Institute and Faculty of Actuaries

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Draft Finance Bill Clauses: Defined Benefit Pension Scheme Surplus Payments to Members

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- The IFoA's Pensions Board take this opportunity to provide feedback on the draft legislation published for Finance Bill 2026-27 specifically in relation to the new authorised member surplus payment clauses. We have replied separately to the DWP's closely connected but separately consulted upon Surplus Flexibilities for Defined Benefit Pension Schemes: Unlocking Value for Employers and Scheme Members consultation.
- We understand that the Government's policy intention in making it easier for pension schemes to make direct surplus payments to members is to promote its goal of schemes investing in growth assets for longer and to release surplus earlier to employers. In aid of those goals authorised member surplus payments (AMSPs) allow an easier, direct and quicker route to sharing surplus with members allowing trustees to demonstrate a clear upside to supporting these goals over the alternatives.
- We believe the draft clauses could be improved in 5 key areas:
    i. Revise Condition 5 so that there is a clear, proportionate approach for schemes (and insurers of bought out deferred awards) to follow, specific to AMSPs rather than repeating the full requirements for authorised employer surplus payments.
    ii. Remove Condition 4 to allow AMSPs to be agreed after triggering wind-up.
    iii. Confirm that AMSPs will not cause the loss of existing member protections such as Enhanced Protection, Fixed Protection, the Annual Allowance Deferred Member Carve-Out, or by bringing pre-06 deferred arrangements into scope of the Annual Allowance.
    iv. Clarify Condition 2 in relation to hybrid arrangements.
    v. Consider where a scheme rules override is required, to maximise the use and economic impact of AMSPs.

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Condition 1

1. The decision to grant the right to receive the payment needs to have been at the discretion of the trustees or managers of the pension scheme. This may assume the trustees are able to exercise a discretionary power unilaterally. We think the discretion is the important point but it needs to cover cases where a power is exercised by or in conjunction with other parties, i.e. employers and/or (less commonly) scheme actuaries.

2. We assume this discretion must be exercised by the trustees under their existing trust deed and scheme rules. We are not aware of any proposal by the DWP to grant trustees an overriding power to make AMSPs. Pensions Act 1995 s36B will give trustees the power to modify their scheme to permit surplus payments to employers, however, this does not appear to extend to AMSPs. Has HMRC considered giving trustees a corresponding power to make AMSPs, as it did when introducing other new forms of authorised member payments, for example, as in FA04 s273B?

Condition 2.

3. How should “held only for the purposes of a defined benefits arrangement” be interpreted where a member has a “genuine underpin” hybrid arrangement, e.g. the final benefits will be one of two types but the eventual type is not yet known? For example, some members have defined benefits subject to a money purchase underpin. Technically this makes the arrangements “hybrid” since the eventual benefits could be all defined benefits or all money purchase, even though it may be highly unlikely the money purchase underpin (e.g. from former protected rights) would ever “bite”. In these circumstances we assume your intention is that the assets could be held for the defined benefit element of a hybrid arrangement.

Condition 3

4. Condition 3(b) is clear that the pension scheme must not have been, at the time of the award, an “investment-regulated pension scheme” under FA04 sch29A para1. However, we are aware that the definition is not always straightforward to interpret in cases where members are able to self-select their money purchase investments, or where money purchase members also act as trustees (and thereby share responsibility for the scheme’s investment strategy). We do not expect that these circumstances would cause a scheme to fall under the definition of “investment-regulated”, as that appears aimed at cases where a member has much more “hands-on” control over the buying, selling and timing of individual investments. We recommend PTM125100 is clarified to avoid the risks of misclassification or schemes needing to take unnecessary legal advice to put the question of their status beyond doubt.

Condition 4

5. Condition 4 is met if the pension scheme was not being wound up at the time the actual or prospective right to receive the payment was first acquired. It therefore restricts the use of the AMSPs to cases where the award is made before the formal triggering of a scheme’s winding-up. However, we question whether this condition is necessary or whether it supports the Government’s broader goals.

