



Trusts and Fiduciary

The Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2012 – Update

Guernsey's States of Deliberation to vote on proposals in response to HMRC'S proposed changes to the QROPS regime

January 2012



Carey Olsen's Response to The New Proposed Regulations

On 6 December 2011 HMRC released draft legislation entitled The Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2012 (the '**New Proposed Regulations**'). The New Proposed Regulations have been published for comment and the consultation process will close on 30 January 2012. Carey Olsen has lodged its own response with HMRC to the consultation process, drawing upon its expertise in pensions and tax and taking into account comments from its clients and stakeholders in the pensions industry. Our five page response to HMRC concludes with the following summary comments:

1. Whilst we understand that the introduction of the enhanced and expanded reporting requirements set out in the Draft Regulations will assist HMRC to police better potential abusive pensions activities, we would recommend that such enhanced reporting requirements are applied on a targeted, jurisdictional risk-assessed basis.
2. We would urge HMRC to consider withdrawing the proposed introduction of new Condition 4 in its entirety as it will not in itself achieve the stated purpose of the Draft Regulations.
3. If, notwithstanding the observations above, HMRC is committed to the introduction of new Condition 4, we would recommend deferring its introduction until clear guidance is available on the issues mentioned above and the ramifications of the proposed changes for pension savers in existing QROPS, so that they have time to assess how best to manage their pension savings going forward.
4. Finally, we would recommend that grandfathering provisions are incorporated into the Draft Regulations so that it is clear that existing QROPS are not in any way prejudiced by new Condition 4. Without such grandfathering provisions existing savers may be prejudiced in respect of payments and reporting obligations following 6 April 2012, through no fault of their own, but due to

changes introduced by HMRC which are punitive and disproportionate in their application to Guernsey administered QROPS.

To read Carey Olsen's response in full to HMRC please see the link to our website at the end of this briefing note. Subject to the outcome of the consultation, the New Proposed Regulations would form part of the Finance Act 2012.

Carey Olsen published a review of the New Proposed Regulations on 9 December 2011, followed by an update on 13 January 2012 providing an overview of more recent developments, including the preparation of a response to the consultation by the Guernsey Association of Pension Providers ('GAPP') and the publication of HMRC draft guidance to the New Proposed Regulations. Links to these briefing notes are included at the end of this briefing.

Carey Olsen has worked very closely with GAPP in its response to HMRC's consultation process and agrees with GAPP that the preferred solution is that the New Proposed Regulations (or more specifically, new Condition 4 of the New Proposed Regulations) are withdrawn or deferred. However, it is recognised that Guernsey should be ready with a solution should this preferred outcome not be achieved by 6 April 2012, being the date on which the New Proposed Regulations are currently proposed to come into force.

This briefing note provides a further update on the topic, focussing on the release by the States of Guernsey of proposals to amend Guernsey's tax legislation in response to the New Proposed Regulations on Friday 27 January 2012.

Release of the March Billet d'Etat

The proposals are set out in a report issued by the Treasury & Resources Department of the States of Guernsey (the '**Report**') and form part of the March Billet d'Etat (papers to be placed before Guernsey's elected government). The proposals recommend amendments to the Income Tax (Guernsey) Law, 1975, as amended (the '**Law**') in order to '*protect and enhance Guernsey's status as a major provider of services in the*

international pensions field, and in particular in respect of transfers from UK pension schemes.' The States of Deliberation (Guernsey's political assembly) is due to vote on the proposals at a meeting scheduled for Wednesday 7 March 2012.

Explaining the rationale behind the recommendations made in the Report, paragraph 1.2 of the Executive Summary states that *'the proposals stem from the need to accommodate significant changes proposed to UK legislation recently in respect of QROPS business ...if the appropriate changes to the Law are not made, or are not made before 6 April 2012, there could be significant ramifications for this particular sector of Guernsey's financial services industry'*.

The Report begins with an introduction to the QROPS industry in Guernsey explaining that Guernsey rapidly became a major base for QROPS because of the island's expertise in international pensions and its system of taxation of personal income.

However, UK tax authorities have expressed concern that some jurisdictions, unlike Guernsey, permit some schemes to offer 100% commutation of pension benefits, so that the whole fund could be accessed by the member in one lump sum. This practice is contrary to what the UK regards as the purpose of such pensions, i.e. to provide an income in retirement and support pension savings.

The Report goes on to say that, whilst there is no evidence that Guernsey schemes were involved in what the UK authorities regard as abusive pension practices, Guernsey, along with other offshore jurisdictions, is now required to review its system of taxation of personal income in the context of new Condition 4 of the New Proposed Regulations in order to decide how best to proceed.

The Report outlines three available options open to Guernsey and their probable consequences:

(1) Take no action.

The Report envisages that existing QROP schemes would lose their QROPS status going forward and Guernsey's QROPS industry would

dissipate over a short period of time, although it is understood that the position of existing members would be protected; or

(2) Extend the taxation of benefits to non-Guernsey members.

The Report explains that this would likely make Guernsey uncompetitive compared to other jurisdictions particularly owing to the fact that Guernsey does not have an extensive network of Double Tax Arrangements, limiting the extent to which Guernsey tax paid could be relieved in the member's home jurisdiction; or

(3) Extend exemption of pensions benefits to Guernsey residents.

The Report explains that under the third option a new, separate, pension regime could be put in place under which no tax relief would be given for contributions and pension benefits would be tax exempt on receipt. This new regime would run in parallel to the existing pension regimes. The Report outlines ways in which the effect of the new regime on Guernsey's domestic tax base could be mitigated.

