



Key Principles of Pension Administration Agreements



Pension administration agreements are an important tool in governing the relationship with the Trustees' appointed Administrator and agreeing, not only the services being delivered, but the way in which they are delivered.

Pension administration agreements have historically been poor in covering some important aspects, such as data and transition projects and are now gaining increasing attention. Muse Advisory and CMS Cameron McKenna LLP have collaborated in producing this guide and setting out key provisions you would expect to see in pension administration agreements. It reflects their vast experience and how agreements have significantly changed in the last few years for the benefit of both parties (client and administrator).

The summary of the main administration agreement clauses and schedules set out below is based on what would commonly be contained in a Third Party Administrator (TPA) appointment agreement. The first half of this guide covers the 'front end' of the agreement and the second half provides information on the commonly drafted schedules, together with some examples. As part of the selection process of a new TPA, it is important to conduct a concurrent review of its contract. This guide is aimed primarily at trustees and employers so as to know what to look for or expect when appointing a TPA. It will also be of help to TPAs to help ensure appropriate standards across the industry and to trustees of in-house schemes when setting up administration agreements between trustees and employer.

Note: This document sets out some key principles only and is not intended to be an exhaustive guide to drafting and agreeing any contract. Therefore, you should not place reliance on this document and the information contained within and we recommend that you seek appropriate advice for negotiating and agreeing a contract with your Third Party Administrator. You should also refer to your obligations and powers under the Trust Deed and Rules when entering into any such agreement.

The front end of the agreement

Overview

Occupational pension scheme trustees can choose to delegate the administration of the scheme to an "in-house" team, i.e. a team employed by the scheme's sponsoring employer, or, to outsource the administration to a TPA who has expertise in this area. Even where the administration takes place in-house, it is important to have an administration agreement in place.

A well drafted administration agreement should set out in detail the scope of the services to be provided and should be easy to follow. It should be used as a working document during the appointment of the administrator rather than being treated as a purely legal document that only needs to be referred to occasionally.

It is important for trustees to note that even if they outsource the administration, they remain responsible for monitoring the performance of the administrator.

Definitions

Frequently used terms can be set out and defined in this section to avoid repetition throughout the agreement. Defining certain terms reduces the risk of ambiguity of meaning depending on where in the agreement the term is used. Where the term is used in the body of the agreement, it will usually be capitalised to show that it is a defined term, the meaning of which should be ascertained in the definitions section.

Parties

The parties to the agreement are commonly the trustees of the pension scheme and the selected administrator.

Principal employers of the scheme are also sometimes included as parties to the agreement. Where the principal employer is included as a party, some thought needs to be given to what rights or obligations are to be given under the agreement and who can give the administrator instructions. At the very least, the principal employer will want to ensure that the administrator expressly acknowledges its liability towards the principal employer as a party to the agreement.

Clearly if the administrator commits an error which in turn causes loss to the pension scheme, the principal employer will be concerned to ensure that it has some recourse to the administrator. This structure helps to avoid arguments by administrators that, unless the scheme members or the scheme have suffered a loss that cannot be recovered from the scheme employers, there is no loss for which the trustees can claim against the administrator (although this line of argument remains to be fully explored in court).

Appointment and delegation

It is usual to summarise the scope of the administrator's appointment and set out the various appointment formalities. These typically include:

- notification to HMRC of the appointment of an administrator and confirmation that the trustees will remain the scheme's administrator for the purposes of the Finance Act 2004;
- confirmation that the administrator is not appointed as a "professional adviser" within the meaning of section 47 of the Pensions Act 1995;
- granting to the administrator a power to delegate its functions to third parties. This will usually be set out in a schedule (see page 17). Such wording will usually contain restrictions to ensure that the administrator can delegate only to certain approved third parties and, even then, that the administrator will remain responsible for the third parties' actions. Trustees are often concerned to ensure that the administrator does not delegate its duties to another party (or overseas). This can be of particular concern to the trustees where the trustees have selected the administrator specifically because of the ability of a certain office or team or because of the administrator's geographical location; and
- a transition plan to set out the process for the 'on-boarding' of the new TPA. This will normally be set out in a schedule to the agreement (see page 15).

Term

Administration agreements typically have an initial term of five years. The agreement can be evergreen (automatically rolling on for a further year at the end of the initial term and each additional year unless either party gives written notice to terminate for convenience); or it can include a right to extend for a set period, e.g. for two years, on one or more occasions.

