From 1 June 2022, both the Trustees of occupational pension schemes and FCA regulated providers are required to provide members and beneficiaries with a 'stronger nudge' to take guidance from Pension Wise before they are able to access or transfer their defined contribution pension savings.

For occupational schemes these new requirements arise under *The Occupational and Personal Pension Schemes (Disclosure of Information) (Requirements to Refer Members to Guidance etc) (Amendment) Regulations 2022* ('the Regulations') whilst for FCA regulated providers, they arise under changes to Section 19.7 of the FCA's Conduct of Business sourcebook (COBS).

Perhaps unsurprisingly, these new requirements have generated a number of queries to the Aries Help Desk, in terms of how and when they apply. The new requirements are certainly complex and it does not help that, whilst the requirements of the Regulations and the COBS are similar, they are not entirely identical.

For this Aries Insight, we will look at some of the differences between the provisions of the Regulations and the COBS.

When may 'stronger nudge' requirements apply?

Occupational Schemes

An occupational scheme must give members and survivors of members (together known as a 'relevant beneficiary' – later referred to below as 'an individual') a stronger nudge when, on or after 1 June 2022, the scheme receives an application or a communication in respect of an application, from the relevant beneficiary, or their representative, to transfer or to start to receive any flexible benefits under the scheme.

FCA Regulated Providers

FCA regulated providers must give policyholders and survivors of policyholders (together known as 'retail clients' – also later referred to below as an individual) a stronger nudge when, on or after 1 June 2022, the retail client has decided in principle to take any of the following actions in respect of their defined contribution ('DC') pension savings under a personal pension plan, a stakeholder pension scheme or an occupational pension scheme:

- to buy a pension decumulation product (e.g. an annuity);

- to vary their personal pension scheme, stakeholder scheme, FSAVC retirement annuity contract or pension buy-out contract, to enable the individual to:

  (a) access their pension savings using a drawdown pension, or

  (b) elect to take any uncrystallised funds pension lump sum payment(s) (UFPLS);

- to take any UFPLS(s);

- to access their pension savings using a drawdown product;

- to withdraw their pension savings in full, reducing the value of their savings to zero; or

- to transfer their pension savings to another pension scheme for the purpose of taking any of the actions listed above.

Aries Comment

The FCA requirements here appear to be more prescriptive, however the broad thrust is much the same.

It is worth noting that, under both regimes, the taking of a trivial commutation lump sum or a "small pot commutation" from flexible benefits / defined contribution savings would be caught by the new requirements.

Exclusions from the 'stronger nudge' requirements

Occupational Schemes

An occupational scheme is not required to provide the stronger nudge where the individual is intending to transfer their flexible benefits and:

- the individual is aged under 50; or

- receiving flexible benefits is not the purpose, or one of the purposes, of the application; or

- the Trustees have received from the individual (or someone authorised to act on their behalf) confirmation that the individual has been referred to Pension Wise guidance by the Trustees or managers of another pension scheme and the individual has either received or opted out of receiving that guidance; or

- the individual is transferring to another pension arrangement, where the provider of that other pension arrangement will be required, under the new FCA requirements, to provide the stronger nudge.

FCA Regulated Providers

For FCA regulated providers, there are fewer exemptions from the stronger nudge requirements. The COBS confirms that the requirements do not apply where:

- the provider is (only) giving the individual regulated advice on the options available to them in terms of accessing their pension savings; or

- the provider has already provided the individual with appropriate retirement risk warnings in relation to their decision to access their pension savings and the provider has reasonable grounds to believe that the retirement risk warnings are still appropriate for the individual.

In addition, a provider may assume that a retail client who is 50 years of age or over who decides to transfer their rights to another pension scheme is doing so for the purpose of taking one of the actions that will trigger the stronger nudge.

Although not explicitly stated in the COBS, this would appear to imply that the new requirements do **not** apply where an individual aged under 50 is seeking to transfer their benefits. This would mirror the occupational scheme exemption on this point.

