

Jason Yianni
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Friday 15 April 2011

Dear Mr. Yianni,

FairPensions welcomes this opportunity to respond to DWP's consultation, *'Preparing for automatic enrolment: Regulatory differences between occupational and workplace personal pensions'*. FairPensions (Fairshare Educational Foundation) is a registered charity established to promote responsible investment practices by pension providers and fund managers. FairPensions champions greater transparency and accountability to the millions of people whose long-term savings are managed by institutional investors and other professional agents. FairPensions believes that responsible investment helps to safeguard investments as well as securing environmental and social benefits. We are a member organisation and count amongst our members a growing number of globally recognised NGOs and trade unions, as well as over 8000 individual supporters.

FairPensions has recently produced a report, *'Protecting our Best Interests: Rediscovering Fiduciary Obligation'*, which explores the future of pension providers' fiduciary duties to pension savers. The report includes recommendations for policymakers and regulators, including DWP, and for pension providers themselves. A copy of the report is enclosed. Since this report sets out our views on a number of issues relevant to this consultation, and is the outcome of a year-long research process, the report forms the basis for our response. A copy of our response to TPR's consultation on DC regulation is also attached. This covers many similar issues to those we set out below.

We make no comment on the questions regarding short service refunds and trivial commutation rules since these lie outside our area of expertise. Below we respond to the questions on disclosure requirements and other regulatory differences.



Disclosure requirements

Question 6: Are specific areas of the disclosure requirements likely to cause difficulties under automatic enrolment? Are the existing differences appropriate due to the nature of the scheme?

Question 7: Do you have any suggestions for resolving any of the problems identified?

FairPensions responded to the government's 2009 consultation on simplification of disclosure requirements, and has a history of engagement on issues of disclosure and transparency. Part of our role entails assisting our supporters to hold their funds to account and to access information about their fund's policies and practices.

We do not believe that the distinction between trust-based and contract-based arrangements justifies discrepancies in disclosure requirements. As the consultation paper points out at paragraph 31, from the member's point of view, the relationship at work is similar in both cases. With the increasing shift to DC arrangements, members increasingly bear the risk on their pension investments. It is therefore an important principle that they should have the necessary information either to make meaningful decisions, or to hold their agents to account for decisions made on their behalf. Indeed, evidence suggests that high quality communication and engagement can help overcome the mistrust that puts many off from contributing to a pension at all, thereby assisting the government's overriding objective of encouraging people to save.

As such, we support attempts to consolidate and harmonise existing disclosure requirements as far as possible. In any such process, the presumption should be that any regulatory differences will be 'levelled up' rather than 'levelled down', in order to protect members' right to information. These issues are considered in depth in chapter 5 of the enclosed report.

Indeed, based on our supporters' negative experiences accessing information about their funds' investments and exercise of ownership rights, we have argued that in some areas, existing disclosure requirements should be extended. In 2010, over 1,500 of our supporters contacted Pensions Minister Steve Webb asking for stronger rights to know what their fund is doing to manage risks to their money, including environmental, social and governance (ESG) risks. We note that in a parliamentary debate on this subject in December 2010, Steve Webb accepted that "*many shareholders do not just want information on a boilerplate policy that might be cut and pasted from somewhere else; they want more specific information on how the scheme approaches its position.*"¹ More recently, we assisted with the drafting of amendments to the Pensions Bill 2011 on this subject, and were encouraged by Lord Freud's response that "*it is important for pension funds and their investment managers to be transparent*" about such issues and that the Government remains "*open to suggestions on how to improve this process*".²

¹ Hansard, HC 14 Dec 2010, c887

² Hansard, HL 15 Mar 2011, cGC28

Other regulatory differences

Question 8: Once automatic enrolment is introduced, what other regulatory differences exist between workplace personal pensions and occupational pension schemes which could influence behaviour or affect the workplace pension reform objectives of increasing persistent pension savings?

Question 9: Do you have suggestions for resolving any of the issues you have identified?

As the consultation paper notes, one of the key regulatory differences between trust-based occupational pension schemes and contract-based workplace personal pensions is the role of the employer. In contract-based arrangements, the employer has no formal legal duties since the contractual relationship is between provider and saver. There is perhaps a danger that this could lead some employers to opt for contract-based arrangements because they are perceived to be 'low-effort'.

It is questionable whether this would be in the interests of members or contribute to the government's objective of increasing persistent pension saving. Evidence suggests that charges tend to be higher in contract-based arrangements, and that high charges may be one of the factors behind popular mistrust of financial products.³ There is also the danger that a shift to contract-based arrangements may create a 'governance gap': as Baroness Drake observed in a recent parliamentary debate, it is unclear "*who in a contract-based provision world should accept the fiduciary responsibility of designing the default fund or deciding how investment governance should be discharged... the guidance and regulatory framework must catch up with the shift from trust-based to contract-based provision.*"⁴ In the absence of trustees, there is nobody charged with making decisions in the exclusive interests of members, and the regulatory requirements applying to these providers are less stringent than fiduciary duties. For instance, the requirements to manage and avoid conflicts of interest are much weaker. In addition, as the paper notes at paragraph 36, regulators have focussed on 'point of sale' rather than on continuing investment governance and culture – although this is beginning to change in the wake of the financial crisis.

We would suggest that the solution to this potential problem is two-fold. Firstly, DWP should work with HMT, BIS and the relevant regulators to clarify the extent to which fiduciary obligations apply to contract-based providers and other commercial agents. In principle, we believe it is at least possible that contract-based providers are in fact subject to fiduciary duties under common law – but there is a paucity of legal authority and regulatory guidance in this area, and most such providers do not appear to regard themselves as fiduciaries.

Secondly, DWP could explore ways to align the role of the employer more closely between trust- and contract-based workplace arrangements. For instance, some employers are voluntarily choosing to replicate trust-based governance structures in contract-based arrangements by establishing 'management committees'. Anecdotally we hear that such structures are felt to materially enhance the quality of governance. DWP could consider mandating them, or at the very least providing some guidance on the role employers might play in contract-based arrangements. Whilst we appreciate the government's desire to minimise burdens on business, the priority must be ensuring adequate governance to

³ TPR, 2010, 'Enabling good member outcomes in work-based pension provision', p26-27

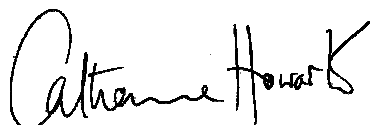
⁴ Hansard HL 15 Mar 2011, Col GC27

make individuals feel confident entrusting their money to a pension provider. As Baroness Drake has noted, *“If you transfer responsibility to the individual, politically governments have a responsibility to ensure that governance frameworks are up to the job.”*⁵ Requiring some kind of governance structure to be in place would not constitute a burden any greater than that required by a trust-based arrangement. Indeed, the rationale for such a move would be precisely to avoid the kind of perverse regulatory differences this consultation is concerned with. Moreover, businesses who felt genuinely unable to take on this responsibility would always have the option of NEST, where robust governance structures, a commitment to transparency and high quality member engagement are in place.

These issues are discussed in more depth, with extensive supporting evidence, in chapter 2 of the enclosed report, particularly pages 47-52.

We would welcome the opportunity to meet with you to discuss any of the issues raised in this response.

Yours sincerely,

A handwritten signature in black ink that reads "Catherine Howarth". The signature is written in a cursive style with a large initial 'C' and a distinct 'H'.

Catherine Howarth
Chief Executive, FairPensions

⁵ Hansard HL 15 Mar 2011, Col GC27