CONFLICTS OF INTEREST QUESTION BANK

We have prepared some resource material to assist with understanding the practical application of the changes to the conflicts of interest provisions introduced by the new amended APS P1, but also in relation to other conflicts-related queries which the Institute and Faculty of Actuaries (IFoA) has received since June 2012.

These are in the form of some scenarios, questions and answers that are based on real queries received by the IFoA. The questions and scenarios have been anonymised.

If Members have queries about conflicts of interest, please do get in touch via the Professional Support Service.

APS P1 v 2.0 Queries

Query 1:

APS P1 v.2 requires a Conflicts Management Plan (CMP) to be put in place before a Member/Member's firm can work for both the Trustees of a scheme and the Company. If a CMP is sent out but not returned signed within a specified period, can there be deemed agreement as to its terms?

Paragraph 5.6 requires there to be 'agreement' to a CMP so it follows that a Member would be expected to be able to reasonably demonstrate that all parties reached consensus. An obvious way of showing that there is agreement would be to have the document signed by the parties. However, if for any reason that is not practical, other evidence of agreement might be acceptable (e.g. confirmation by email). It will not be sufficient to assume agreement of the CMP from silence on the part of any of the parties to the agreement.

This underlines the importance of steps being taken by Members to impress upon clients the need to consider and provide a response to a proposed CMP (in much the same way as they might do to ensure clients are content with their terms of engagement).

Query 2

In relation to the disclosure requirements of 5.2 of APS P1 v.2, what level of detail should be disclosed to Trustees in terms of the work being carried out?

Would it be correct to say that this should describe work that is actually being carried out (and where it might lead) but it should not be a 'catch all' statement which could cover all types of work? For example is it correct to say that it would not be appropriate to use the phrase "corporate advice" as this is too wide but it might say "advice on assumptions for a part 3 valuation"?

The requirement in 5.2 is not intended to require the Member to provide any substantial detail of the work undertaken for the Employer elsewhere in the Scheme Actuary's firm (in any event, in many cases it is unlikely that that the Scheme Actuary would be aware of that level of detail). The important point is that Trustees are made aware of any potential for conflicts (and that they are provided with enough detail so that they are properly informed) and that, where the work being done for the

employer falls under the definition of Client Advice in relation to the scheme, appropriate detail about that work is set out in the CMP required under 5.6.

Query 3

If there is a situation where there are two separate pension plans of the same Sponsor Employer with different sets of Trustees and two different Scheme Actuaries is there a need to disclose and have a CMP?

APS P1 v2 does not impose any specific requirements in relation to conflicts between two sets of Trustees (in particular, the CMP requirements of 5.6 would not apply to this scenario).

However, the potential for conflicts needs to be recognised under principle 3 of the Actuaries' Code and under 3.5, any steps taken to reconcile a conflict need to be documented (and where appropriate agreed) with the client(s).

The content of any 'plan' put in place would depend heavily on the circumstances. Some pairs of Trustees might consider there to be little scope for conflict and be happy to work closely together, whereas others (perhaps competing for a limited Employer budget) might think very differently and a formal plan to ensure separation of advice and to build in special confidentiality safeguards might then result. Clearly there is a very high potential for conflicts to occur here and the importance of a CMP covering the need for separation and independence of advice and maintenance of client confidentiality should not be underestimated.

Query 4

I am a Member who advises the Employer of a scheme on actuarial matters (including funding issues) but I am not the Scheme Actuary. That appointment is held by someone at another firm. I am, however, involved in advising the Trustees of the scheme on general consultancy work regarding the scheme (but not funding/benefits work as that is the preserve of the Scheme Actuary) and my firm does all of the other work for the scheme (administration, consultancy etc). I understand that under APS P1 v.2 I am unable to give funding/benefit advice to the Trustees.

