

Chapter 12

Guidance for persons running or advising on personal pension schemes

12.2 Establishing, operating or winding up a personal pension scheme

Q2. What is a personal pension scheme for the purposes of this regulated activity?

The term is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*) as any scheme other than an *occupational pension scheme* (OPS) or a *stakeholder pension scheme* that is to provide benefits for people:

- (1) on retirement; or
- (2) on reaching a particular age; or
- (3) on termination of service in an employment.

Although the definition does not expressly say so, it is, in the FCA's view, clear from the context in which the term is applied, that such a scheme will be one the sole or principal purpose of which is to provide benefits to members of the scheme upon their reaching a pensionable age. This will typically include pension schemes that are intended to be registered with The Pensions Regulator and to be eligible for tax relief relating to pension schemes. It will also include other types of pension schemes such as qualifying recognised overseas pension schemes (QROPSs) that are not occupational pension schemes.

This will include *self-invested personal pension schemes* ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers, contractual scheme managers or deposit takers (including free-standing voluntary contribution schemes).

To determine whether a pension scheme is a personal pension scheme it is first necessary to determine whether it is an OPS. An OPS is defined in the Regulated Activities Order by reference to an OPS as defined in section 1 of the Pensions Schemes Act 1993 but without including paragraph (b) of that section. This means that a pension scheme is an OPS if, broadly speaking, it is a pension scheme:

- that is established:
 - for the purpose of providing benefits to, or in respect of, people with service in employments of a description; or
 - for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

by persons who are, or who include, employees of that kind or their employers, or persons representing the interests of either, at the time the scheme is established; or

- that is prescribed or is of a prescribed description (such as a scheme that is prescribed under the Pension Schemes (Categories) Regulations 2005 (SI 2005/2401)).

The effect of omitting paragraph (b) from the Pensions Schemes Act definition of an OPS is that a pension scheme that would otherwise be an OPS but for the fact that its main administration takes place in another *EEA State* will be an OPS for the purposes of the Regulated Activities Order and this guidance.

Q3. What is involved in establishing a personal pension scheme?

The establisher of a *personal pension scheme* is the *person* responsible for putting in place the arrangements founding the scheme. With a trust-based scheme, this will usually be the person who executes the trust as provider. In a scheme established by deed poll, it will be the person who enters into the deed poll. There will usually only be one person who establishes the scheme. Any professional firms that they may employ to act as their agent (such as solicitors) would not be establishing the scheme. The establisher may also be the operator but need not be. An employer will not be establishing a personal pension scheme (such as a *group personal pension scheme*) purely as a result of them having chosen such a scheme to offer to their employees.

The activity of establishing a personal pension scheme ceases once the scheme is established. This means that persons who have established schemes prior to 6 April 2007 will not require authorisation for establishing a personal pension scheme unless they intend to establish a new scheme after that date.

Q4. What is involved in operating a personal pension scheme?

The 'operator' is the *person* responsible to the members for managing and administering the assets and income of, and the benefits payable under, the scheme in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. In this respect, the responsibilities that are placed under Part 4 of the Finance Act 2004 on a pension scheme administrator (as defined in section 270(1) of that Act) will mean that he is likely to be the operator of the scheme. In trust-based schemes, the trustees may act as scheme administrator or there may be a separate person who acts in that capacity. Where there are separate trustees, it may be the case that they are operating the scheme jointly with the scheme administrator by virtue of the responsibilities they assume under the trust deed for the management and administration of the scheme assets. However, in situations where the trustees' role is merely to act as a bare trustee holding the scheme assets, it is the scheme administrator who is likely to be the sole operator of the scheme. The scheme may be established by an *authorised person* who acts as a provider of investment products or services to the scheme. This does not make that person the operator of the scheme if, as a matter of fact, he has appointed another person to be responsible to the members for carrying out all the operator's functions as scheme administrator or as trustee, or both as the case may be. But a person to whom activities may be outsourced by the operator will not, thereby, become an operator of the scheme (see further guidance in Q6).

The fact that a member of a SIPP has the right to direct which investments are to be held for his benefit does not mean that he is to be regarded as operating the scheme as a result of exercising that right.

Q5. What is involved in winding up a personal pension scheme?

