Regulation 2 of the Occupational Pension Schemes (Charges and Governance) Regulations 2015.

- schemes with only one member
7. The Regulations prevent charges being levied on members to recoup payments that service providers have made to advisers for advice or services to members and employers under **new** commission arrangements in occupational pension schemes used for automatic enrolment from 6 April 2016. New commission arrangements are those that are entered into on or after 6 April 2016. The Regulations do not apply to commission arrangements that were entered into before 6 April 2016 unless the agreement is renewed or varied on or after this date. The Government will consult in due course on regulations to ban charges from being imposed on members under existing commission arrangements.
 8. The Regulations do not apply to advice and services provided to trustees of these schemes. This will enable trustees, who should be acting in the best interests of their members, to continue to use member-borne charges to pay for advice and services that they need or are required under law to obtain to run their schemes effectively.

Member Protection

9. The Regulations apply to all members, whether contributing or not contributing, who are or were employed by a qualifying scheme employer who participates (or has participated on or after 6th April 2016) in the scheme. A qualifying scheme employer is an employer who participates in an occupational pension scheme which is a qualifying scheme in relation to at least one of its jobholders.
10. In a multi-employer scheme such as a master trust, the Regulations do not apply to workers of employers who are not using that scheme as a qualifying scheme for automatic enrolment.
11. Where a member leaves a qualifying scheme employer to become a worker of another employer, and the new employer is not a qualifying scheme employer, the Regulations do not apply to the member in relation to that new employment. However, any funds accrued when the member is or was a worker of the qualifying scheme employer would continue to be protected by the Regulations, provided that the member did not transfer their accrued assets out of the scheme.
12. If the member transferred their pot to a scheme which was not a specified scheme under the Regulations, that pot would no longer be covered by the Regulations as the Regulations only apply to a specified occupational pension scheme (as set out above) that is being used for automatic enrolment by an employer in relation to at least one jobholder.
13. However, the Regulations provide that the ban continues to apply to a member of a specified scheme even if the scheme stops being a specified scheme.

Regulatory duties

Service Providers

14. The Regulations define a service provider as ‘a person who provides an administration service directly to the trustees or managers of a specified scheme’. In practice, service providers are likely to be a person or firm who provides a bundled⁴ administration service(s) to trustees or managers, such as an insurer or master trust provider. It will also include a person or firm who provides unbundled⁵ administration service(s) to trustees or managers, such as third-party administrators, including employee benefit consultants.
15. Service providers do not include a person or firm who does not provide any form of administration service to trustees, for example, if the only services they provide are only actuarial or investment services.
16. Any person or firm who meets the definition of service provider as set out in the Regulations is required to comply with the provisions set out in the Regulations, assuming that the scheme is in scope.
17. The Regulations place regulatory duties on both service providers and trustees; with service providers under a duty to prevent charges being imposed on members of specified schemes to recoup the cost of advice and services provided by an adviser.
18. Trustees are required to inform their service provider whether the scheme is used for automatic enrolment within three months from whichever is the later of:
 - the Regulations coming into force;
 - the employer’s staging date; or
 - the date the service provider becomes a service provider in relation to the scheme.
19. This will be a factual notification by the trustee that the scheme is within scope of the Regulations, and does not mean that trustees are empowered in any way under the Regulations to designate whether a scheme can be considered to be used for automatic enrolment or not.
20. Service providers are required to act on the information from trustees and must, within two months of the application of the ban, inform trustees that they are not imposing any charges on members relating to a commission payment to an adviser under a commission agreement entered into (or varied or renewed) on or after 6 April 2016. Additional time will be afforded to service providers if they

⁴ Where the employer or trustees procure administration and investment services through a single pension provider.

⁵ Where the trustees procure investment management or administration services directly from separate providers.

need further information about non-contributing members, and trustees will be required to provide this information within one month of the request from the service provider. They will also be required to notify the trustees as soon as practicable (and at the latest within one month) if they stop being compliant for any reason.

21. Trustees will also be required to notify The Pensions Regulator via the scheme return, in 2017, whether or not their service provider has confirmed to them that they have complied with the Regulations.