Finally here, it is worth noting that the FCA Policy Statement on this area states that, in the context of transfers, the new requirements are limited to DC to DC transfers, rather than defined benefit (DB) to DC transfers. This may be particularly relevant where a member holds a DB style Section 32 policy and is seeking to transfer.

Aries Comment

The exemption for occupational schemes where the individual is transferring to a FCA regulated provider who will have to deliver the stronger nudge is very welcome. There had been a concern that individuals would receive multiple nudges from both a transferring scheme and a receiving FCA regulated provider, leading to 'nudge fatigue' and reenforcing the perception that pension providers tend to stand in the way of members actually transferring or accessing their benefits.

The exemption for occupational schemes where the individual has already been referred to Pension Wise guidance does not extend to FCA regulated providers. The FCA Policy Statement confirms that "*We continue to consider that the nudge should be delivered to all consumers. This includes those who have previously received guidance or advice as it may still be beneficial to these consumers*".

For occupational schemes, there is an explicit exemption from the new requirements where a member is transferring their flexible benefits but is not doing so for the purpose of accessing those benefits. Whilst the COBS does not specifically mention this exemption, the above FCA Policy Statement does say that:

> "*our age* [50 cut-off] *proxy is guidance and may be applied where the reason for a transfer is not known… . We recognise that if firms take a blanket approach and nudge all consumers aged 50+, this may mean that consumers are nudged when they are transferring for reasons other than to access their savings. … [P]roviders can choose to limit the scope of the nudge by taking steps to establish the reasons consumers are transferring*".

This suggests that FCA regulated providers are also exempt from the new requirements where the individual is transferring for reasons other than to access their benefits (although the provider may have to establish the individual's intentions, which may lead to push-back from the individual).

Who delivers the stronger nudge?

Occupational Schemes

It is clear that the stronger nudge must be delivered by the scheme under which the individual holds the flexible benefits (unless, of course, any of the exemptions above apply).

FCA Regulated Providers

Where the individual is transferring from one FCA regulated provider to another, the position is a little more complicated. Under the original proposals, the FCA suggested that the stronger nudge should be delivered by whichever provider (the transferring provider or the receiving provider) the individual contacts first.

Under the final rules, however, this has changed, so that both providers will be required to deliver a stronger nudge. As explained in the FCA Policy Statement "*… consumers can contact the receiving or ceding provider in order to transfer their savings and we want the requirements to be triggered at the earliest point in the consumer journey. While this means some consumers may receive multiple nudges, consumers can opt out of subsequent nudges in relation to the same transaction*".

Aries Comment

The requirement that both FCA regulated providers involved in a transfer are required to give the stronger nudge may be a very pragmatic solution to the practical difficulties with the initial proposals (which would have required the providers involved having to establish which of them the individual contacted first). It does, however, still leave open the issue of 'nudge fatigue' with the individual having to opt out of one of the nudges (assuming, of course, that they do not wish to attend two separate guidance sessions in respect of the same transaction).

Opting out of the stronger nudge

Occupational Schemes

For an occupational scheme, an individual can only opt out of taking Pension Wise guidance via a communication made solely for the purpose of opting out of the guidance (so adding an "*I opt out of the guidance*" tick-box on an application form is out of the question), unless the Trustees have received from the individual (or someone authorised to act on their behalf) confirmation, either verbally or in writing, that:

1) the individual has received either:

   i) appropriate pensions guidance (i.e. guidance from Pension Wise), or

   ii) regulated financial guidance in connection with their application which has been provided by a financial adviser regulated and authorised by the FCA to provide such advice,

   within the 12 month period (excluding the date of receipt) before the date on which the Trustees received the individual's application to transfer or access their flexible benefits under the scheme; or

2) the individual qualifies for a serious ill health lump sum; or

3) the individual's application is solely to transfer any of their rights to flexible benefits accrued under the scheme.

