NB This is not advice. A note of only two pages might draw attention to but can barely scratch the surface of this subject.

The investment freedom of early SSASs (small self-administered pension schemes) to "invest" in fine wine, works of art, classic motor cars, holiday homes in the sun and such like was brought to an end in October 1989 by Memorandum 101, which applied to both personal and occupational schemes. Following the much-heralded pensions simplification effected by the Pensions and Finance Acts 2004, the freedom of investment is restricted by both pension and tax legislation.

The pension legislation prohibits certain classes of investment and imposes civil penalties under the Pensions Act 1995, s10 of up to £5,000 on individual and £50,000 on corporate trustees. The Finance Act 2004 distinguishes between authorised and unauthorised payments by pension schemes and imposes tax charges on unauthorised payments and, with a few exceptions, such as pensions, does not charge tax on authorised payments; but it does not prohibit unauthorised payments. The tax is an unauthorised payment charge of 40% of the amount of the payment plus a surcharge of 15%, if in any period of twelve months, the total of the unauthorised payments reaches 25% of the scheme's assets, and possibly scheme sanction charges.

The two sets of legislation do not always correspond with each other, resulting in the complicated and sometimes opaque set of restrictions summarised in the table below.

| | | |
|---|---|---|
| 1 | (background) family etc trust | No statutory restrictions on classes of investments, but there may be restrictions in the trust instrument (Trustee Act 2000 ss2, 3). In selecting investments, a trustee must "take such care as an ordinary prudent man of business would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide".<br>(re Whiteley [1887] 32 Ch D 196, HL) |
| 2 | "ordinary" occupational pension scheme | - Not more than 5% of the scheme's assets may be invested in employer-related investments, and<br>- none in employer-related loans.<br>(Pensions Act 1995 s40 and the Occupational Pension Schemes (Investment) Regulations 2005 articles 10 to 16)<br>See also rows 4 and 7. |
| 3 | small scheme ("SSAS") | Although these are occupational, the employer-related restrictions in row 2 do not apply.<br>(The above Investment Regulations, SI 2005/3378 article 12)<br>See also rows 4 and 7. |
| 4 | all occupational pension schemes | A payment for shares in a sponsoring employer is not an employer administration payment and therefore not an authorised payment if, when the payment is made:<br>- the market value of the shares in the sponsoring employer is equal to or greater than 5% of the scheme's assets or a total of 20% in shares in the sponsoring employers.<br>An authorised employer loan is an authorised payment if:<br>- it does not exceed 50% of the scheme's assets; and<br>- other conditions including security, repayment period and interest are satisfied.<br>(FA 2004 s180(5) and s179) |

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| 5 | "normal" personal pension scheme | The scheme must be established by a person with permission under the Financial Services and Markets Act 2000 (Part 4A). (Pensions Schemes Act 1993, s1 and Finance Act 2004 s154)). These investments are outside the scope of this note. |
| 6 | self-invested personal pension ("SIPP") | Investments may be selected by the member<br>- subject to restrictions imposed by the provider, and<br>- the employer-related restrictions in row 2 do not apply, because a personal pension scheme does not have an employer,<br>- but, if the member's employer is controlled by the member or an associated person and the company holds taxable property, the investment would be unauthorised.<br>See also row 7. |
| 7 | investment-regulated scheme | The acquisition or improvement of taxable property is treated as an unauthorised member payment. Taxable property is defined as residential property and tangible moveable property (including gold bullion, but excluding certain property worth less than £6,000 neither held directly by the scheme nor used by the member). HMRC is reported to have extended its interpretation of taxable property to include plant and machinery.<br>(FA 2004 s174A and sch 29A Part 2) |
| 8 | employer financed retirement benefits scheme ("EFRBS") | An EFRBS administered in the UK or outside the EEA States is an occupational pension scheme subject to the employer-related investment restrictions of s40, but is likely to be a small scheme and so exempt from them under article 12. See rows 2 and 3 above.<br>No EFRBS is registered with HMRC or subject to the restriction and penalties under the FA 2004, and rows 4 and 7 do not apply.<br>It might be seen as a return to the pre-Memorandum 101 era, albeit without the tax advantages. |

**definitions**

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| small scheme | Fewer than twelve members. Each must be a trustee; and all decision to be unanimous or the scheme to have an independent trustee.<br>(The above Investment Regulations SI 2005/3378 article 1) |
| employer financed retirement benefits scheme | The equivalent of an unapproved funded retirement benefits scheme before 6 April 2006.<br>(Income Tax (Earnings and Pensions) Act 2003 s393A) |
| investment-regulated scheme | A registered scheme, in which the member or a related person can directly or indirectly direct, influence or advise on the manner of the investment of the scheme's assets.<br>Or, in the case of an occupational scheme or a section of one, there are 50 or fewer members and one or more of them has influence etc as above.<br>And the scheme has an interest in taxable property.<br>(FA 2005 sch 29A Part 1) |

END