Advice or a Service

22. The ban in the Regulations relates to 'advice or a service', subject to the exclusions discussed in paragraph 23 below. There may be things that the service provider provides which do not fall within that term and are more in the nature of the administration of the scheme, for example, self-service tools or the provision of generic information. However, whether or not something is covered by the ban will depend on all the facts of the particular case. Service providers who are subject to the Regulations may, therefore, wish to seek legal advice as part of their compliance with the Regulations.
23. The Regulations do exclude two specific services from the prohibition on levying a charge on members to recover the costs of commission: payroll services and middleware services. The Regulations define payroll services as, 'a service relating to the administration of employee remuneration including tax deductions'. The Regulations define middleware services as, 'a technological service which permits or enhances the ability of the service provider's computing system and the computing system provided by or on behalf of the employer to work together'.

Member Opt-in

24. The Regulations include a provision for members to opt-in to advice and services provided to them and have the costs of any such advice or service met by their fund. In order for any such agreement to take effect, the agreement must satisfy the conditions set out in the Regulations, including the condition that the agreement is set out in writing and states the cost of the advice or service.
25. Where a member decides to opt-in to an advice or service and have the cost met from their pot, this may be as a result of their approaching an independent financial adviser, or approaching an adviser who is, in some way, affiliated with the service provider or scheme.
26. As trustees and service providers each have duties under the Regulations, and are separately responsible for managing and administering the scheme, once the adviser has entered into an agreement with the member, a copy of that agreement will need to be provided to both the trustee or manager and service provider.

27. Where an adviser thinks that the charge relating to the member opt-in agreement may breach the charge cap (if the member in question is protected by the charge cap), they may also wish to provide a member opt-in agreement in relation to the charge cap (under regulation 9 of the Occupational Pension Schemes (Charges and Governance) Regulations 2015⁶) (a “regulation 9 agreement”) for the service signed by the member to the trustees or managers and service provider alongside the member opt-in agreement under these Regulations. By providing the regulation 9 agreement in this way, advisers may be able to speed up the process outlined in the paragraphs below. It should be noted that a regulation 9 agreement cannot be entered into in relation to “core services”, which are described in regulation 9 of the Occupational Pension Schemes (Charges and Governance) Regulations 2015. Therefore, if a regulation 9 agreement is required in relation to a member opt-in agreement, but the service it relates to is a “core service”, the member opt-in agreement cannot take effect.
28. Under the Regulations, the trustees may, within one month from receiving a copy of the written agreement, require the member to enter into a regulation 9 agreement if the costs of such services will incur charges which are likely to be above the charge cap (where this applies). Under the Regulations the trustees, if they are of the opinion that the value of the member’s rights in the scheme are not or will not be sufficient to pay for the service, may, within one month of receiving the agreement, inform the member, the adviser and the service provider of that opinion and the agreement will not take effect.
29. Where a regulation 9 agreement is required but is not provided, or where the member does not have sufficient funds within the scheme, then the member opt-in agreement will not take effect, providing that the trustee or manager informs the member, adviser, and service provider within one month of receiving the member opt-in agreement. If the trustee or managers do not provide this notification within one month, the adviser may find it helpful to check that the trustees or managers are satisfied that a regulation 9 agreement is not required and that the member has sufficient funds.
30. In addition, scheme rules may also prevent a member from charging the costs of any advice or service they opt-in to against their pot. Advisers may find it helpful to check with the trustees or managers of the scheme whether scheme rules would prevent a member from bearing the costs of advice or services in this way. Trustees or managers may also want to clarify whether scheme rules prohibit a member using their pot in this way.
31. As outlined above, it is envisioned that the adviser will want to gain assurances from the trustees or managers on whether or not a regulation 9 agreement is required, whether or not the member has sufficient funds; and whether or not scheme rules prevent the member from having their fund bear the cost of any advice or service, before providing the service to the member.

⁶ http://www.legislation.gov.uk/ukxi/2015/879/pdfs/ukxi_20150879_en.pdf