Administrator's obligations

An administration agreement will contain detailed provisions on the administrator's obligations in relation to the services it has agreed to provide. Customarily, the following administrator obligations will be covered:

- the required standard of care (usually with "reasonable skill, care and diligence" or by reference to good industry practice as a defined term). Note that even if the agreement is silent on the point, the Supply of Goods and Services Act 1982 would imply a term that the services will be provided with reasonable care and skill (unless the application of that Act is validly excluded);
- to ensure technology and processes are up to date, in line with 'best practice' and regularly improved to ensure sustainability, efficiency and future proofing of the operations;

- an obligation to use personnel with appropriate experience and expertise and to ensure those personnel receive continued training and education in line with legislative and scheme specific changes and to ensure compliance with 'best practice' standards in pensions administration;
- a summary of the resource and personnel the administrator will allocate. It is usual for the parties to agree that certain "key" personnel will be used by the administrator for a certain period from commencement of the agreement – these will usually be listed in a schedule (see page 16 for more detail).
- an obligation on the administrator to inform the trustees if they become aware of any material issue which may prevent them from fulfilling their duties or prevent them from performing them in accordance with applicable law;
- an obligation on the administrator to provide the services in accordance with the trust deed and rules of the pension scheme. Sometimes the administrator will also be required to comply with trustee policies e.g. on conflicts of interest. In addition, if the principal employer is a party, the administrator may be required to comply with certain of the principal employer's policies e.g. the supplier code which may set out how it expects any suppliers to run their business (e.g. from a corporate social responsibility point of view). The policies the administrator will be required to comply with will usually be set out in a schedule (see page 17 for more details);
- an obligation on the administrator to comply with all applicable law and industry codes of practice, standards and guidelines. This will give the trustees comfort that the pension scheme is being administered on a best practice basis;
- warranties and representations from the administrator that it has the power and capacity to enter into and perform the agreement, that once executed the agreement will bind it, that it is not subject to any contractual or other restrictions that would prevent it from performing its obligations and that there are no proceedings, actual or threatened against it or any material subcontractor that might affect its ability to perform its obligations; and
- an obligation on the administrator to obtain all necessary authorisations, licences, rights, consents and approvals necessary to perform its obligations.

Trustees' (and Principal Employer's) obligations

In addition to the administrator's obligations, the agreement will also customarily contain obligations on the trustees (and the principal employer if it is a party). Whilst these obligations are typically less detailed than the administrator's obligations, they will normally include obligations on the trustees (and principal employer) to:

- act reasonably and cooperate with the administrator so it can provide the agreed services; and
- provide the administrator with access to the scheme's data and advisers where (and to the extent) necessary.

It is also usual for the agreement to contain a statement that the administrator will not be liable for breach of its obligations under the agreement to the extent that the breach arises as a result of the trustees' (or principal employer's) failure to perform its obligations.

The trustees (and principal employer) will usually be required to give similar representations and warranties as the TPA in terms of their power and capacity to enter into and perform the agreement.

Finally, it is routine for there to be provision in the agreement about who can give instructions to the TPA.

Services, service levels and service credits

The services to be provided will usually be included in a schedule (see page 13 for further information) and should contain detailed descriptions of all the services. Each service line will usually have performance levels assigned to it – such as performance timescales, accuracy and quality checking criteria. If part of the solution is based on a technology platform then availability and failure response time service levels may also be relevant.

The service descriptions and service levels may also be underpinned by separately documented processes, preferably shared with the client, for example knowledge management systems or process maps. Where applicable, industry or other quality standards should be referred to.

The administrator will be required to perform the services so as to meet or exceed the service levels. For example, that it will deal with transfer requests within a fixed timescale or answer telephone calls within a fixed number of rings etc. Service levels, service credits and pricing mechanisms for fees need to be carefully designed to ensure that they drive best behaviours and do not lead to perverse outcomes. For example, payment focused on the time taken to respond to transfer value quotations, combined with service levels that do not encourage the TPA to respond quickly could lead to member complaints of slow response times whilst the TPA would still be hitting the service levels – on the face of it performance requirements are being met but in practice the outcome is highly unsatisfactory as fee levels do not reflect an improvement in service quality or performance in real terms and scheme members are unlikely to be happy with their experience.

Should the administrator fail to meet or exceed the service levels (except at the fault of the trustees or, where it is a party, the principal employer) it may be liable to pay a “service credit”. Service credits are usually treated as a reduction in the price payable for the services, and accounted for on a monthly basis. They will often be subject to a monthly or annual financial limit set at a percentage of the standard fees.

Repeated or severe service failures can lead to escalation of the level of service credit payable and/ or a termination right on behalf of the trustees. Care should be taken to ensure that service credits are not the sole remedy of the trustees in the event of a service failure (e.g. rights to terminate and claim damages should be clearly preserved where the level of performance drops substantially below that which the service credits were intended to compensate).

If “bolt on services” such as an employee benefits portal are to be provided, care should be taken to determine whether they should be provided under the terms of the administration agreement or a separate agreement – and whether it should be the trustees and/ or the principal employer that procures the service. These added value services are increasingly based on internet or intranet delivery models and will often rely heavily on a technology solution. As such, they may require bespoke service levels and additional terms appropriate to the nature of the service e.g. it may be necessary to prescribe privacy notices and an end user licence agreement and/ or acceptable use terms.

Supply chain management

It would be usual for restrictions to be placed on the administrator’s right to subcontract performance of its obligations. The administrator should be responsible for all acts and omissions of, and compliance with, the terms of the agreement by its suppliers and subcontractors.

Business continuity

It is usual for the administrator to be required to develop, maintain, test and regularly update a business continuity and disaster recovery plan. Recovery timescales should also be specified within the plan. The agreement should provide a mechanism for invoking the plan e.g. if a disaster, supply chain issue or force majeure event arises.

