

**CONSULTATION ON DRAFT SCHEME ORDER AND RULES**  
**COMMENTS OF SACKER & PARTNERS LLP**

**A. Background**

The purpose of this document is to set out our comments on the consultation on the draft Scheme Order and Rules published by the Department for Work and Pensions (DWP) and the Personal Accounts Delivery Authority on 28 April 2009<sup>1</sup>, in connection with the scheme (the Personal Accounts Scheme) to be established under section 67 of the Pensions Act 2008 (the Act).

Sacker & Partners LLP (Sackers) is a firm of solicitors specialising in pensions law. With over 50 pension lawyers, we act for in excess of 800 pension schemes, including household names and a number of FTSE-100 clients. The views expressed in Sackers' response to this consultation have been collated following discussions with a sub-group of the firm's solicitors.

**B. General comments**

1. One of the goals of the Personal Accounts Scheme is that it should be as easy to understand and as accessible as possible for members to enable them to assess the arrangement that they are paying into, and for them to understand the nature (and estimated amount) of the benefits they will receive on retirement. The same also needs to be true for employers, so that the joining, participation and general administration requirements are not overly burdensome. The model also needs to be simple in terms of communication (to both members and employers). We assume that these overriding aims will be borne in mind in relation to the ultimate requirements and the drafting of the Scheme Order and Rules.
2. In terms of the charging structure, transparency is key. The consultation document suggests that there will be a number of calls on members' accounts, for example to meet set-up costs, promotion of the Personal Accounts Scheme to the wider public, remuneration of panel members etc.. It is essential that both the amounts deducted from members' accounts and the use of the charge are expressly set out in

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<sup>1</sup> <http://www.dwp.gov.uk/docs/draft-scheme-order-and-rules28april2009.pdf>

communications with members so that they are aware of what proportion of their contributions (and those paid on their behalf) will be used to meet these costs.

3. Is there a danger that the first members will be disproportionately hit by the costs of setting up the Personal Accounts Scheme? Will any proportion of these costs be met by the Government?
4. In the light of 2 and 3 above, will anyone have responsibility for scrutinising the Trustee's spending on the Personal Accounts Scheme (for example, the members' panel)? In a traditional occupational pension scheme, trustees' expenses are (to a degree) monitored by the principal employer.
5. We note that the intention is for employers to be able to adhere to the Personal Accounts Scheme electronically. While this reflects modern business practice, it will be necessary to ensure that there are adequate safeguards in place (encryption etc.) to ensure that data is fully protected.
6. We also note that the contribution limit will not apply in the year that the member leaves the Personal Accounts Scheme through retirement, death or transferring out. However, the procedure for the Trustee to reject excess contributions until such time as a member has actually left the Personal Accounts Scheme seems unnecessarily complicated and could usefully be clarified.
7. We understand that there is to be a further consultation which will address the degree of control that the Government will have over the Trustee. Presumably this further paper will also explore what the Government's responsibilities will be to the Trustee and to the Personal Accounts Scheme generally when exercising such control.
8. The Act applies certain existing pensions legislation to the Personal Accounts Scheme. We assume that there will be a miscellaneous set of amending regulations (from both the DWP and HM Revenue & Customs) to disapply and adapt existing legislation where needed to accommodate the Personal Accounts Scheme.

## **C. Consultation questions**

### 1. *Article 7: Composition and functions of the panels*

*Are the following aspects of the members' panel the right model for ensuring that members' interests and perspectives influence the day to day running of the scheme?*

- *The role of the members' panel*
- *The members' panel involvement in the recruitment and selection process for all members of the trustee corporation*
- *The members' panel remit to produce a report on whether the trustee considers members' interests in constituting itself.*

Given the scale on which the Personal Accounts Scheme will operate, the members' panel is a practical approach to member representation. However, until the Personal Accounts Scheme is operational, it will be difficult to predict, in detail, the best ways in which this panel will need to function for it to be effective. Is it intended that the panel's role will be further defined in the light of practical experience (and, if so, within what timeframe)?

As drafted, the provision in the Rules for the selection and appointment of panel members (both member and employer panels) is left to the discretion of the Trustee. Although a degree of flexibility is required, in our view, it would aid the Trustee if the selection process were more clearly defined.

In order to comment on the requirement for the members' panel to produce a report (bullet point 3 above), the role of the members' panel needs to be clearly delineated. In addition, it would be helpful to have clarification of the ultimate use for such a report. For example, what would be the consequences for the Trustee if a negative report is made?

The DWP's 2007 consultation response on the Personal Accounts White Paper<sup>2</sup> suggested that "the remit of the panel would be to act as a combination of sounding board and watchdog, ensuring that the trustees fulfil their duty of acting in the members' best interests and communicating member concerns to the trustees" and that "this would be achieved through a formal structure, including a prescribed number of meetings, prescribed areas for consultation – for instance on changes to

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<sup>2</sup> Published on 14 June 2007:  
<http://www.dwp.gov.uk/docs/personalaccountsconsultationresponsejune2007.pdf>

investment strategy – and both prescribed and ad-hoc reports.” In our view, it would be helpful if this level of detail were prescribed before the Personal Accounts Scheme becomes operational.

