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Karen Bishop
HM Revenue & Customs

14 September 2021

By email to pensions.policy@hmrc.gov.uk

Dear Karen

Pension Scheme Pays reporting: information and notice deadlines

I am writing on behalf of the **Association of Consulting Actuaries (ACA)** to provide comments on the Draft legislation published on 20 July 2021, Pension Scheme Pays reporting: information and notice deadlines - GOV.UK (www.gov.uk), which will make changes to the mandatory Scheme Pays information and notice deadlines.

The ACA welcomes the opportunity to provide input and set out in the Appendix comments on the draft legislation and areas where we believe further guidance is required. These are set out in the Appendix.

Members of the ACA are all qualified actuaries – mainly Fellows of the Institute and Faculty of Actuaries. All actuarial advice given by our members is subject to the Actuaries' Code. Members provide advice to thousands of employers and pension schemes – with total assets exceeding £1 trillion – including most of the country's largest schemes – and increasingly consulting actuaries are now involved in a wide range of additional areas.

We are therefore responding in the capacity of a representative body for professional advisors who provide advice to occupational pension schemes, including the experience we have from some of our member firms providing administration services to such schemes (particularly private sector).

We would be happy to discuss this matter further. Please contact me on 020 7432 6621 or karen.goldschmidt@lcp.uk.com

Yours sincerely

Karen Goldschmidt FIA, Chair of the Pensions Taxation Committee
On behalf of the Association of Consulting Actuaries Limited

Appendix from the Association of Consulting Actuaries

Comments on the draft legislation

Our observations on the draft legislation are set out below.

1) The draft legislation shortens timescales for payment for some mandatory Scheme Pays elections

At present if an individual wants to use mandatory Scheme Pays then they must notify their scheme before 31 July in the year following the end of the relevant tax year. The scheme administrator then reports and pays the Annual Allowance (AA) charge to HMRC via its Accounting for Tax return (AFT) for no later than the quarter ending 31 December. The AFT for the quarter ending 31 December needs to be delivered to HMRC within 45 days of the quarter end, ie by 14 February. Taking the 2022/23 tax year as an example, the deadline for payment would be 14 February 2025.

Our understanding of the draft legislation is that it amends the deadline for reporting and making payments to HMRC for all Scheme Pays elections, including 'normal' Scheme Pays elections (ie where there has not been a 'retrospective change of facts' – to use the terminology in the policy paper). For many such cases, the deadline will be earlier than would have been required under the current rules.

We illustrate this point with an example of an individual who has an AA charge in the 2022/23 tax year:

- the individual submits a mandatory Scheme Pays election to the administrator on 31 March 2024 (which is well in advance of the 31 July deadline).
- under FA04 254(7A) as amended by subsection 4 of the draft legislation the administrator would need to report the AA charge to HMRC in the AFT for the quarter ending 30 June 2024 with payment being made before 14 August 2024, which is six months earlier than the current rules require.

We do not believe that the easements for revised statements should lead to shorter deadlines for 'normal' Scheme Pays elections (which will make up the majority of mandatory Scheme Pays elections). We believe that this may be an unintended consequence, particularly as the policy paper only mentions that the measure "extends the reporting and payment deadlines".

2) Additional regulatory changes are needed to trigger the provision of new or revised information

New section 237BA(3) sets out when new subsection (5) applies, in particular when "the scheme administrator is required to give the individual the information by regulations under section 251". Our understanding is that the intention here is that a new provision under section 251 will trigger a requirement for administrators to issue a new or revised pension savings statement to individuals where their Annual Allowance charge has changed due to a 'retrospective change of facts'.

You confirmed in email correspondence that there are regulatory changes needed to section 251 in order to trigger such provision of a new or revised pension savings statement. You have indicated that there will be a technical consultation on the draft legislation and we look forward to seeing this in due course. This does limit our ability to comment fully on the operation of the draft clauses.

We ask that the changes to section 251 (and its supporting regulations) are drafted in a way to avoid ambiguity as to what the trigger is. For example, the changes need to be clear about what is required for both new and revised pension savings statements following a 'retrospective change in facts'.