Report recommendations

The Report recommends that the third option be adopted and that the States of Deliberation direct that legislation be enacted to amend the Law and provide for the creation of a new type of pension scheme with the following features:

- Guernsey tax relief would not be available to the member (or the employer, in the case of occupational schemes or employer sponsored personal pension schemes) on contributions made to the scheme;
- Benefits paid from the scheme are to be exempt from Guernsey income tax;
- The scheme must be established and administered in Guernsey under a contract or trust by a licensed person, and, if established under trust, there must be two individual trustees or one corporate trustee, with all decision making in relation to the scheme being carried on in Guernsey;
- A separate approval regime is to apply to the new type of scheme;

- Benefits are to commence no earlier than age 55 (except where the member is in ill-health). There would be no maximum age limit by which benefits need to be drawn;
- 70% of a member's tax relieved scheme funds must be designated by the scheme manager to provide the member with an income for life;
- Lump sum commutations may not exceed 30% of fund value at maturity;
- Schemes currently approved under the Law may, with the approval of the Director of Income Tax, elect to be approved under the new regime.
- Upon ceasing to be approved under the scheme's existing approval regime, Guernsey tax relief previously received would be repayable at the rate of 20% in respect of any funds held by a scheme which have benefitted from tax relief in Guernsey; and
- Transfers to the new schemes can be made only from other Guernsey approved or recognised schemes or from funds which have been, or are derived from contributions that are subject to UK tax relief.

The States of Deliberation will vote on the proposals in the Report at a meeting which will take place on Wednesday 7 March 2012.

If the States of Deliberation approves the proposals as set out in the Report, the next step would be for appropriate legislation to be drawn up to be effective prior to 6 April 2012.

Carey Olsen supports the recommendations published in the Report and is confident the implementation of these will enable Guernsey to continue to provide QROPS services of the highest standards to pension savers, both at home and abroad.

Next steps for QROPS providers

If the States of Deliberation votes in favour of the recommendations, and legislation giving effect to the recommendations is put in place before 6 April 2012, QROPS providers will need to consider carefully how best to continue to run their QROP schemes. Timing is likely to be very tight and consequently providers will need to act early to be ready for the anticipated changes. Providers will need to consider, for example, whether to elect for their schemes to cease to be governed by their existing approval regime and to be approved by the new approval regime instead. This is not a straightforward decision as such an election could trigger a repayment of Guernsey tax relief previously received to the extent that Guernsey tax relieved funds are comprised in the scheme when the funds leave their existing approval regime before entering the new approval regime. This would be likely to arise if the scheme had Guernsey-resident QROPS members at the time it leaves its present approval regime. However the new regime may hold other advantages to such members, potentially enabling them to draw their pensions income (inclusive of future fund growth, if any) free of Guernsey tax. How to manage schemes going forward, and whether it is appropriate to transfer out certain members, will need to be considered on a member-specific basis, so that the relative benefits and disadvantages of the various options and their implications for members can be properly considered. Providers are advised to consider obtaining legal advice in good time in anticipation of these changes to ensure they are in a position to discharge their fiduciary obligations and understand their member notification obligations.

Set out below are links to websites which will be of assistance to readers (click on the link to access on screen).

Carey Olsen

Link to briefing note which outlines The Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2012 (December 2011)
[http://www.careyolsen.com/downloads/publications/the_overseas_pensions_schemes_\(miscellaneous_amendments\)_regulations_2012.pdf](http://www.careyolsen.com/downloads/publications/the_overseas_pensions_schemes_(miscellaneous_amendments)_regulations_2012.pdf)

Link to briefing note on response to HMRC's proposed changes (January 2012)

http://www.careyolsen.com/downloads/publications/responding_to_hmrCs_proposed_changes_for_guernsey_qrops.pdf

Link to response letter from Carey Olsen to HMRC on proposed changes
www.careyolsen.com/files/012012/Letter_to_HMRC_from_Carey_Olsen.pdf

States of Guernsey

Link to States of Guernsey States Meetings & Billet d'Etat V 2012 March, Volume 1 Page 1180

<http://www.gov.gg/ccm/policy-and-hr/billets--resolutions/2012/march/billet-detat-v-march-2012.en>

Guernsey Association of Pension Providers

<http://www.gapp.gg/index.php?page=2&moreinfo=21>

HMRC

Draft legislation forms and explanatory notes on Finance Bill 2012

<http://www.hmrc.gov.uk/budget-updates/march2011/draft-tax-finance-bill-2012.htm#5>

For specific documents relating to QROPS see:

1. Overseas transfers of pension savings - Forms
2. Overseas transfers of pension savings - HMRC statement
3. Overseas transfers of pensions savings - Tax Information and Impact Note
4. Overseas transfer of UK pension savings - Draft Legislation

HMRC's Draft Guidance issued 20 December 2011

<http://www.hmrc.gov.uk/pensionschemes/draft-guidance-qrops.pdf>

QROPS listed by HMRC as at 18 January 2012.

<http://www.hmrc.gov.uk/pensionSchemes/>

Note: The list is updated twice a month

Carey Olsen will provide follow up client briefings on this topic as further information becomes available. If you have any queries, please do not hesitate to contact the pensions team.

Contact us

For further information or professional advice please contact our lawyers below.

Carey House PO Box 98 Les Banques
St Peter Port Guernsey GY1 4BZ

Tel: +44 (0)1481 727272 Fax: +44 (0)1481 711052
www.careyolsen.com



Konrad Friedlaender, Partner
konrad.friedlaender@careyolsen.com
Telephone: +44 (0)1481 741567



Laila Arstall, Senior Associate
laila.arstall@careyolsen.com
Telephone: +44 (0)1481 741544



Vanessa Franklin, Associate
vanessa.franklin@careyolsen.com
Telephone: +44 (0)1481 741584

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.