Records and Reporting

The administrator will be required to record and make a variety of management information available to the trustees to enable them to properly supervise, monitor and manage performance by the administrator and the operational and regulatory risks inherent in the performance of the outsourced functions. Some of this information may be made available for access on an ongoing basis through internet portals, but it is common to prescribe a set of records and reports that the administrator has to prepare, maintain and disclose to the trustees on a regular basis.

The reports will typically include areas such as the administrator's performance against the service levels, call centre activity, emerging issues and complaints, quality control, security incidents (e.g. data breaches), and will usually be monitored via the production of reports by the administrator setting out the levels achieved and any credits due. A "compliance certificate" could be produced on a regular basis by the administrator confirming that it has complied with its obligations to provide the services under the agreement (see page 17). This all helps trustees to demonstrate that they have been monitoring the provision of the administration services.

The agreement should establish appropriate record retention requirements and access rights.

Where the agreement contains continuous improvement obligations, the administrator may be required to monitor the market for, and report to the trustees on, emerging best practice processes and procedures and new technologies that could be employed to increase the efficiency, quality or security, or reduce the cost, of the services. The trustees would then have the option to discuss any recommended changes with the administrator and could request the services be changed to incorporate them through the change management procedure.

Relationship management

Often referred to as "service governance", there will usually be a provision either in the front end of the agreement or in a schedule (see page 14 for further information) setting out the principal points of contact for each party in relation to the management of the agreement.

The governance framework will often be used as part of the commercial disputes escalation process.

Audit

In order to satisfy themselves (and, if necessary, the Pensions Regulator) that the agreement is being performed in accordance with its terms and in a manner that enables the trustees to meet their regulatory obligations it is likely that the trustees will require audit rights. The process also gives the trustees (and the Pensions Regulator) some transparency on the administrator's operations and comfort that the scheme is being administered correctly.

These will typically require effective access to premises, records, systems and personnel engaged in the performance of the services and the right to require information and ask questions of personnel. To manage business disruption and cost, the parties may agree to notice provisions, restriction on the frequency of audits and cost allocation (which may depend on whether or not a material breach, regulatory non-compliance or an overpayment to one or more members has arisen).

Fees and VAT

There will usually be detailed provisions in a schedule setting out the level of fees, which will vary depending on the size and complexity of the pension scheme, the timescales within which they should be paid and the ambit of what the fees cover (see page 14 for more detail).

Bank and other accounts

It is usual for the administrator to use set bank accounts authorised by the trustees. To reduce the risk of misappropriation of scheme assets, payments out of the accounts should be limited. Payments are commonly restricted to providing benefits, transfer payments, expenses properly payable under the scheme and any other payments the trustees may authorise.

Intellectual property

There should be a provision setting out each party's ownership and licensing responsibilities in relation to intellectual property (e.g. in software, know-how or documentation). Express provision should be made in relation to the use of business names, trademarks or other corporate branding.

It would be usual for each party to retain ownership of its pre-existing intellectual property, and to licence it to the other party to the extent necessary for the provision or receipt of the services e.g. allowing the administrator to use the employer's/trustees' branding on announcements to members. Intellectual property and data created in the performance of the services and any deliverables (reports, scheme specific processes, checklists etc.) should vest in the trustees (even though in our experience, TPAs will try to retain this), with a licence granted back to the administrator to use it for the performance of the services. The clause will require an assignment of any intellectual property which vests or otherwise becomes owned in a manner inconsistent with the ownership allocation it specifies.

Licences should be restricted to permitted uses and territories and cover any required sub-licensing or use by the trustees' other service providers, which may include the principal employer and its affiliates. The licence term should cover the term of the agreement and any exit period and also allow each party to use the intellectual property licensed to it to the extent required to meet its regulatory obligations or other obligations under the agreement (which may survive termination). Consideration should be given to whether any licences need to be perpetual. Special terms may need to apply in respect of third party software or other intellectual property provided by or on behalf of the administrator or otherwise required to be used by the trustees or the principal employer to receive the services or obtain the benefit of the agreement.

Each party should indemnify the other against any loss or damage arising in connection with any claim or allegation made by a third party that the materials, deliverables or services supplied, used or made available by the indemnifying party infringe the intellectual property rights of the third party. Claims under the indemnity will usually be subject to conduct of claim/dispute provisions. Where the administrator is responsible for the infringement it may be required to alter the services or deliverables, or procure an alternative solution, in order to avoid further infringement.

Confidentiality

It is usual for a confidentiality clause to protect the information of both parties and place restrictions on public announcements. The clause should require the parties to keep the information secure and confidential, restrict its disclosure and prescribe to whom information may be disclosed. Use and retention of the disclosed information should be limited to set purposes. Provision should be included to make sure the disclosing party ensures that those it discloses the information to also keep it secure and confidential. Certain exclusions will usually be provided for e.g. disclosure required by applicable law.

Data protection and information security

As the trustees will be supplying scheme information to the administrator (including personal member data) it is important for there to be clear provisions in the agreement setting out how the trustees are complying with their data protection obligations.