FCA Regulated Providers

For FCA regulated providers, the opt-out provisions are more relaxed. Whilst the COBS is virtually silent on opting out, the Policy Statement confirms that "*The main difference between our requirements and those that DWP consulted on* [which are applicable to occupational schemes], *relates to how consumers can opt out of guidance. Our rules allow consumers to opt out in the same communication with their provider as that used to initiate contact*".

Having said that, however, the COBS does require that, where an individual opts out of taking Pension Wise guidance "*if the retail client states that the reason for opting out … is because they already received pensions guidance prior to approaching the firm, the firm must explain to the retail client that they may still benefit from receiving the guidance again if their personal circumstances, or the value of their pensions savings, have significantly changed such that the different options described to the retail client in the guidance may be of different significance and relevance to them than when they previously received the guidance*".

Aries Comment

The opting out provisions for occupational schemes are somewhat restrictive and schemes will need to ensure that any opt out is provided in a separate communication, unless any of the exclusions to this requirement apply.

Whilst the opting out process for FCA regulated providers is somewhat easier, those providers may still need to suggest that the individual does take the guidance, even after they have opted out. Occupational schemes do not need to consider taking this extra step.

Record Keeping

Occupational Schemes

Occupational schemes must keep records of their having given a stronger nudge to affected individuals. Specifically, the scheme must maintain records of:

- an individual having received Pension Wise guidance;

- an individual having opted out of taking Pension Wise guidance; and

- the receipt of any confirmation that the individual does not have to opt out of taking Pension Wise guidance in a separate communication.

FCA Regulated Providers

For FCA regulated providers, the record keeping requirements are slightly different. The provider must record whether the individual has:

- received the retirement risk warnings (a separate part of the FCA requirements),

- received regulated advice (i.e. advice from a FCA authorised adviser),

- received Pension Wise guidance, or

- opted out of taking Pension Wise guidance.

Note that, if an individual confirms to the provider that they have already received Pension Wise guidance or regulated advice before approaching the provider and that they therefore do not need to receive Pension Wise guidance, this should be recorded as the individual having received Pension Wise guidance or regulated advice, rather than as an opt out.

Aries Comment

All schemes and providers will need to ensure that they maintain full and correct records for all cases where a stronger nudge is required. Whilst the actual record keeping requirements for occupational schemes are different from those for FCA regulated providers, this stems from the differences in the way that the stronger nudge requirements, including the opt out provisions, apply under the two regimes.

Our Observations

Whilst the new stronger nudge requirements are to be welcomed, it remains to be seen how well they will actually work in practice and whether they achieve the intended goal of more individuals taking up the Pension Wise guidance. As the FCA Policy Statement notes "*The latest retirement income data show that only 14% of consumers accessing a DC pension pot for the first time used Pension Wise*". It will be interesting to see how this figure changes now that the new requirements are in force.

It is somewhat inconvenient that the requirements for occupational schemes and FCA regulated providers are not fully aligned. Any provider that operates under both regimes will need to ensure that their procedures reflect the requirements for the particular individual they are dealing with.

It is also worth noting here that, as illustrated in several places above, to fully understand the practical application of the FCA's requirements, it is often necessary to consider the Policy Statement rather than looking at the changes to the COBS in isolation. Whilst, in some ways, this may not appear to be very different from the way in which the Regulations for occupational schemes are supported by an Explanatory Memorandum and further guidance from the Pensions Regulator, at least with the Regulations, where there is any conflict between the wording of those Regulations and the supporting guidance, it is clear that the Regulations themselves must prevail. The position where there is any conflict between the FCA's Policy Statement and the actual COBS rules may not be quite so clear cut.

Finally, there is already early evidence that some members who are being referred to Money Helper as a result of an 'Amber Flag' being identified as part of a transfer request are accidentally booking themselves a Pension Wise guidance session instead. Given the similarity of the websites, this is not entirely surprising. However, schemes and providers may wish to consider how they communicate with members to avoid this sort of confusion, which will otherwise lead to delayed transfers and disgruntled members.

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