In terms of the requirements of 6.4 - 6.7 of APS P1 v.2 and following the principles of 5.1, 5.2 and 5.6, I am preparing a CMP. In looking at 5.6, would it be acceptable to effectively change around the words 'Trustees' and 'Employer' so that I am treated as a Company Actuary also giving advice to the Trustees. Does this raise any issues around 5.6.3 and 5.6.4?

If the words are exchanged then under 5.6.3 can the employer's interests be safeguarded by waiving the duty of confidentiality to the trustees? Under 5.6.4 can the employer be given the option to keep the actuary (the Trustees aren't being left without an adviser as they have a Scheme Actuary)?

Assuming, as seems likely, that this "general consultancy work" falls within the definition of 'client advice', then under 6.4 of the APS "the principles of 5.1, 5.2 and 5.6" would apply. In relation to 5.6, this means having a (proportionate) CMP which covers all the work done by this person and his/her firm for the trustees and the sponsoring Employer in relation to the scheme.

It would not be appropriate to interpret the words 'trustees' and 'employer' in 5.6 'the other way round'. It should still be approached from the perspective that a firm advising the Trustees is also advising the Employer.

Regarding 5.6.3, the CMP would need to provide for a waiver of confidentiality otherwise owed to the Employer by you and your colleague where this would be necessary to safeguard the interests of the Trustees. We do not, however, think this precludes in principle an additional equivalent provision in favour of the employer.

In relation to 5.6.4, because it specifically addresses the position of the Scheme Actuary, it is not relevant where the Scheme Actuary is in a different firm. It would, therefore, be open in principle for the Member to agree a provision to the effect that the employer (or the trustees) have the option to continue the appointment, in the event that the Member's firm is unable to continue to act for both parties (but is in a position to continue to act for one).

Query 5

I work within a firm that has a client management structure where staff may be regarded as having carried out work for the company but then carry out some work for the trustee advice team, or where trainees (who might not be restricted to carrying out work for either party) attend trustee meetings.

The main point of concern is how far the waiver of confidentiality to the Company (5.6.3) extends. As an example:

1. ***If person Z is involved in the provision of Client Advice to the Trustees in relation to issue A, then clearly Z must inform the Trustees of information which is material to the Trustees in relation to issue A and of which Z is aware from work with the Company in relation to issue A.***
2. ***We believe that this duty must extend to information, which is material to the Trustees in relation to issue A and which Z is aware of from any work with the Company (ie not just in relation to issue A).***
3. ***However, it is not clear whether Z is also required to communicate information which is material to the Trustees in relation to other issues.***

In relation to point 3, is it correct that Z is NOT required to communicate information which although relevant to the trustees in some way, is not relevant to the issue A being considered? Is there any cut-off period after which it would be reasonable to assume that information might no longer be relevant?

In 5.6.3.2 of APS P1 v2, it provides for waivers in relation to any Member "directly responsible for the provision or review". However there is a difference between a situation where a trainee is just taking minutes at a meeting as opposed to actually having some input into the content of material presented. Is it correct that that trainees who are not directly responsible for preparing the advice are not caught by the duty to disclose, and that the duty to disclose arises only in relation to information obtained once such trainees reach a level at which they do become directly responsible for the advice?

5.6.2 appears to extend to everyone involved in the provision or review of Client Advice whereas 5.6.3 only applies explicitly to Members (and this may include Members who provide investment or other advice). Does the need for a waiver of confidentiality (where applicable under 5.6.3) extend to non-Members?

The first point to make is a general but important one; that the provisions of APS P1 should be read in the context of the Actuaries' Code. In particular, principle 3.1 of the Code requires that Members "*ensure that their ability to provide objective advice to their clients is not, and cannot reasonably be seen to be, compromised*". Principle 3.4 states that, "Members will disqualify themselves from acting when there is a conflict of interest that cannot be reconciled". These are overarching principles which apply to all Members and call upon all Members to exercise judgement to ensure that they are, and are seen to be, in a position to act in the best interests of each of their clients.