We also ask that care is taken so that the changes to section 251 (and its supporting regulations) do not inadvertently sit in conflict with the guidance set out in HMRC's Guaranteed Minimum Pension

[(GMP) equalisation newsletter - February 2020 - GOV.UK (www.gov.uk)] . In particular, the newsletter says that "there is no need for schemes to revisit pension input amount calculations done in the past for changes to implement GMP equalisation [where schemes use a dual record keeping approach]" – which we understand reflects HMRC's reading that GMP equalisation by dual record method is not a 'retrospective change in facts'. This is important guidance, particularly as many schemes are yet to implement GMP equalisation and we already expect equalisation will be a complex process for schemes.

3) Individuals who have started receiving their pension benefits do not benefit from the extension to the Scheme Pays deadlines

If an individual wishes to use mandatory Scheme Pays then they must notify the scheme administrator before becoming entitled to their benefits.

In the example of an individual retiring and then being subject to a 'retrospective change of facts' causing them to have an AA charge for an earlier tax year (when there had previously been no AA charge for that year), it would be helpful if you could confirm whether the individual will be able to use mandatory Scheme Pays. This would appear to require further changes in legislation (within s237B(6)).

This situation could arise often in practice, especially given the new measure can be used up to six years after the relevant tax year. We note that voluntary Scheme Pays could be used in these circumstances, although not all pension schemes would allow this (and if used, it will count as late payment of tax in relation to the relevant tax year). We question whether this is fair as, by definition, the member could not have been aware of this 'retrospective change of facts' at the time.

4) Possible issues with late notification

We note that the deadline for the scheme administrator to provide the individual with revised information could in some cases be the same deadline (or only shortly before) the deadline the member has to submit a new Scheme Pays election.

Using the 2022/23 tax year as an example:

- if there has been a 'retrospective change of facts' then under new section 237BA(4) the administrator could provide revised information to an individual on 5 April 2029, which is within six years of the period beginning at the end of the tax year in question.
- in order to use mandatory Scheme Pays under new section 237BA(5)(b) the individual would need to make their election on 5 April 2029, which leaves them almost no time to do so and therefore the opportunity to make an election could be lost.

Areas where additional guidance would be helpful

There are a number of areas where we would appreciate guidance about how the draft legislation will be applied in practice.

1) Definition of 'retrospective change of facts'

The policy paper states that under the draft legislation the scheme will be required to pay the AA charge if it arises because of a 'retrospective change of facts' (the policy paper refers to "members who have retrospective increases in UK tax relieved pension contributions or entitlement greater than the annual allowance in a tax year").

We would appreciate clarity on which circumstances could be considered to be a retrospective change of facts. For example:

- can the legislation be assumed to apply where a member's pension input amount has changed due to the scheme having the right facts all along but making a calculation error in one or more earlier years?
- can the legislation be assumed to apply where a member's pension input amount has changed due to a change in data (in particular, this is relevant for the many private sector schemes that are currently going through the GMP rectification process)?

For completeness we note that this definition clearly is not intended for changes that pension schemes operate on a retrospective basis but which under tax law are deemed to happen in real time, for example backdated pay rises (as described in PTM053800).

2) Interaction with the existing 4-year statutory time limit for varying previous Scheme Pays elections

Individuals can already amend a mandatory Scheme Pays election, once made, up to four years after the end of the relevant tax year if "the member's liability to [the charge] changes after submission of the notice" (SI2011/1793 para 4). (We would comment that the precise conditions under which this provision is triggered are not clear to us, in particular, how they compare with the 'retrospective change of facts' definition being introduced under the new regime.) To do this, individuals must notify their scheme of the change before the 31 July after the four years following the end of the relevant tax year.

If the individual's tax charge has increased then the scheme must report and pay the additional charge to HMRC in their AFT in respect of the following quarter e.g. if notification is received on 31 August 2021 then this is included in the administrator's AFT for the quarter ending 31 December 2021 and provided, with payment, to HMRC by 14 February 2022. The individual would also need to amend their self-assessment tax return.