Responsibility for compliance with the current UK data protection legislation falls on the "data controller". In most circumstances this will be the trustees. Accordingly it will be necessary for the trustees to flow down into the agreement certain of the obligations imposed on them by the legislation as obligations on the administrator. If the administrator performs special consultancy or actuarial services beyond mere administrative processing, or performs services in relation to which it or any of its employees engaged in the performance of the services are bound by particular

professional obligations this will increase the risk that the administrator may be a “specialist service provider” and thus would also be a data controller. Similarly, the appointed Scheme Actuary may also be a data controller.

Common provisions include:

- A requirement to comply with the trustees’ (or the principal employer’s) security policy and standards, or the administrator’s own one, which will be appended to the agreement. The policy will need to be reviewed, tested and updated regularly (with changes subject to trustee approval). All security incidents and data breaches should be reported. The policy should among other matters cover physical (e.g. premises), technical (e.g. IT systems) and procedural measures (e.g. incident management and resolution, back-ups, encryption for data disclosure and transfer and secure, permanent erasure and destruction of equipment).
- A requirement only to process personal data in accordance with the trustees’ instructions.
- A requirement to implement appropriate technical and organisational measures to protect the personal data against unauthorised or unlawful processing and against accidental loss, destruction, damage, alteration or disclosure, and to provide written details of those measures on request.
- Restrictions on the locations in which the data can be processed – typically restricted to the UK or the European Economic Area (“EEA”) – and a prohibition on transfers of data outside the UK/ EEA.
- Notification and assistance requirements relating to data subject access requests and complaints.
- Staff vetting and reliability assurance measures.
- Obligations around maintaining the accuracy of records and data retention.
- An indemnity against loss or damage suffered as a consequence of a breach of these obligations.

Employment matters

Where an incumbent administrator is being replaced, detailed provisions on employment matters will be required where a further replacement administrator is appointed on termination of the agreement. The following areas are usually addressed in the new administration agreement.

Key Personnel – as mentioned earlier, the agreement may contain provisions identifying particular personnel or roles that the trustees determine are important to the provision of the services to be provided by the administrator, including, for example, restrictions on removing or replacing such persons.

Provisions on “entry” of new administrator – the parties will normally acknowledge the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) and that TUPE shall apply on commencement of the administration services under the new agreement to transfer the contracts of employment of employees assigned to providing the administration services from the incumbent administrator to the new administrator. Which of the outgoing administrator’s personnel will transfer employment under TUPE is a question of fact, depending on how involved they have been with the scheme compared with their other duties.

Obligations under TUPE – the parties will acknowledge and confirm their intention to comply with their obligations under TUPE, including the obligation to inform and consult with employee representatives.

Apportionment of employment liabilities – the parties will agree the apportionment of employment liabilities. Usually the trustees take responsibility for employment liabilities relating to the period before the appointment of the new administrator and the new administrator takes responsibility from the time that it starts providing the services under the new agreement. The new administrator will also usually expect protection from claims by employees/ other personnel of the existing administrator who are not entitled or expected to transfer to the new administrator as a result of arrangements under the administration agreement.

Detailed provisions dealing with the “exit” of the incumbent administrator should also be included in the agreement with the incumbent. The following areas are usually addressed in such a situation:

Staffing Information – the administrator is required to provide staffing information, including terms and conditions of employment, details of any employment litigation and other key potential liabilities concerning the employees. This information must normally be provided within a specified time period prior to termination of the agreement. This information is used by the trustee to re-tender the services to identify a replacement administrator.

Standstill provisions – the parties agree that the administrator cannot make changes to the way that it resources the administration of the services for a certain period prior to termination of the agreement, for example redeploying employees away from the services, changing terms and conditions of employment or introducing enhanced remuneration and other policies. This is to prevent the administrator inflating costs for a replacement administrator.

Application of TUPE on termination of the administration agreement – the parties will acknowledge the application of TUPE on termination of the agreement and that TUPE shall apply to transfer the contracts of employment of employees assigned to providing the administration services from the administrator to the replacement administrator.

Obligations under TUPE – the parties acknowledge and confirm their intention to comply with their obligations under TUPE on termination of the agreement, including the obligation to inform and consult with employee representatives.

Apportionment of employment liabilities – the parties will agree the apportionment of employment liabilities. Usually the incumbent administrator takes responsibility for employment liabilities relating to the period before termination and the trustees’ replacement administrator takes responsibility from termination onwards.

Liability and insurance

The administrator will want to restrict its financial liability under the agreement. The agreement will usually set financial limits on the parties’ liability, which are generally reflective of the size of the pension scheme, complexity and the nature of the services. For reasonably large schemes the administrator’s potential liability is likely to be significant.

In addition to the liabilities (such as fraud and liability for death or personal injury caused by a party’s negligence) which cannot be excluded at law, the parties may agree to exclude certain liabilities from the application of the financial limit, e.g. under the IP indemnity, for breach of confidentiality or data protection obligations. The administrator may also seek to exclude liability for certain heads of loss e.g. loss of profit or anticipated saving.

The agreement may provide for a remedial plan mechanism to give structure to the manner in which the administrator is required to respond to and rectify breaches or service failures.

The trustees’ liability should be limited to the amount that can be lawfully recovered by them from the pension scheme.

Provisions should be included requiring the administrator to take out, maintain and evidence appropriate levels of insurance against risks associated with the performance of the services.

