

Business Update: Pensions: Regulatory Overview

Background

The process of restructuring the Isle of Man's regulatory landscape concerning pensions commenced with the introduction of the Retirement Benefit Schemes Act 2000 ("the Act"). 1 November 2004 represented the beginning of the end of this process. Accordingly, compliance with the regulations introduced on 1 November should be added to the New Year resolutions of any Isle of Man employer operating a retirement benefit scheme. Before outlining the significance of the new regulations, it may be helpful to touch upon the background of the Act and its objectives.

The thrust of the Act is twofold, dividing conceptually into regulatory and commercial purposes. At a regulatory level, it aims to provide scheme members with additional protection. The mainstays of this protection are: the introduction of a pension scheme regulator (the Insurance and Pensions Authority ("IPA")); registration of schemes and scheme administrators; 'fit and proper' requirements for administrators and trustees; improved information flow from the schemes to the regulator; professional adviser and whistle blowing requirements; and the introduction of an independent element to trustee boards.

At a commercial ("Isle of Man plc") level, the Act was intended to provide a platform for the Isle of Man's administrators to promote their expertise to the international pensions market. This innovative proposal targets international pension schemes available to employees who are either based in low tax jurisdictions and/or whose employment may require them to work in a variety of tax regimes. The advantage to employers is the provision of global pension benefits under a single regulatory regime. The advantage to employees is the administration of their benefits in an economically stable and well regulated jurisdiction.

Domestic Regulations

The form of the Act is not dissimilar to the approach taken by the Financial Supervision Act 1988 (in relation to collective investment schemes) in that its centrepiece is a restriction on the operation of retirement benefit schemes in or from the Isle of Man unless such schemes are appropriately authorised (or exempted from authorisation). A precondition for obtaining authorisation is good administration. Authorisation is underpinned by the requirement for scheme administrators to be registered with the IPA (such registration turning on the administrator being "fit and proper" for the job in hand) and the specific management and reporting criteria set out under the Act. Failure to comply with the Act is an offence.

For domestic schemes the full effect of the Act will become mandatory as from 1 May 2005. However, as from 1 November 2004, regulations came into force enabling domestic schemes to apply for and receive the authorisation that must be in place as from 1 May 2005. This means schemes now have less than five months to review and understand the implications of the Act and the domestic regulations and, to the extent required, implement procedures to obtain authorisation by 1 May 2005. In this regard, the main areas of concern are as follows.

Authorisation (application)

It is an offence to operate a retirement benefit scheme in or from the Isle of Man unless the scheme is registered as an authorised, recognised or permitted scheme under the Act. Leaving the latter two categories aside (they are dealt with below), the application for authorisation is the responsibility of the scheme's trustees and must be made in the form dictated by the IPA. The application forms for authorisation, as well as the relevant legislation, can be found on the IPA's website www.gov.im/ipa.

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Authorisation (criteria)

A scheme will only be authorised if it satisfies the Act's criteria. In this regard, the scheme must, amongst other things, have an appropriately registered administrator, have fit and proper trustee(s), be under irrevocable trust and have a trustee board that satisfies the independent trustee requirements (see below). Where the scheme is an occupational scheme (i.e. an employer contributes to it and it provides tax approvable benefits) there are additional requirements relating to, amongst other things, scheme information and refunds of employee contributions. Once authorised, limited particulars of the scheme are entered on a public register.

Registration (administrators and trustees)

The application forms, fees and process for registering as an administrator can also be found on the IPA's website. An administrator is the person responsible for the management of the scheme. As well as satisfying the IPA that they are fit and proper to act in that capacity, the administrator must carry on business in or from within the Isle of Man. It should be noted that provision is made for non-professionals to act as administrators. The latter are referred to as 'in-house administrators' and are commonly a participating employer or trustee of the scheme.

Professional Advisers

The Act requires certain advisers be appointed in relation to schemes, namely: an auditor, investment manager and actuary (although the latter is not required for money purchase schemes). The mandatory appointment of these advisers is intended to increase member protection. Member protection is further pursued by the whistle blower provisions under the Act that require any of the above and/or the trustees or administrator to give a written report to the IPA where they have reasonable cause to believe that any duty relevant to the administration of the scheme has been or is not being complied with and that the failure to comply is likely to be of material significance in the exercise of the IPA's functions. It is worth noting that the whistle blower provisions do not extend to the legal adviser to the scheme and this may provide trustees, who are unsure as to their position under the Act, with a source of advice that does not itself trigger a notification to the IPA.

Alterations

A further and significant provision that comes into force for domestic schemes is section 18 of the Act. I have termed this "the transparency provision" as it enables the IPA to be kept fully informed of all material events that unfold in a scheme. This is a potentially significant development in that it includes any proposal to amend a scheme, alter the trustee body or remove or appoint new professional advisers and any such proposal will not take effect until the IPA has approved such alteration (subject to rejection or automatic approval one month after the date the notice of the alteration was submitted).

Independent Trustee

A requirement of authorisation is that each trustee board should have a trustee independent of the scheme's participating employer(s) (or where the trustee is a single corporation, a director independent of such employer(s)). However, the regulations introduced on 1 November 2004 include within the definition of "independent", a trustee (or director) that has been nominated by the active members of the scheme in accordance with specified statutory requirements. The exceptions to this requirement relate to schemes where the trustee board is the entire membership of the scheme.

Miscellaneous

There are a number of other miscellaneous provisions that need consideration and these relate to a range of substantive requirements from the form of scheme governing documentation (such as the avoidance of exclusion clauses) to the form and content of annual reports and accounts etc.

Recognised and Permitted Schemes

As consideration of the domestic regulations is triggered by Isle of Man scheme membership, schemes operated outside the Isle of Man are also subject to the Act. However, provisions were introduced on 1 November 2004 to allow relief for schemes operated in recognised jurisdictions such as the UK and Ireland (recognised schemes). There are also de minimis provisions for schemes with low numbers of Isle of Man participants (permitted schemes).

In summary, 1 November 2004 saw the introduction of additional regulatory considerations for trustees, scheme administrators and advisers alike. Many well run schemes should already be in compliance with the spirit of the administrative and reporting requirements. However, there are additional obligations that will need specific consideration, particularly in relation to scheme authorisations, amendments and management.

Whilst only a brief overview of key issues, I hope the above has raised awareness of the Act's implications pursuant to the introduction of the domestic regulations. It should be noted that section 47 of the Act provides a defence in criminal proceedings under the Act where a party can establish that it took reasonable precautions and exercised all due diligence to avoid the commission of an offence under the Act. Following 1 November 2004, trustees, administrators and professional advisers would be well advised to review their obligations under the Act. Taking legal advice / undertaking a compliance audit sooner rather than later should avoid any unwanted and unforeseen repercussions that may befall schemes as from 1 May 2005.

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