We are not clear on whether the new measure can be used where mandatory Scheme Pays is already being used for a particular previous tax year (and if this is the case then what is the interaction with the process described above) or whether it can only be used to make a new election. We would appreciate clarification.

If it is the former, then we have some specific questions on how this would work in practice and illustrate our questions with an example below.

Where individuals have a revised tax charge (rather than a new tax charge) from a retrospective change in facts, we are seeking clarity on how this additional amount should be treated, in particular where the additional amount by itself does not meet the criteria for mandatory Scheme Pays but would have done so when combined with the original charge (which by definition would have satisfied the mandatory Scheme Pays criteria).

To give an example, consider a member who incurred an AA tax charge of £3,000, which met the relevant conditions and was settled using mandatory Scheme Pays. In a later tax year this member receives, following a retrospective change in facts, an updated pension savings statement which would have resulted in an AA tax charge of £4,000 (ie an additional £1,000 over what has been settled previously). For such a member, if the updated information is received:

- Between four and six years after the end of the tax year. The ability to amend the original mandatory Scheme Pays election is not available. Is the member able to use mandatory Scheme Pays for the additional amount on the basis that under Section 237B(1)(a) their liability for the tax year is greater than £2,000? Or should this provision be read as referring to the additional liability only, in which case mandatory Scheme Pays could not be used for this member?

- Between zero and four years after the end of the tax year. We presume that the member can choose to either vary his original election or use, depending on the answer to the above question, mandatory Scheme Pays to settle the additional charge.

A similar question arises where a member has previously met the original tax charge through voluntary Scheme Pays (for example where the criteria for mandatory Scheme Pays were not met) and where the additional charge in isolation wouldn't qualify for mandatory Scheme Pays, but the aggregate charge would do so.

An alternative interpretation is that the new measure could only be used where mandatory Scheme Pays is not already being used in respect of the relevant previous tax year. In this case, we would ask that the usual time limit for varying previous Scheme Pays elections is increased from four to six years to be consistent with the new measure and to achieve consistency across individuals who have been subject to a 'retrospective change of facts'.

3) Implications for voluntary Scheme Pays

We note that the measure does not apply to individuals who are not eligible to use mandatory Scheme Pays for any or all of their charge and who therefore have to rely (partially or wholly) on voluntary Scheme Pays. This will cover a significant number of individuals including those who have a tapered Annual Allowance or who have Pension Input Amount across more than one scheme.

The effective deadline for submitting a voluntary Scheme Pays election is 31 January after the end of the relevant tax year, coinciding with the self-assessment tax return form deadline. This is because late notifications can attract interest or penalties. We would ask HMRC to consider waiving interest and penalties where a voluntary Scheme Pays election is made late, due to a retrospective change of facts.

4) Additional guidance for members

Whilst this is outside of the scope of the legislation we are commenting on, we note that individuals may require additional guidance related to these changes. In particular, relating to any retrospective changes that they need to make to their self-assessment tax return.

In forming our response to this consultation, we note the comment we made in our response to a consultation on the McCloud provisions, which sets out our understanding of the tax reporting requirements generally, as context for the above comments:

> *"We would also request clarification of what is referred to as the nature of the "usual 4-year statutory time limit" so that the situation is clearer for those outside the consultation target members. We understand that both HMRC and the taxpayer can amend a return at any time up to four years after the end of the year of assessment to which it relates, to correct for any further or better information that comes to light or to correct any misstatement of tax due. Beyond that time limit, HMRC may seek to amend a return for up to six years where there has been a loss of tax through carelessness by the person being assessed, and up to twenty years where the loss was brought about deliberately by the person. We interpret the guidance's reference to be to a statement / easement, that in this case only, and not for other situations, not only do they expect members not to report "new" tax charges from before 4 years, but they will specifically classify such omission to report as not being a careless, let alone a deliberate omission. While they may take this view in other cases, the guidance is not a statement of blanket reassurance."*

We would be happy to discuss this matter further. Please contact Karen Goldschmidt on 020 7432 6621 or karen.goldschmidt@lcp.uk.com