6. In the context of an ongoing scheme the goals in for AMSPs therefore presuppose a period in which surplus payments are made to employers and/or greater investment risks are taken, before any eventual derisking and wind-up. We envisage that many schemes making use of AMSPs may want to spread surplus payments to members over a period of time before making a final surplus payment to the members. We expect that the final surplus payment amounts to members might not be known until quite late in the life of the scheme. For example, the scheme might wish to have secured all scheme benefits and have a very certain expectation of its final surplus position before making the final surplus payment to members. That decision might well be taken after the scheme

has formally triggered wind-up (and it is also possible the triggering of wind-up timing is not, in the event, something the trustees could practically defer). In those circumstances we cannot think of a policy objection for why the trustees at that point may not award a final AMSP. However, as drafted Condition 4 would prevent the award of any AMSP once winding-up has been triggered. Furthermore, a block on making a final award during wind-up could reduce the attractiveness of embarking on a program of member surplus payments in the first place.

7. Payment of a AMSP in this scenario would also accelerate tax revenue (by comparison with a pension in payment) and it will generally be more efficient for trustees to pay a lump sum instead of adjusting pension payments, particularly for schemes that have already secured a buy-in or buy-out.

Condition 5

8. We are unsure how thoroughgoing Condition 5 is intended to be when it says that "the payment would have been an authorised employer surplus payment if the right to receive the payment had been granted to the sponsoring employer of the pension scheme". Taken literally, this would invoke the very detailed provisions currently being consulted upon by your DWP colleagues in their draft Occupational Pension Schemes (Payments to Employer) Regulations 2027, which raises three problem areas:

   i. The modified interpretation of those regulations, which includes employers both as payment recipients and in other capacities.

   ii. The practical application to individual member payments which will be much harder than when applied to employers (and industry is already expressing its concerns about the practicality of meeting those requirements in relation to employers).

   iii. The ongoing risk that DWP changes intended for authorised *employer* surplus payments inadvertently or inappropriately alter the HMRC conditions for AMSPs.

9. The phrase "the right to receive the payment had been granted" reminds us of the concept of "awarded…before normal minimum pension age" in the DWP's proposed amendment to the Occupational Pension Schemes (Revaluation) Regulations 1991. However, just because the trustees might "grant the right" to a surplus payment to the employer does not mean its later payment would meet the requirements of s37: that section restricts the ability of a scheme to make the *payment* not to award such a payment from a future date. It is possible the trustees might grant an employer a *right* to a future surplus payment that, as it later turns out, does not meet the requirements of s37 at the later date and therefore is not able to proceed as a *payment*. We suspect that your intention in Condition 5 might have been that the payment would have been an authorised employer surplus payment if *paid* to the sponsoring employer of the pension scheme.

10. Incidentally, we note your DWP colleagues' draft regulations are also unclear on this point since they would invoke revaluation of a "deferred authorised member surplus payment" if a member were "awarded an authorised member surplus payment before normal minimum pension age". We have noted to them that your regulations define a particular way a payment might be authorised, and therefore an AMSP is a payment that in the instance of being paid meets certain conditions, which might change between the award and the payment. It is therefore not clear what it means to award an authorised payment ahead of making the payment.

11. An authorised (employer) surplus payment under FA04 s177 is conditional on regulations, including SI 2006/574. A scheme meeting Condition 4, above, will be an ongoing scheme, and therefore any AMSP if it were instead paid to the employer would ordinarily fall under section 37 of the Pensions Act 1995, and therefore SI 2006/574 regulation 2 (regulation 3 covers schemes where s37 isn't applicable, which we ignore here given the typical defined benefit schemes we are focussing on). In turn, regulation 2(2) would need to be met, i.e. compliance with the requirements contained in

section 37 of the Pensions Act 1995. This takes us to the draft Occupational Pension Schemes (Payments to Employer) Regulations 2027 setting out the DWP's intended requirements for s37 to be met.