Reports to the Pensions Regulator

It is usual for the agreement to include clauses setting out the parties’ ‘whistleblowing’ obligations. Trustees are required to report to the Pensions Regulator (under s.70 of the Pensions Act 2004) when they have “*reasonable cause to believe that...a duty...imposed by...law, has not been...complied with, and...the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions*”. This duty also applies to administrators and the principal employer and so the agreement will normally make this clear.

The administrator will usually notify the trustees before it makes a report to the Pensions Regulator.

Change Controls

It is standard practice for the parties to allow for changes to the services or the terms of the agreement, including the fees, to be made by written agreement of the parties. However, for more complex arrangements it is common to agree a change management procedure that will prescribe the process required to implement a change (including any due diligence or impact assessment required, response timescales and agreeing the scope and detail of the change and documentation). This will often be set out in a schedule to the agreement (see page 18 for further detail).

It may be appropriate to grant the administrator a degree of flexibility to make minor operational adjustments as to how the services are delivered, provided they do not impact the risk profile, technology, personnel or cost of the services.

It is also usual for the agreement to contain provisions dealing with a situation where the law, or the requirements of the Pensions Regulator or Information Commissioner, change and detailing how the administrator will implement this and whether additional charges will be made. It is usual for an administrator to make additional charges for a change in law only if that change affects that specific client (or a small number of clients which include the trustees).

Most changes will be recorded in writing, the format of which will depend on what the parties have agreed in negotiating the agreement.

Dispute resolution

In the majority of cases, the agreement will include a clause setting out a commercial dispute resolution procedure to be followed before any legal proceedings are commenced. The clause should also provide that the parties must continue to perform their obligations under the agreement whilst any dispute is being resolved.

Termination of agreement

The agreement needs to set out the basis on which each of the parties may terminate it. This is a particularly important clause and should be drafted clearly and comprehensively to ensure that there is no room for argument should the parties wish to terminate the agreement, especially where there has been a breakdown in relationship between the parties.

It is normal to see the rights of termination arising in the following circumstances:

- by the trustees (only) for convenience, on giving an agreed notice period. Termination on less notice may also be acceptable but a compensation payment may become payable e.g. to cover stranded or committed costs. Provision should also be included on how notice may be given (see “Boilerplate clauses” below).
- in the case of the trustees, on the administrator’s insolvency or in the case of the administrator following the trustees’ or principal employer’s insolvency (this latter scenario may be tempered by a right to require termination services – albeit with payment made in advance);
- by the trustees if the administrator fails to remedy a material breach within a reasonable period or is responsible for persistent service failures;
- by the trustees in the event of persistent failures or breaches in providing agreed services and achieving service level agreements;
- by the administrator if the trustees (and/ or principal employer) fail to pay undisputed fees to the administrator within a reasonable period or receipt of a demand for the overdue amount(s); and
- where a force majeure event (i.e. an event beyond the reasonable control of the party claiming relief) endures for a significant period.

Other termination rights that may be appropriate include: breach of applicable laws (or restricted to e.g. breach of the Bribery Act or other named legislation), fraud, breach of data security requirements, requirements of a regulator, change

of control of the administrator or failure to comply with business continuity requirements that result in a material adverse effect on the administration of the pension scheme.

Consequences of termination

It is important for the agreement to contain provisions to manage the positions of the parties on termination or expiry of the agreement. It should make it clear which provisions of the agreement survive termination, make provisions for the return of confidential information, materials, intellectual property rights, personal data, trustee data etc., and make provision for termination assistance to be provided.

The agreement should provide for a detailed exit regime, with obligations on the administrator to prepare and update an exit plan, provide termination services and all assistance reasonably required to transfer the services (or, on a partial termination, those services that are to terminate) to a replacement provider (or “in-house” to the trustees). This is usually set out in a Schedule (see page 16). It is usual to place minimum requirements on the scope, contents and level of detail of the exit plan. The period of termination assistance will vary depending on the scope, complexity and scale of the outsourcing, but will typically be between 6 and 24 months.

Miscellaneous

Other provisions that it may be appropriate to consider including in the agreement:

- Provisions dealing with performance/ reliability issues with and/ or retention and continuity of administrator personnel.
- Application of a quality assurance framework.
- Continuous improvement and value for money (e.g. benchmarking) provisions.
- A process determined by the trustees setting out how under and overpayments will be managed.

Boilerplate clauses

The agreement should also include interpretation provisions, standard regulatory compliance provisions (e.g. anti-bribery and corruption) and provisions dealing with force majeure events, rights of assignment, service of notices, rights of third parties, waivers and severability of provisions, signing in counterparts, governing law and other standard “boilerplate” provisions. The main boilerplate provisions are summarised below:

Entire Agreement – The agreement will usually contain an entire agreement clause to ensure that the agreement supersedes any prior agreements between the parties relating to the subject matter of the agreement, whether written or oral, and that in entering into the agreement they are not relying on any representations not set out in the agreement. This is important in the context of an administration agreement. The parties may wish to carve out, from the ‘entire agreement’ wording, any other agreements in place with the administrator e.g. for special projects.