The *person* who winds-up a *personal pension scheme* will be the person who is responsible for putting in place the arrangements for bringing the scheme

to an end in a way that complies with the relevant provisions of the instrument that established the scheme and any relevant rules under pensions or tax legislation. This will, more often than not, be the operator of the scheme.

Q6. What is my position as an operator of a personal pension scheme if I delegate day-to-day functions such as administration of the scheme or the management or custody of the scheme assets to another person?

As explained in Q4, the operator of a *personal pension scheme* is the person who is responsible to the members of the scheme for ensuring that the scheme is operated in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. Provided he remains responsible to the members for such matters, he will remain the operator even though he may delegate or out-source the day-to-day carrying out of his functions as operator to another person. That other person will not become an operator of the scheme purely as a result of carrying out such functions on behalf of the operator. However, he may be carrying on other regulated activities in performing his delegated or out-sourced tasks (such as *arranging or managing investments*) in which case he will be subject to regulation for those activities.

Chapter 10.4 of PERG has general guidance about the circumstances in which persons who administer pension schemes on behalf of the operator or trustees may be carrying on a regulated activity including an *insurance distribution activity*.

Q7. As the operator of a personal pension scheme, is my position affected by whether the underlying property of the scheme is comprised of physical assets such as commercial property rather than investments such as shares or life policies?

No. It is the establishment, operation and winding up of the scheme that is regulated under the new activity - regardless of the type of assets the scheme will hold.

Q8. Will I need to be authorised for managing the assets of a personal pension scheme which is invested solely in physical assets such as commercial property on behalf of the operator?

No. Such assets will not become *designated investments*. However, the operator of the scheme will remain responsible for the management and administration of the assets as these are part of the regulated activity of operating the scheme.

Q9. Will I satisfy the 'by-way-of-business' test that is necessary for authorisation to be required?

The application of the by-way-of-business test to any particular *person* will always depend on that person's individual circumstances. A number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular *regulated activity* that is carried on.

In very broad terms, it is likely that any corporate body (including corporate trustees) that operates a *personal pension scheme* would be carrying on that activity by way of business. Chapter 10.5 of PERG has specific guidance about the limited circumstances in which employers may be likely to satisfy the by-way-of-business test when advising on or arranging pension benefits for their employees.

Q10. Can there be more than one person who operates a personal pension scheme?

Yes. For example, the *person* establishing a scheme may appoint a trustee and an administrator to operate the scheme jointly (see Q4). In this case, both the trustee and the administrator will need to be *authorised*. Or there could be two or more trustees who are jointly responsible for operating the scheme, in which case each will need to be *authorised* if they are doing so by way of business.

Q11. I am a trustee operating a self-invested personal pension scheme ('SIPP'). Can I rely on the various exclusions available to trustees for other regulated activities such as dealing in investments, managing investments and safeguarding and administering investments?

Yes, provided you are able to satisfy the conditions applicable to the exclusions. No changes were made to any of the exclusions as a result of the changes in regulatory scope that took effect on 6 April 2007. Guidance on the exclusions is given in Chapter 10 (Q23) of PERG.

Q12. Do the same principles apply to establishing, operating or winding up a stakeholder pension scheme?

Yes. In principle, the answers given to other questions apply equally to *stakeholder pension schemes*. Establishing, operating and winding up a stakeholder pension scheme are already regulated activities. Guidance on these activities is given in Chapter 10 (Q24 to Q28) of PERG.

Q13. Does the regulated activity of establishing, operating or winding-up a personal pension scheme have any effect on occupational pension schemes?

No. But the establishment, operation and winding up of *occupational pension schemes* that are *stakeholder pension schemes* are regulated activities in their own right.

Q14. I intend to operate a personal pension scheme under which members will acquire benefits derived from the management of a pool of assets. Will the scheme become a collective investment scheme or an AIF?

No. *Personal pension schemes* (along with *stakeholder pension schemes*) are specifically exempted from being *collective investment schemes*. In the FCA's view a *personal pension scheme* also does not amount to an AIF (see ■ PERG 16.2 question 2.32). However, where a *personal pension scheme* invests in a pooled investment vehicle of some kind, that vehicle may itself be a *collective investment scheme* or an AIF unless another exemption applies to it.