12. It is not straightforward to interpret the lengthy requirements of the draft Occupational Pension Schemes (Payments to Employer) Regulations 2027 according to the hypothetical situation that an AMSP was alternatively paid to an employer. For example, in the draft regulations the "employer" is mentioned both as the recipient and as a party that needs to be consulted with, or the consent obtained from. We assume that in the recipient cases we are substituting the employer for the member(s), but in the latter cases the reference remains to be interpreted as relating to the actual employer and not the member.

13. Parts of the DWP draft regulations may not make sense if a scheme needs to apply them to AMSPs. Some parts may make sense but be much more challenging to apply in cases of AMSPs than they are to apply to employer payments. For example,

    i. The requirement to provide a written statement to (all, if contactable) members of the target date and amount of the payment(s). Taken literally (and without aggregation), if trustees varied their AMSPs across their membership (quite reasonably, e.g. having regard to the different value of their rights, or because of the NMPA restriction), it might be read that they will need to inform all members of all the different payments.

    ii. The trustees would need to notify the Pensions Regulator of each member's payment (this would already be required under regulation 12(f) but we suggest that notification to the Regulator of each and every AMSP would be disproportionate and unnecessary.

    iii. The payment must be paid within 5 working days, beginning with the date that the actuarial certificate is given. This is highly challenging in the case of employer payments and unworkable in the case of individual member payments. Inevitably, the trustees will not be able to pay all members within that timescale. For example, the trustees might not hold the bank details for the member (especially if their pension is not yet in payment) or the payments may bounce back. In the case of deferred awards the payments will not be until at least the member's NMPA. It is unworkable for the actuary to have to recertify the scheme surplus in each case.

14. How should Condition 5 be interpreted where a scheme has bought out the members' benefits with an insurer? For example, if there are deferred AMSPs we would expect the trustees to buy out those deferred awards when they buy out the members' main benefits. It seems reasonable that the insurer should be able to make the payments to those members after their NMPA. However, if the same payments were made *by an insurer* to a (former) sponsoring employer, it is not clear that they could ever be authorised employer surplus payments.

Payments outside of the annual allowance and lump sum (death benefit) allowance

15. We welcome the proposal that surplus payments (being fully taxable) should not count against a member's individual lump sum (death benefit) allowances or their annual allowances.

16. The amount of an authorised member surplus payment is not to be taken into account for the purposes of determining the pension input amount in respect of any arrangement.

17. We would also recommend clarification that this also means that the payment of an AMSP or the granting of a right to such a future payment would never cause a member's deferred member carve-out to be lost?

18. Similarly, we recommend clarifying that it would never cause a pre-6 April 2006 leaver's arrangement to come into scope of the annual allowance regime?

19. We assume that since an AMSP would not be treated as a lump sum for any purpose under FA04 Pt 4, then it is of no consequence to a member's enhanced protection or primary protection. Again, we would recommend putting this beyond doubt.

20. It is less clear whether the payment of an AMSP or the awarding of a deferred right to an AMSP could cause the loss of fixed protection. For Fixed Protection 16 (the FP14 and FP12 legislation is very similar but not identical) the key question appears to be whether there is "benefit accrual in relation to the individual" or "an arrangement relating to the individual is made under a registered pension scheme otherwise than in permitted circumstances". [FA16 sch4 para 3(a) and (d)]. Although Fixed Protection can only be lost for applications made on or after 15 March 2023 (which we understand will be very few, if any at all), it remains a risk to trustees that their actions inadvertently lose protection for a member, with disproportionately costly consequences to the member (and to the trustees who might then need to deal with a compensation claim). The small risk of large claims therefore inhibits the use of AMSPs. We suggest the opportunity be taken to put beyond doubt that Fixed Protection would not be lost by granting these rights to surplus payments.

21. For all the above points, given the Government's policy intention to maximise use of AMSPs as a way to encourage trustees to maximise the (safe) release of defined benefit surplus to employers and into the economy, we encourage HMRC to clarify that AMSPs can have no adverse consequences for members, such as by causing them to breach allowances, pushing them into higher tax brackets or causing the loss of means-tested benefits (including child benefit and childcare subsidies). The easier it is for trustees to agree to share surplus by means of AMSPs, without being concerned about unintended adverse consequences for their scheme members, the more successful (and efficient) the policy will be.

Normal minimum pension age

22. Draft clause 168A(1)(b) would restrict the AMSPs to where a member had attained their normal minimum pension age (NMPA) or met the ill-health condition immediately before the payment.

23. Pension Industry Stakeholder Forum members (including the chair of the IFoA Pensions Board) have already raised with HMRC the desirability (from the perspective of the Government's policy intention in □) of being able to make AMSPs before NMPA. Stakeholders highlighted the difficulties for trustees in being able to make immediate payments to older members but not younger members in a particular membership class, particularly as those younger members would be most exposed to the risks arising from the early surplus sharing and prolonged investment risk-taking. Stakeholders also set out how AMSPs would be a reasonable exception to the general principle of restricting access to member payments from registered pension schemes before NMPA if not in ill-health. However, we understand the policy decision has now been taken so we do not argue that case further here.

24. We do point out that deferred AMSPs will give rise to a range of issues, costs and decisions for trustees to make, including benefit design (e.g. the ability to defer payments beyond NMPA until actual retirement; how the benefit is treated on other contingencies such as death, transfer out and divorce), administration costs (for recording/paying the benefits awarded or securing it with an insurer) and communication with members. These complications may lead trustees to distribute surplus to members under NMPA in other ways – which may defer tax revenue – or not at all – which may hinder the Government's intention in 2 above.

25. NMPA is not always a unique date for each individual. With NMPA rising from 55 to 57 on 6 April 2028, some members born between 1971 and 1973 will attain NMPA, then fall below it, then attain it

again. That pattern may be repeated for younger cohorts if NMPA is raised again. We note it is therefore possible (and therefore risks confusing members' expectations) that a member might qualify to immediately receive one surplus payment but not a later one.

26. For example, consider a member born in August 1972. They will reach NMPA on their 55th birthday in August 2027. However, from 6 April 2028 their NMPA will become their 57th birthday in August 2029. (As an aside, even though HMRC are currently consulting on "transitional provisions" for the increase in NMPA, this member would be able to commence their pension on Wednesday 5 April 2028 but not on Thursday 6 April 2028 – having to wait until August 2029 if they intended to but did not complete the paperwork in time for 5 April 2028. We consider that deeply unintuitive to ordinary members, raising a high risk of confounding members' plans and generating complaints against schemes. A simpler approach would be to allow, in any event, payments to any member who reached age 55 before 6 April 2028).

27. The "ill-health condition" is set out in FA04 sch28 para 1. However, is it possible that a member who met the condition at one point does not meet the condition at a later point, because they resumed their occupation? The question here also arises for repeated payments of uncrystallised funds pension lump sum payments before NMPA. We consider that possibility to be rare enough that the administrator should be able to consider the ill-health condition, if met, as "once and for all". Nevertheless, HMRC guidance on this would be helpful.

Death of a member before payment

28. After the death of a member the AMSP can only be paid to "a dependant of the member". This is much narrower than the potential classes of beneficiaries who might be paid other lump sum death benefits. It also means that if a member does not leave a surviving dependant (on HMRC's definition) no surplus benefit can be paid in respect of them. We recommend that this restriction is removed so that the scheme may make a payment in respect of a member after the death of that benefit.

Cross-reference tidying

29. Following the amendment of "authorised surplus payment" to "authorised employer surplus payment" and the associated updating of FA04 s177, PA95 s37(1A) should also be updated.

Further regulations

30. What is HMRC's intention for the power to be taken in FA04 s168A (1)(c) to prescribe "any other conditions prescribed in regulations made by His Majesty's Revenue and Customs are met in relation to the payment." Is that a fallback power or do you have plans to use it?