Force Majeure – This clause allows a party to be excused from performing its obligations under the agreement for certain events outside its reasonable control, which typically include acts of God, hurricanes, earthquakes and other natural disasters, terrorism, government acts, embargos, labour strikes and lock-outs.

Rights of assignment – It is not usual for a party to be able to assign its rights under the agreement without the consent of the other party and so there will usually be a non-assignability clause. However, it is conventional for the administrator to be able to assign its rights to certain of its group companies.

Contracts (Rights of Third Parties) Act 1999 – It is commonplace to see a clause that specifies that non-parties to the agreement do not benefit from and cannot enforce the agreement. This is necessary because in the absence of such a clause, the Contracts (Rights of Third Parties) Act 1999 could have the effect of granting certain people/ groups of

people rights under the agreement such as scheme members (and/ or the employer if they are not a party to the agreement).

Service of notices – The agreement should be clear on how any written notices under the agreement should be served, e.g. in writing, by post, by email, by hand delivery etc.

Waiver – It is usual for the agreement to contain a clause making it clear that any delay by the parties in exercising, or failure to exercise, any right or remedy in connection with the agreement shall not operate as a waiver of that right or remedy and that no waiver in connection with the agreement shall be effective unless it is in writing.

Severability – This clause is usually included to ensure that if a provision of the agreement is held to be illegal, invalid or unenforceable, in whole or in part, the remainder of the agreement shall not be affected.

Signing in counterparts – For ease, it is commonplace for there to be a clause allowing the parties to sign different copies of the same version of the agreement, which together are treated as one agreement. Any signing restrictions of the parties should be checked before inserting such a clause.

Governing Law

Finally, the agreement should make it clear as to the relevant law that governs the agreement. For administration agreements in the United Kingdom, for the most part, this will be the governing law of England and Wales.

Schedules

We have set out below the key schedules that we would recommend are considered in pension administration agreements. Not all of these will be applicable all of the time and this is intended as a guide only, rather than a template. There is usually flexibility as to under which schedules some of the terms will fall, and they could also form part of the main terms and conditions of the agreement.

List of schedules:

Recommended Schedules	Optional Schedules
Services schedule and service standards	Service Management Framework
Service governance	Data rectification
Fees	
Transition or transformation	
Exit plan	
Key personnel	
Compliance certificate	
Client policies	
Delegations	
Change controls	

Recommended Schedules

Services schedule and service standards	
Purpose of Schedule	To provide a comprehensive list of the services being provided by the TPA and the standard for performance against each.
Key principles	<ul style="list-style-type: none"> • A comprehensive list of the services required from the administrator will need to be included here, and this will require careful thought. • The schedule should cover all aspects of the service being provided, such as the core cradle-to-grave administration processes, accounting, payroll and web. • Most TPAs will have a standard services schedule and ‘Service Level Agreements’ to which they work. These can be a useful point from which to develop the schedule and begin negotiations over individual aspects of the service, and appropriate service levels. • Careful thought should be given to any services required that may not be included in the standard service offering, such as ongoing data maintenance and mortality screening. • Service levels should not just be quantitative. Qualitative measures should also be included. An example of these could be customer satisfaction levels measured by automated telephone surveys at the end of member

calls, or issuing feedback questionnaires to members at the conclusion of a transaction.

Service governance

Purpose of Schedule To set out the overall process by which the trustee and Administrator will oversee and manage their relationship throughout the term of the contract.

Key principles

- The way in which the relationship will be conducted on an on-going basis should be considered: who will be the key contacts for the administrator, the trustee and also the employer (if party to the agreement); what are the contract management arrangements, and responsibilities; what are the key interactions, frequency and purpose of meetings, escalation processes?
- Reporting requirements are also important. Agreement should be reached on, for example, the types of reporting required, the frequency and content of reports.
- If both trustee and participating employer are party to the contact, consideration should also be given as to how priorities will be managed and who will instruct the administrator.

Fees

Purpose of Schedule To establish clearly all fees payable in respect of services being provided, as well as the payment terms and treatment of out of scope projects and associated fees.

Key principles

- The ongoing fees should be set out clearly along with any assumptions made in agreeing the fees. The level of any annual increase should be detailed, and the trigger for any revisions to the fee (such as material changes in membership) should be agreed.
- Provision should also be included as to how the fees may be disputed (and payment of disputed sums withheld pending settlement of the dispute) or varied.
- Transition fees also ought to be covered in detail, and again the assumptions made in reaching the fee should be clarified. It should also describe when fees for transition fall due. This could be a one-off or series of payments, or may be amortised over the period of the agreement.
- The hourly and or daily rates for any out of scope project work should be set out for key levels of staff and team-members.
- Any fees payable on termination should be made clear. For example, the fees may be tiered depending on the period of the agreement remaining at date of termination. These fees are distinct from those in the Exit Plan schedule (see page 16), and relate to fees payable on termination for convenience. Where any transition fees have been amortised over the life of the agreement, we would expect to see that referenced as part of any termination fee obligations falling on the trustee.