A critical consideration in assessing, firstly, whether a conflict of interest exists and, secondly, whether it is appropriate or not to act, will be whether or not there is any restriction on the ability of the Member to disclose relevant information to one or more of their clients. It is clear that the duty to act in the best interests of one's clients includes the appropriate disclosure to those clients of relevant information.

In a conflict situation, as described in the Guide for Actuaries on Conflicts of Interest, a duty of confidentiality to one client may be seen to conflict with a duty of disclosure to another. Paragraph 5.6 of APS P1 is designed, in part, to ensure that, where it is appropriate to act, the possibility of this issue arising is managed effectively in advance by the putting in place of a conflicts management plan.

The responsibility for the plan itself under paragraph 5.6.2 rests with the Scheme Actuary. The scope of the plan includes everybody (Members and non-Members), involved in the provision or review on behalf of the firm of advice of the sort described (having regard to the definition of "Client Advice"), to either the trustee or employer. The scope of the plan, in other words, is deliberately broad, with a view to ensuring very clear disclosure and agreement as to the approach to be adopted.

Paragraph 5.6.3, in effect, provides one of a number of safeguards designed in the context of the plan to provide specific protection to the trustees. It is designed to ensure that there is a clear mechanism by which conceivable conflicts between the duty of confidentiality to one party (the employer) and a duty of disclosure to the other (the trustees) may be resolved. It, in effect, protects the interests of the trustees by facilitating a mechanism allowing certain Members, who would otherwise owe a duty of confidentiality to the employer, to disregard that duty in order in certain circumstances to disclose relevant information to the trustees.

You are correct to the extent that the requirement to make provision for such a waiver relates only to the Scheme Actuary and "any other Member directly responsible for the provision or review of client advice to the trustees", so 5.6.3 does not in itself catch either Members in supporting roles (without direct responsibility for the advice) or any non-Members.

That is not to say that it is only these Members who could ever conceivably have a duty of disclosure to the trustees such as might give rise to a conflict of interest. The position of individual Members falls to be assessed according to the specific circumstances, having regard to each individual Member's obligations under the Actuaries' Code. There would, of course, be nothing to prevent there being a broader agreed waiver provision, such as to include others or indeed all of those involved in acting for the trustees. This is on the basis that (potential) conflicts identified and addressed in advance are more likely to be capable of being effectively managed.

A conflict of interests of the sort described is less likely to be a risk for a Member only incidentally involved – or perhaps only involved at an administrative level – in the provision of advice for either the employer or the trustee, where they have no direct advisory responsibility to either client. However, it should be recognised that the same administrative role might be seen to assume greater importance with hindsight, for example where the same individual goes on subsequently to acquire a more substantial advisory role for the same client(s). Assuming that the view has been reached that it is

possible to act in the first place, it is critical that an appropriate plan is put in place and agreed encompassing all of those involved.

The key issue is the nature of the information which must be disclosed (in this context, to the trustees). That will depend on the particular circumstances but in broad terms, there is a professional responsibility (and potential legal duty) to disclose to any client all such information which is material to the interests of that client, as relevant to the matter in relation to which you are instructed to act.

Moreover it is important not to interpret relevance in this context in a way which might be perceived to be artificially narrow. So, using the scenarios provided, examples one and two appear to be correct analyses. In relation to three, the answer will depend upon the nature of the "other issues" mentioned. If those issues relate directly to the matter in which a Member is engaged to act or is involved in acting (i.e. not simply the specific narrow point upon which they happen to be advising at that particular point in time), then the duty of disclosure might encompass example three as well. However, the position will require to be assessed according to the particular circumstances.

It is worth noting that relevance in this context should not necessarily be considered to be time constrained. Some information might remain relevant indefinitely to the interests of the client, whereas other information may conceivably cease to be relevant after a period of time. It is not possible, therefore, to prescribe a particular period of time beyond which it may be said that the duty to disclose will necessarily have expired.

Query 7

I have an interest in seeking guidance as regards a scenario where there is a UK consulting actuary whose company is involved in providing accounting assumptions (e.g.US-GAAP - related) for a global entity. Typically, there a co-ordinating actuary (say based in the US who may or may not be the same company as the UK actuary) and the UK Actuary is asked to fill out assumptions on a global spreadsheet in respect of the UK pension schemes. This would be part of a global exercise which could include many different countries. The assumptions are then discussed with the US parent company, after which time the UK actuary is instructed to calculate the liabilities for the UK pension schemes (the UK schemes and UK employers aren't always aware of this information until after the US parent). The UK pension schemes are generally immaterial in terms of size as regards the US entity together with its other overseas countries but this might not be the case.

Quite often the UK Actuary is the Scheme Actuary and would also be providing UK accounting assumptions/advice with an appropriate CMP in place.

The issues are:

1. ***Can it be assumed that the existing CMP (between the Trustees and the UK employer) can be extended to cover the provisions of the US assumptions i.e. it includes the provision of US assumptions/advice but the US Parent is not party to the CMP?***
2. ***Does the answer change in 1) if there is a Client Agreement in place between the UK consulting firm and the UK Employer to supply US GAAP assumptions/advice?***
3. ***Does the answer to questions 1) and 2) change if the Actuary (of the consulting firm) giving the advice is not the Scheme Actuary i.e. the CMP in place which identifies that there is a different actuary from the consulting firm acting as the corporate actuary and the Scheme Actuary and in this case could be extended to include US GAAP assumptions/advice?***

These questions proceed on the assumption that there are no irreconcilable conflicts in the first instance. The aim is to try and avoid the situation where there are multiple CMPs. There is

also awareness that to get the distant party to consider and understand the issue could be problematical and expensive.

In this sort of situation there should be a CMP and it should cover all relevant work and advice that is delivered to the employer (or related entity) whether they are in the UK or overseas.

In terms of 5.6 of APS P1, the CMP should cover all 'Client Advice' provided to the 'Employer'. For the purposes of APS P1 the definition of 'Employer' specifically includes any entity that "is associated with" the entity that is the 'employer' in the legislative sense (i.e. the person(s) actually employing the scheme Members). Accordingly, work for a US parent is likely to be automatically included within a CMP prepared in terms of 5.6. If for some reason the US parent is not 'associated' with the participating employer then work for that parent would not fall within the APS P1 CMP requirements.

Work or information is only 'client advice' to the entity receiving the work/information if they are entitled to rely on it as a 'client'. It is not intended to include any user who is not a 'client'. If work that involves a material element of judgement or analysis is performed under a 'client agreement' with the scheme's employer, including an entity associated with the employer, it can be expected to constitute client advice to be covered under a CMP. However, if it is not performed under such a client agreement it would appear, on the face of it, that the work is not 'Client Advice' needing to be covered by a CMP.

The CMP has to cover all Client Advice to the Employer in relation to the Scheme provided by anyone in the Scheme Actuary's firm (or on behalf of it). As such, in terms of whether the work falls to be covered by a 5.6-compliant CMP or not, it makes no difference whether the work is done by the Scheme Actuary, by a 'close' colleague of the Scheme Actuary or by any other colleague within the same firm. However, the safeguards and detail required to be included in the CMP in relation to this work could be very different dependent on who in the firm is doing it and their 'closeness' to the Scheme Actuary.

If the scenario set out had involved a conflict between the UK subsidiary and the overseas parent then the requirements for a CMP in terms of APS P1 would not apply (they do not apply to conflicts other than those with Trustees). However, a Member involved in such a situation would need to have regard to other provisions of APS P1 and/or the Actuaries' Code.

Query 8

I am a trustee of a small closed DB scheme linked to a charity. There are 100 or so Members, half in benefit and half having preserved pensions. Our actuary wrote to us sending a copy of the "Conflict of Interest and Actuaries a note for pension scheme trustees June 2012" together with a pro forma "Conflict of Interest Plan". Reading your guidance paper it appears to me that the key fundamental of such a plan is where the actuary has a formal relationship both with the trustees and the sponsoring employer. The covering email says that the scheme is "…a new requirement" and notes as follows:

> ***"Additionally, the Scheme Actuary must ensure that a written conflicts management plan is agreed with the trustees and the employer if the Scheme Actuary, or anyone else in the Scheme Actuary's firm, is advising the employer in relation to the Scheme."***

In our small scheme there is no direct relationship between the actuary and the employer. Clearly the trustee body comprises employer and employee nominated individuals and any one of the 100 can be motivated by self interest or as a director of the sponsoring company thus giving rise to potential conflicts of interest. I do wonder if this pro forma plan is a convenient means of harvesting fee income.

My other concern is that the trustees are being asked to agree to its introduction, without debate and to pay a fee.

The "new requirement" which you refer to above comes from new conflicts of interest provisions in Actuarial Profession Standard (APS) P1 "Duties and Responsibilities of Members Undertaking Work In Relation to Pension Schemes" v2.0 which can be found here: http://www.actuaries.org.uk/APS_P1_version_2

This revised standard was published on 29 June 2012 and pensions actuaries are subject to these requirements from 1 July 2013, although we have been encouraging Members to comply with these provisions as soon as they are able.

These provisions were included in APS P1 with the strong encouragement of the IFoA's oversight body, the Financial Reporting Council after a long period of consultation with Members of the IFoA, financial regulators and other interested stakeholders, including trustee representative bodies, the Pensions Regulator and the National Association of Pension Funds. We should make it clear that the motivation behind these conflicts provisions was the protection of the interests of the trustees and Members of pension schemes through increased transparency and accountability by Members of the IFoA working on/for those schemes. The provisions were certainly not introduced to encourage the generation of additional fee income.

If neither the Scheme Actuary nor anyone else in (or on behalf of) the Scheme Actuary's firm has a client relationship with the employer (including any entity associated with the employer) for work relating to the scheme, then no conflicts management plan is required under the new provisions of APS P1.

The trustee indicates that "there is no direct relationship between the actuary and the employer". This may suggest that there is no relevant client relationship with the employer but it does not demonstrate that point clearly – there could for example be a relationship between the employer and someone else in the actuary's organisation. It may perhaps be that while the Scheme Actuary does not have a relationship with the employer, the Actuary's firm does. The trustee should clarify this point with the Scheme Actuary.

The Scheme Actuary should not imply that the trustees have to accept his plan without debate. The trustees (and the employer) specifically need to agree to it, and the Scheme Actuary must also be reasonably satisfied that the trustees understand the plan and its implications. And, apart from anything else, if the trustees do not wish to accept such a plan they can instead insist that in future their Scheme Actuary's firm has no client relationship with the employer (although they cannot insist that the current Scheme Actuary continues his appointment with them on this basis if he does not wish to do so – i.e. the Scheme Actuary could then, subject to acting in accordance with the Actuaries' Code and meeting the relevant legislative requirements, resign the appointment).

The question about whether the Scheme Actuary may or should charge the quoted fee for producing the plan is fundamentally a matter for the contractual terms of engagement between the actuary and the trustees. While on the face of it, an explicit charge of this kind for what might seem to be a document produced solely to enable the actuary to comply with his professional requirements might appear unreasonable or at least insensitive, actuarial firms do need to cover their costs somewhere from the fees they charge and at least this approach is an 'open' one. However, the actuary should not be seeking to impose this charge if a plan is not actually needed (see fourth and fifth paragraphs of this response) or the trustees wish any client relationship to be discontinued (see sixth paragraph of this response).

Personal conflicts

Query 1: Recommending IFAs

I specialise in providing Pension Sharing reports for solicitors and their clients in divorce cases. I charge a fixed fee to collect data and report on the possible options for dealing with the pensions on divorce. In the vast majority of cases I am instructed as a Single Joint Expert.

The reports are always done under any Civil/ Family Procedure Rules and so are for the benefit of the Court regardless of who instructed me.

In general, the vast majority of schemes offer the external transfer only i.e. the former spouse must transfer their pension credit benefits to an external pension provider and so the report will be advising on a share of that pension. Clearly there is then a need for independent financial advice as to where to transfer the pension credit benefits. I do not provide such advice because by not doing so there can be no question that the derived Pension Shares in my report are influenced by any possible post report remuneration from either client.

In some cases a scheme will offer the internal and external transfer options. In those cases my reports always provide Pension Shares based upon the internal transfer option since this always provides greater post Pension Share income to both parties than would be the case for an external Pension Share.

It should be noted that whilst the reports set out a range of Pension Shares and options I am not involved in any other way on how a settlement is reached.

I am very aware that the intricacies of Pension Sharing are not always understood by some IFAs. Accordingly, I recommend 2 IFAs I know because I am certain that they are sufficiently familiar with the process of implementing a Pension Sharing Order such that the client will be receiving appropriate advice. Accordingly, by recommending these IFAs I know that they will revert to me and my knowledge of the Pension Sharing legislation if they are uncertain of any aspect of it. I have two questions:

1. ***Is there anything that would prevent me from writing to each party (so not just the pension credit beneficiary, but the member from whom a Pension Share might be made) once a report (or indeed before a report has been prepared) to say that I can recommend an IFA who could assist them with any Pension Sharing Order that might arise following their divorce?***
2. ***Is there anything that would prevent me from signing an introducer's agreement with the IFA so that in the event that any Pension Share was done in a case a payment would be made to me for the introduction?***

A fixed fee has already been paid for my report and so any fees are not dependent upon an introduction. There is no guarantee that a client will use one of the IFAs, but if they did then they have been put in contact with an IFA who has suitable knowledge of the overall Pension Sharing process. From the IFA's point of view, if contacted, then they are provided with individuals who need to transfer pension benefits in order for a Pension Sharing Order to proceed.

The only area that I believe could be questioned is the size of the Pension Share that is calculated. Clearly if an introducer's agreement is based on the size of the pension credit transfer then the greater the Pension Share the greater the possible income from an introduction. However, Civil/ Family Procedure Rules mean that the reports will state, when appropriate, that there is a range of Pension Shares.

Question 1 response

It appears that this situation could be perceived to involve a conflict of interest and the perception of a conflict is as important as an actual conflict given the requirement in the Actuaries' Code to provide objective advice and **be seen** to be doing so (see 3.1 of the Code).

In particular, the questioner states that they "do not provide such advice because by not doing so there can be no question that the derived Pension Shares in [the] report are influenced by any possible post report remuneration from either client." It would appear that there is no difference in principle when it comes to accepting an introducer's fee that depends on the calculated amount of the transfer: if one is unacceptable, then so is the other.

While there may be limited (or no) scope actually to manipulate the calculated amounts, there is likely to be a perception of a conflict of interest. Accordingly, you will be required to disclose your interest in the arrangement and you must not enter into any relationship which compromises your independence in the context of your expert role.

Question 2 response

Again, the Member is required under the Code to consider the perception of a conflict of interest which is as equally important as an actual conflict. In this situation, the Member would be required to disclose any commissions or payments made so that the parties are aware of the arrangement and can make an informed decision as to whether or not to proceed with the Member's recommendation. Finally, the Member should consider the nature of the payment: a percentage fee may be viewed as a conditional fee arrangement which is considered to be an arrangement which may compromise an expert's independence because the report may be influenced by the amount of commission/uplift etc that the expert receives. A fixed fee arrangement, which is also disclosed, would be a more suitable arrangement for the Member to consider.