2. *Article 7: Composition and functions of the panels*

*Are there ways in which the panel can be constituted or its functions defined that would maximise its effectiveness?*

As the Act does not provide a framework for the operation of the panels, it would be helpful if this were clearly set out in the Scheme Order.

We note that the Trustee is required to consult both the member and employer panels before giving its consent to the making of an order in relation to the Personal Accounts Scheme or the making of scheme rules. It would be helpful therefore if the panel’s responsibilities in this regard were also specified. For example, a procedure could be set out which the panels are to follow in the event that either panel is not satisfied as to the appropriateness of the Trustee’s proposals (such as recourse to the Pensions Regulator).

Is it also intended that there should be wider powers of scrutiny on the actions of the Trustee generally (either by the panels or by the Secretary of State)? If so, it would be helpful for this to be set out in the Scheme Order.

Draft article 7 makes provisions for the composition, selection and appointment and functions of the panels. Provision also needs to be made for the removal of panel members (whether by resignation, retirement or removal).

3. *Article 7: Composition and functions of the panels*

*Is it appropriate to allow representative bodies on the members’ and employers’ panels?*

Although the members’ panel will not be acting as a trustee because of the functions it is likely to be exercising, it will still need to comprise individuals with a good level of knowledge and understanding of pensions and trust law. This is particularly so if part of the role of the panels is to review and scrutinise the Trustee’s actions.

Representative bodies are likely to bring with them a high level of knowledge and expertise which may be welcome, particularly during the early days of the Personal

Accounts Scheme. Such bodies are also likely to have access to greater resources generally than individual panel members.

However, it will be important to get the balance right between representative bodies and individual members. Although the Scheme Order currently states that the panels “cannot be comprised entirely of persons who are not members of the Scheme”, it would be helpful if there were a minimum number of Personal Accounts Scheme members / participating employers represented on the panels.

Given the above, will there be a consultation on the proposed method for selecting panel members?

4. *Article 14: Protection*

*Are the provisions in the scheme order providing indemnity and insurance appropriate to this scheme?*

While it is right that the Trustee should be protected against third party liability in the same way as the trustees of occupational pension schemes, careful thought needs to be given as to how this can be achieved in the context of the Personal Accounts Scheme.

Draft article 14 does not make clear provision for an indemnity for the Trustee. In an occupational pension scheme, it is commonly the employer who provides trustees with an indemnity and, only in default can the trustees be indemnified out of the fund. We are aware that the charging structure for the Personal Accounts Scheme has yet to be finalised. However, is the policy intention that charges on members will potentially be used to indemnify the Trustee and/or provide for the cost of any Trustee insurance? If so, it will be essential for this to be transparent to members.

Draft article 14 provides for the Trustee to meet the cost of insurance from the Personal Accounts Scheme fund. However, will the Trustee have recourse to members’ accounts beyond the standard charge? The power in draft article 25(1) which, as drafted, permits deductions from members’ accounts for the administration and management of the Personal Accounts Scheme is very wide. Depending upon how the indemnity provision is intended to work, further thought may need to be given to limiting and clearly defining the circumstances in which deductions from members’ accounts may be made to meet expenses.

5. *Article 15: Providing information about the scheme*

*Does the wording of article 15 adequately cover the activity that the trustee will need to undertake to raise awareness of the Personal Accounts Scheme to employers and prospective members?*

The scope of draft article 15 is very wide.

One of the key issues for Personal Accounts will be to ensure that information is provided, to both members and employers, in an appropriate manner. Not only does the information need to be comprehensible for a wide cross-section of the public, but the manner of dissemination will need to be considered. While we appreciate that in many cases online / electronic communication will be acceptable, this may not be appropriate in all cases.

Whereas trustees of occupational schemes are primarily required to safeguard the interests of their scheme members, for the Personal Accounts Trustee there is an additional requirement on it to promote the Personal Accounts Scheme to its target market. In this sense, the Personal Accounts Scheme is unusual.

If the Government does not have responsibility for promoting the Personal Accounts Scheme, the power in draft article 15 should be more restrictive, so that the Trustee (and the panels) have a specific set of guidelines as to how to promote awareness of the Personal Accounts Scheme.

As regards communication generally, is it envisaged that there will be a role for the members' panel, in terms of reviewing Personal Accounts Scheme communications etc.?

6. *Article 17: Duty to accept employers*

*What remedies would it be useful for the trustee corporation to have available in order to deal with employers who persistently fail to meet the agreed terms and conditions of the scheme?*

Potentially giving the Trustee powers to sanction participating employers would represent a move away from the traditional model of the trustee / employer relationship in an occupational pension scheme.

Is it intended that, where employers do not fulfil their responsibilities in connection with the Personal Accounts Scheme, remedies will only be available via the Pensions Regulator?

Ordinarily trustees have whistleblowing responsibilities and there is a complex system in place for the Pensions Regulator to impose appropriate sanctions where an employer has fallen short in carrying out its duties towards its pension scheme. In our view, and given the compliance powers given to the Regulator under the Act, this model could also be applied to the Personal Accounts Scheme.

7. *Articles 18 and 19: Duty to admit members / members' accounts*

*Are there any issues arising out of the proposal to operate one membership category and not to differentiate between "active" and "deferred" members?*

The proposed system of requiring individuals to remain in the Personal Accounts Scheme once they have joined, without the option to transfer their Personal Accounts benefits to another scheme (for example, if they change employer), could prove inflexible.

Flexibility is important, both for employers (to determine what pension benefits are offered as part of the employment package) and for employees to have the ability to join the Qualifying Scheme of their employer.

Provided Personal Accounts Scheme members will have the flexibility to dip in and out of membership depending on their employment status, we do not object in principle to the operation of just one membership category.

In addition, the general prohibition on members transferring their benefits into or out of the Personal Accounts Scheme means that they will potentially have a number of small pension pots (in the Personal Accounts Scheme and other arrangements), leading to extra costs and possible difficulties in purchasing annuities. We understand that the policy intention underlying the restriction on transfers is to ensure that the Personal Accounts Scheme is able to serve and protect most effectively those individuals with little or no private pension saving. However, this could be addressed by setting minimum and maximum transfer levels.

8. *In order to avoid disproportionate administrative costs should the scheme set a minimum level of contributions in relation to workers without qualifying earnings?*

Applying a minimum level of contributions may put some people off pension saving, and there is a danger that those most likely to be deterred will be those most in need of encouragement to save. By the same token, enabling individuals to join the Personal Accounts Scheme who may ultimately potentially be financially worse off as a result could lead to claims of misselling. Whether a minimum level of contributions is set or not, clear communication will therefore be key.

On a related note, will consideration be given to the introduction of a minimum period of membership, either for those who are within, say, 12 months of pensionable age, or who have announced their intention to retire before the introduction of Personal Accounts?

9. *Article 25: Membership charges*

*Should there be a specific provision to require the trustee corporation to make the method and level of deductions transparent, and if so how can this be achieved?*

Yes, it is essential that the mechanism for deducting charges from members' accounts is transparent. As a fundamental part of the contract between individuals and the Personal Accounts Scheme, members need to know how much will be deducted from their accounts and how the charges will be applied (for example, what proportion is applied towards running costs, and how such sums will be allocated). This is a matter of good governance.

Members may find it helpful for this to be illustrated in member communications (such as booklets and annual benefit statements) by means of worked examples which illustrate what proportion of their (and their employer's) contribution goes on management / running costs and what proportion of their contribution goes towards providing a benefit for the individual.

10. *Should the trustee have the power to change the scheme rules without the agreement of the Secretary of State? If not, what are the circumstances where you feel the trustee should not be able to make changes?*

In certain circumstances, where rule changes have been agreed following consultation between the Trustee and the employer and member panels, it may be



too restrictive / time consuming to seek the agreement of the Secretary of State to amendments of the Personal Accounts Scheme. This is particularly likely to be the case once the Personal Accounts Scheme is up and running, if it becomes apparent that minor amendments are required to ensure the Personal Accounts Scheme rules reflect intended practice.

We note that draft article 16 gives the Trustee the power to make rules under section 67 of the Act. However, neither the Act nor the rules are clear as to whether this also covers making amendments to rules already made (as opposed to making new rules).

**D. Specific comments on Scheme Order and Rules**

1. The consultation requirements set out in draft article 6 are very general. Employers are required to consult on certain changes to future service benefits under occupational pension schemes for a minimum of 60 days. Thought should therefore be given to similar consultation provisions for amendments to the Personal Accounts Scheme.
2. Draft article 9 provides for “reasonable payments” to panel members. Is it intended that there will be guidance as to what is reasonable?
3. Draft article 24 provides for the refund (or otherwise) of excess contributions arising where a member is in multiple employments. It is not clear how the Trustee would operate its discretion here (to retain or refund such contributions) and it would be helpful if the position were clarified.
4. We note that the Rules specifically incorporate a number of Finance Act 2004 requirements (for example, the distinction between the death benefits which can be applied depending on whether a member is under or over age 75 at the time of their death). A more flexible way of drafting may be to make reference to the statutory provisions, rather than to incorporate these directly into the Personal Accounts Scheme Rules, on the basis that the Finance Act provisions may change. A further option may be to disapply such provisions with the aim of providing a simple benefit that is easy to communicate.
5. The lack of a discretion under draft rule 18 for the Trustee to apply death benefits potentially leaves members liable to an inheritance tax charge. This could be

addressed by incorporating such a discretion (which is likely to be fairer on members who have, for whatever reason, failed to update their death benefit nomination form), or by disapplying the inheritance tax requirement for this purpose. On this point, if there is to be no discretion, careful thought will need to be given as to how to make reminders about updating nomination forms effective. Without this, the Personal Accounts Scheme potentially leaves itself open to complaints from beneficiaries of members who have failed to keep their nomination form up-to-date.

**Sacker & Partners LLP**  
**20 July 2009**