- Although these are the 'core' fees that are likely to apply in all cases, there may be other projects being undertaken as part of transition, or with the TPA, that could usefully be covered here. For example, if a data exercise is ongoing in parallel to installation, the related fees could be set out in this schedule.
- Finally, any billing conditions and payment terms could be included here, although sometimes these are included in the main body of the agreement.

Transition or Transformation

Purpose of Schedule

For first time outsourcing, transition from TPA to TPA or arrangements undergoing a transformation, a robust project governance regime will usually be required to provide transparency, monitoring against clear success measures and milestones, information provision and accountability during implementation, migration or transformation.

This schedule could act as an abridged project plan, or project initiation document, that sets out the key aspects of the transition or transformation project to which the contractual commitment of the TPA is required.

Key principles

- This schedule should start with an overview of the transition project, which details, for example, the key objectives, the requirements of the TPA, the workstreams involved in the project, and target completion date.
- The leaders, or managers, of each workstream should be agreed, and an estimate of their time allocation could be included alongside each.
- All key project milestones should be included, with target dates, objectives and their success criteria, for example the go-live targets for various aspects of the administration (payroll, automation, web etc.) and how readiness to go-live will be evidenced.
- The governance approach to be used for the project should also be included. This will detail the roles of key parties, such as a Steering Group and/ or Working Group and the Project Manager. This section could also be used as an abridged Terms of Reference for the conduct of meetings as well, noting quorum and notice requirements.
- Reporting requirements for and from the parties specified in the schedule should also be detailed, e.g. the format of reports and the regularity.
- A detailed implementation plan and services, backed up with set project milestones, milestone dates and any financial performance incentives (which can be deductions, liquidated damages and/or bonus payments) and acceptance testing requirements will usually be required.

Exit Plan	
Purpose of Schedule	This schedule aims to ensure a smooth migration of services that minimises the impact on the continuous provision of services to members. It also provides upfront clarity on the information to be transferred across to the new provider from the incumbent, and the associated fees for exit.
Key principles	<ul style="list-style-type: none"> • The objectives of the schedule should be set out as well as the assumptions made in preparing the exit plan and determining termination assistance requirements and related fees. • Governing principles of termination should be defined, e.g. how the project and approach will be governed, risk management, communications and confidentiality requirements. • It is important to set out what data and knowledge will transfer (e.g. what is scheme specific information). • A high level exit plan should be drafted, noting that full detail cannot be established until actual termination. The high level plan should set out the key phases in a termination project (e.g. initiation, planning etc.), and the workstreams expected to form part of any project (e.g. HR, I.T. communications etc.) • The termination assistance required from the incumbent should be agreed. For example, the trustee may expect to be given details of any projects currently underway, outstanding issues and plans to resolve them, etc. • There will likely be a fee for this assistance, so as far as possible, this should be specified in the schedule. In the absence of a specific fee the basis for any fee should be set out. This should explain not only what the trustee are content to pay for, but also for what they will not be expected to pay. For example, we would not expect the trustee to agree to pay for additional resource due to project overruns caused by the incumbent. • The exit plan implementation should also be considered here. For example, the trustee should confirm the expectation that the administrator continue to provide the services under the Agreement during the exit phase, the timetable or how it will be agreed, the security and risk actions to be taken, and the transfer of documents, and bespoke intellectual property rights.

Key Personnel	
Purpose of Schedule	To specify the key staff and team-members at the TPA involved with the delivery and management of administration services, both during and after transition, and the client relationship.
Key principles	<ul style="list-style-type: none"> • This schedule is commonly a list of the key personnel associated with the delivery of services. • The arrangements for notifying the trustee of any changes in key personnel may also be included here.

- The period for which the personnel are contractually committed, and their hourly/daily rates, could also be included.
- The agreement should also cover what happens in the event of injury, sickness, resignation etc. of these “key” personnel.

Compliance Certificate

Purpose of Schedule To provide a template certificate for the administrator to sign and provide to the trustees on a regular basis that confirms compliance with agreed services and the agreement.

- Key principles**
- The compliance certificate should be agreed with the administrator. It, should cover compliance with required controls and standards. This will include those mandated or recommended by, for example, HMRC.
 - The certificate should provide comfort that services are compliant with the terms of the agreement and relevant legislation.
 - The frequency for provision of the signed certificate should be set out in the reporting requirements of the trustee in the service governance schedule.
 - A sample compliance certificate has been provided in Appendix 1. However, this is not comprehensive and you should consider the relevant points for inclusion in the certificate.

Client Policies

Purpose of Schedule This section is where the trustee or sponsor policies, to which the administrator are required to adhere, can be included.

- Key principles**
- A few example policies are listed below, but the list is not exhaustive and it is important that the relevant and appropriate policies are included:
 - Conflicts of Interest
 - Overpayments
 - Complaints handling
 - Fraud
 - Anti-bribery
 - Anti-money laundering

Delegations

Purpose of Schedule This schedule should detail any authorities and/ or discretions that have been delegated to the administrator by the trustee.

- Key principles**
- The delegated authorities/ discretions should be set out as an overview, rather than detailing the processes followed. The processes should instead be included in the administration guide.

