Maintaining contributions

RESPONSE FROM ICAS TO THE PENSIONS REGULATOR

30 November 2012
Introduction
The ICAS Pensions Committee welcomes the opportunity to comment on the Pensions Regulator’s consultation on “Maintaining contributions: Review of code of practice 5 and code of practice 6”.

Our CA qualification is internationally recognised and respected. We are a professional body for over 19,000 members who work in the UK and in more than 100 countries around the world. Our members represent different sizes of accountancy practice, financial services, industry, the investment community and the public and charity sectors.

Our Charter requires ICAS committees to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members’ views and to protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.

Key points
We have the following key points to raise about the consultation:

- We support the inclusion of the smallest schemes within the scope of the codes, particularly with the advent of auto-enrolment which will give rise to an increase in the number of employers who will pass on contributions to pensions schemes. We recognise that this will put pressure on TPR resources given the potential for an increase in the number of reported material payment failures.

- We do not support plans to extend the definition of a payment failure, which is of material interest to the regulator, from 90 days from the due date to 120 days from the due date. We believe that such a move would make recovering payments from employers more challenging and would therefore be contrary to the interests of employees and the scheme.

- We recommend that TPR should undertake an impact assessment as we believe that code changes will have cost implications for investment managers and other providers.

We have not considered each of the 18 consultation questions individually. However, we do explore our concerns in more detail below.

Any enquiries should be addressed to Christine Scott, Assistant Director, Charities and Pensions, at cscott@icas.org.uk.

Detailed comments

Reporting payment failures to TPR
The due date for employer contributions is, unless the payment schedule sets an earlier date, the 19th day (or 22nd day if payment is by electronic means) of the month following deductions. Therefore, 120 days from the due date is a significant delay in reporting a payment failure to TPR. We believe that there should be no change to the existing 90 days from the due date for reporting a payment failure on the grounds that the extension would make recovering the payments from employers more challenging and would be detrimental to the interests of employees and the scheme.

PAYE and class 1 national insurance contributions (NIC) are due on the 19th day (or the 22nd day if payment is by electronic means) of the month following the end of the tax month or tax quarter to which they relate. However, HMRC operates an interest charging and penalties regime, with interest being charged from the first day a payment is late. HMRC has a much higher expectation of employers’ payment performance and a tougher enforcement regime. In our view TPR’s proposed extension to 120 days appears unjustified relative to the arrangements for PAYE and NIC.

We are concerned that the reason for extending the period from the current 90 days to 120 days may be related to concerns about the sufficiency of TPR resources rather than a genuine belief that it is reasonable to wait for 120 days before classifying a late payment as being of material interest to the regulator.
We have the following additional comments on reporting late payment failures:

- Creating a basis of whether or not to report late contributions based on a subjective employer state of mind where “the employer is unwilling to pay” seems inappropriate. However, we do believe that trustees and managers should exercise judgement when deciding whether a late payment should be reported to TPR in less than 90 days (or another specified number of days).

- The test for reporting a failed payment allows for judgement to be applied which should mean not having to wait the 120 days before making a report. However, this aspect of the definition of a failed payment which requires reporting is contradicted by an aspect of paragraph 46 of code of practice 5 and paragraph 49 of code of practice 6. These paragraphs state, “Trustees/ managers should not normally report where contributions are paid late but in full within the 120 days of the due date.” We recommend that the test for reporting a failed payment should be clear and consistent and should allow for the application of judgement. There could be an increased risk of accusations of maladministration against trustees and managers if there is confusion over the importance of judgement in this regard.

**Impact assessment**
We believe that it would be appropriate for TPR to undertake an impact assessment and disagree with the reasons given for not doing so. The code changes will have an impact on investment managers and product providers and there are costs attached to this, which need to be considered more explicitly and then a cost benefit analysis undertaken.

We believe that trustees of trust based arrangements are already well on their way to understanding their responsibilities in relation to maintaining contributions which means that they are better placed in terms of meeting TPR’s expectations on governance issues, notwithstanding that auto-enrolment brings with it, its own challenges for trustees.

With the code focusing on the date contributions are being paid and not considering the risk that monies are not applied on a timely basis or applied to the wrong funds by investment managers or other providers, it is not clear who is responsible for checking that investment managers and other providers are investing funds correctly and on time. Is this a role for TPR or for third parties’ internal auditors or external auditors? This issue should perhaps be dealt with within the codes and therefore by the impact assessment.