- Example delegations could be approval and authorisation of payments to members within set limits, or taking discretionary decisions to write off a pension overpayment on death below an agreed amount.
- Of course, the type of delegations will be specific to any individual scheme and set of rules.
- This schedule records delegations at the outset, but it is likely that they will change and develop over time. It is a good idea to maintain a separate document providing full details of all delegations, not just to the administrator but to other advisers as well.

Change Controls

Purpose of Schedule

Change controls are used where the trustee or the administrator require a change to the services. This schedule should set out the process and could also include a template form for initiating a change.

Key principles

- The schedule should set out the change control process. For example, how requests should be submitted, and the timescales for acknowledging a request.
- The high-level approach to treatment of costs associated with changes should be agreed (the specific detail will need to be agreed in relation to each change and included in the change control notice).
- Consideration and acceptance of change requests should also be included. For example, which parties are required to sign-off a change before it can be implemented (administrator, trustee, and sponsor).
- A change control log is often kept to monitor and record changes. The format and information required to be logged can be determined in this schedule.
- The process for change controls may vary, and consideration should be given to whether variations to the process need to be set out separately for, say large projects, or even a specific project if it is significant enough to warrant it (such as a data rectification exercise).
- A section could also be included to cover how changes should be agreed and implemented in 'emergencies', which would be any change required in a shorter timescale than that provided for in this schedule.
- A template change control form is included as Appendix 2.

Optional Schedules

Service Management Framework	
Purpose of Schedule	To provide a framework for assessing the service and, if appropriate, to cover how incentives/ penalties for over and under performance will apply.
Key principles	<ul style="list-style-type: none"> • Where applicable, this section covers incentives and penalties (financial incentives and penalties may also be set out in the fees schedule). These require a significant amount of thought to ensure they are robust and appropriate. For example, should specific member processes, or scheme tasks (such as payment of payroll) be incentivised or penalised; what are appropriate trigger levels; and, in what circumstances should incentives or penalties be suspended or waived? For example, a service credit procedure could also be included where service levels are not met. • A Balanced Scorecard could also be incorporated into this schedule. This could cover subjective and objective criteria, but ought also to cover how the scorecard will be evaluated, and the consequences of exceeding, or falling short of specified levels.

Data Rectification	
Purpose of Schedule	Data rectification exercises are increasingly common. When negotiating a contract with a TPA this schedule can be included as appropriate to govern any data rectification activity, and obtain contractual commitment to deliverables.
Key principles	<ul style="list-style-type: none"> • The schedule should set out an overview of the project activity, including key milestones, target dates and success criteria against each. • The scope of the project should also be clearly defined, including project initiation tasks, pre-rectification work and the various workstreams included in the project. Each of these should have their success criteria defined as well. • A section that details the assumptions, tolerances and cost impact of the data rectification work could also be included. For example, the acceptable tolerance for common data accuracy, or GMP reconciliation, including estimated volumes, cost and allowances for contingencies.

APPENDIX 1 – Example Compliance Certificate

TO: the trustee of the XYZ Pension Scheme (the "Scheme")

1. This certificate is given in accordance with the agreement dated [xx] for the administration of the Scheme (the "Agreement"), and is given in respect of the period ending on [x] 20[xx].
2. We certify that, except as disclosed by Paragraph 3 of this certificate or as already specifically disclosed by us to you:
 - 2.1 the Scheme has been administered by us in all material respects and all benefits have been paid by us, in each case in accordance with its Trust Deed and Rules (as defined in the Agreement), and with all statutory provisions affecting it from time to time;
 - 2.2 to the best of our knowledge and belief, all contributions and other payments due to the Scheme have been paid in accordance with the agreed schedule of contributions for the Scheme;
 - 2.3 we are not aware of any circumstances relating to our administration of the Scheme which could prejudice the registered or contracted-out status of the Scheme; and
 - 2.4 the Scheme's Records have been maintained throughout the period in accordance with the terms of the Agreement.
3. Give details of any qualifications to the certificate, or otherwise say "There are no qualifications to any of the statements made in paragraph 2 of this certificate".

Date: 20[xx]

SIGNED by _____

For and on behalf of the Administrator

APPENDIX 2 – Example Change Control Notice

CCN serial number	
Originator and date of the request for the relevant Change	Originator: Date of request:
Service to which the Change relates (where the Change relates to an existing Service)	
Reason for the relevant Change	
Full details of the relevant Change	
Variations to charges and expenses	
One-off and any change to recurring costs should be noted together with details of the nature of the work and effort at a suitable level of detail to substantiate the charges. It should be clear whether costs are fixed, capped or time cost.	
Details of a timetable for implementing the relevant Change, including an analysis of the technical feasibility of the proposed Change and on the ability to deliver in line with Service Levels and other requirements of the Agreement together with an appropriate extension of time for the performance of any associated obligations and any proposals for acceptance of the relevant Change	
Details of consequential amendments, if any, to the Agreement necessitated by the relevant Change	
Date of expiry of validity of the CCN as agreed between the parties, which unless stated herein shall be ninety (90) days after the date of receipt of this CCN	
Signature by the Administrator's Client Manager for acceptance or rejection of the CCN	Signature: Print Name: Job Title:
Signature by the trustee's representative for acceptance or rejection of the CCN	Signature: Print Name: Job Title: