Pensions and Employment: Pensions Bulletin

13 January 2017 / Issue 1

Legal and regulatory developments in pensions

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For more information, or if you have a query in relation to any of the above items, please contact the person with whom your normally deal at Slaughter and May or Bridget Murphy

Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Severance payments and tapered annual allowance pitfall	From 6th April, 2016	Pensions Bulletin 16/06 2.1 Since 6th April, 2016, the £40,000 annual allowance for high income individuals is reduced by way of a taper to a minimum of £10,000 for those with income of £210,000 or more. 2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of: ♦ £110,000 "threshold" income, and ♦ £150,000 "adjusted" income. 2.3 Any taxable element of a termination package counts towards both threshold and adjusted income. A taxable termination payment could therefore catapult an individual over the £150,000 limit, resulting in a tax charge for the member on pension provision already made. 2.4 There may be scope for timing taxable termination payments to straddle tax years but care would be needed in view of anti-avoidance provisions. Termination procedures should be reviewed to build in a process to identify and manage this point.
2.	Members who intend to apply for Fixed Protection 2016 ("FP 2016") must have stopped accruing benefits (note that fixed protection may be lost on joining a registered life cover arrangement)	6th April, 2016	Pensions Bulletin 15/16
3.	Abolition of DB contracting-out: Rule amendments needed Note: Statutory power to amend, retrospective to 6th April, 2016, expires on 5th April, 2017	6th April, 2016	If your scheme was contracted-out on 6th April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5th April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6th April, 2016 to prevent the inadvertent addition of an additional underpin to the accrued GMPs of those active members. See further Pensions Bulletin 16/03.
4.	Put in place register of persons with significant control ("PSC") for trustee company where trustee is a corporate	6th April, 2016	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5th July, 2016 at the latest	Trustees must notify "service providers" if the scheme is being used as a "qualifying scheme" for auto-enrolment purposes and some or all of the benefits are money purchase. Pensions Bulletin 16/04.
6.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer's staging date	For example employers with a 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016. Publication available to clients on request from usual pensions contact.
7.	First Chair's annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6th July, 2015)	For example, schemes with a 31st December year end must submit statement by 31st July, 2016. Client note dated June, 2015 available from Dawn Holmes.
8.	"Brexit"	Referendum held on 23rd June, 2016	Consider potential impact on pension schemes. Client publications available on Slaughter and May website.

No.	Topic	Deadline	Further information/action
9.	DC Code of Practice 13 on governance and administration takes effect	28th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code.
10.	GMP equalisation		
10.1	Lloyds Trade Union announces intention to bring GMP equalisation class action	August 2016	We will continue to monitor developments in this litigation, said to be worth £300 million.
10.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	Pensions Bulletin 16/19
11.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
11.1	CJEU decision in *Parris v. Trinity College, Dublin*	Decided on 24th November, 2016	A 'death bed marriage' scheme rule did not indirectly discriminate on sexual orientation grounds. Pensions Bulletin 16/18
11.2	Provisional date for Supreme Court to hear appeal in *Walker v. Innospec*	March, 2017	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force.

No.	Topic	Deadline	Further information/action
12.	**Derivatives: New requirements to exchange variation margin**	**31st March, 2017**	**See item X below**
13.	PPF Levy		
13.1	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31st March, 2017	Pensions Bulletin 16/14
13.2	**Submission deadline for most certificates and scheme return**	**31st March, 2017, midnight**	**See IX below**
14.	HMRC's existing practice on VAT and pension schemes ends (please see our item on this in Pensions Bulletin 16/13)	31st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.
15.	Data protection: New Regulation	25th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15
16.	IORP II expected transposition deadline	**12th January, 2019**	Pensions Bulletin 16/11

New Law

I. Defined benefit schemes Select Committee report

1. The Work and Pensions Select Committee report[1] on defined benefit pensions (dated 21st December, 2016) contains several recommendations on DB regulation.

2. The report expressly states that the Committee tested whether its recommendations would reduce the chances of another pension scheme collapsing in the manner of BHS. For example, the report states that it is reasonable to expect a buyer to have a credible plan for tackling a substantial pension deficit.

3. The report calls for several of its recommendations to be addressed in the Green Paper on pensions, expected in the first few weeks of 2017 according to Richard Harrington MP, Under Secretary of State for Pensions.

4. The recommendations propose:

   4.1 giving the Regulator power to add punitive fines to contribution notices or financial support

[1] Defined benefit pension schemes – Sixth Report of Session 2016-17

directions, so that the fine trebles the original demand;

4.2 requiring advance clearance from the Regulator if a transaction could be materially detrimental to the pension scheme's funding position, albeit in a narrow range of circumstances, such as a sale or merger of the employer where the deficit is higher than a fixed proportion of the value of the company;

4.3 allowing trustees to change, temporarily or permanently, the level of pension indexation, when in members' interests;

4.4 requiring riskier schemes to provide valuations more frequently;

4.5 allowing recovery plans to exceed 10 years only in exceptional circumstances;

4.6 reducing the timescale for valuation submission from 15 months to 9 months, but allowing the Regulator to request information sooner where there are scheme sustainability concerns;

4.7 on Regulated Apportionment Arrangements:

- streamlining the process,
- relaxing the requirement for employer insolvency to be inevitable within 12 months, and
- encouraging earlier Regulator involvement in formulating the RAA proposals;

4.8 giving trustees power to demand timely information from sponsors;

Comment (1): Employers are already required[2] to inform the trustees within 1 month of any event which there is reasonable cause to believe will be of material significance in the exercise of the trustees' duties.

Comment (2): Under the same regulation, employers must also disclose, on request, information reasonably required by the trustees for the performance of their duties.

4.9 urging the PPF to incentivise good governance by providing a levy discount where appropriate;

4.10 urging the PPF to examine the effect of its levy on certain types of employer, such as mutual societies and SMEs;

4.11 establishing a statutory aggregator fund to facilitate the consolidation of small DB scheme assets and liabilities:

- without the need for employer insolvency, but
- requiring a conditional programme of contributions at the point of transfer agreed by the employer;

4.12 relaxing the rules for taking small DB pensions as lump sums; and

4.13 broadening the Regulator's Section 11 Pensions Act 1995 power to wind up a scheme to allow it to do that when:

- in the best interests of the PPF and levy payers; and

[2] Regulation 6 of the Occupational Pension Schemes (Scheme Administration) Regulations 1996

- no alternative is realistically available to deliver a better outcome for members.

Comment (1): The report does not constitute an announcement of changes in the law. It merely sets out a number of recommendations which the Government may choose to reject, in whole or in part.

Comment (2): The Regulator is under pressure to address any shortcomings in its performance as perceived by the Select Committee.

Comment (3): The Committee envisages "a nimbler TPR intervening earlier to nip potential problems in the bud". The paper notes that the Regulator has substantial powers but is reluctant to use some of those powers and can be aloof in dealing with trustees.

II. Bulk DC transfers without consent - call for evidence

1. The DWP has issued a call for evidence (dated 20th December, 2016) seeking views on how to improve the requirements currently in place regarding bulk transfers of DC benefits without member consent, from occupational and stakeholder pension schemes.

2. The DWP notes that restrictions contained in the current preservation regulations (Occupational Pension Schemes (Preservation of Benefit) Regulations 1991) can prevent such transfers from taking place in a number of situations.

3. Views are sought until 21st February, 2017.

4. The anticipated date for any changes is April, 2018.

5. The call for evidence does not cover:

   5.1 the block transfer regime governed by Schedule 36 of the Finance Act, 2004, and

   5.2 the bulk transfer provisions that will apply to master trusts under the Pension Schemes Bill.

6. The DWP does not plan to change the requirements for bulk transfers without consent from DB schemes.

7. Although the paper does not cover the requirements for TUPE[3] transfers, contained in Sections 257-258 of the Pensions Act 2004, the DWP is happy to hear views on whether those requirements should be eased.

8. The paper notes that the DWP has previously been asked to consider allowing the receiving employer to provide a personal pension arrangement where the transferring employer's scheme is an occupational scheme.

9. The DWP accepts that the "broadly no less favourable" test set out in the preservation regulations may not be suitable for DC schemes. Under this test, the actuary must certify that in their opinion the transfer credits to be acquired for each member in the receiving scheme are broadly no less favourable than the rights to be transferred.

10. The paper contemplates using other measures, in addition to, or instead of, that test, such as a comparison of the schemes' governance, charges, investments and retirement options. The DWP note the complexity of carrying out such comparisons, however.

11. The DWP also seek views on whether an appropriately qualified independent person, rather than an actuary, should carry out the comparison.

12. As regards bulk transfers from stakeholder pension schemes, the paper notes that the current requirements need to be updated. The paper contemplates

[3] Transfer of Undertakings (Protection of Employment) Regulations 2006

allowing contract-based stakeholder pension scheme members to be transferred without consent to an individual or group personal pension.

Comment: The Government is keen to see the consolidation of smaller DC schemes and states expressly in its call for evidence that it hopes that changes to the bulk transfer legislation would facilitate such consolidation.

III. FRC to review companies' pension disclosures

1. The FRC has announced, in a press release dated 15th December, 2016, that it will review certain aspects of companies' reports and audits. One aspect that will be reviewed concerns pension disclosures.

2. The review is scheduled to take place in 2017.

3. The FRC plans to conduct the review of companies' pension disclosures to encourage more transparent reporting of the relationship between a company and its pension plans.

4. The disclosures required by IAS 19, 'Employee Benefits', focus on factors that could affect the future pension expense and cash flows of the company and the security of future payments to pensioners.

5. The FRC expects:

   5.1 quantified information about the level of pension scheme funding expected in future years;

   5.2 the risks inherent in the investment strategy to be clearly identified and explained - for example, when complex financial instruments are used;

   5.3 where "net pension assets"[4] have to be considered, the basis upon which the company expects to benefit, including the judgements made when assessing trustee rights; and

   5.4 an explanation of how fair value has been determined for assets such as insurance contracts or longevity derivatives.

6. The press release states that the FRC will write to a number of companies prior to their year-end, informing them that it will review disclosures in their next published reports.

IV. Single guidance body - consultation

1. The Treasury and DWP have issued a consultation[5] (dated 19th December, 2016) on introducing a single body for financial guidance, including pensions.

2. The consultation proposes the establishment of a new body which would bring together pensions guidance, money guidance and debt advice in one place. This would replace the Money Advice Service, The Pensions Advice Service and Pension Wise.

3. The new body would be launched no earlier than Autumn, 2018.

4. The consultation closes on 13th February, 2017.

5. Funding for the new guidance body would be achieved by a levy on the financial services industry, as is currently the case.

Comment: While members are likely to benefit from greater levels of education about their pension saving, the guidance on offer will be generic.

V. Auto-enrolment review and thresholds

The Government has announced, in a Ministerial Statement made by Richard

[4] e.g. as a prepaid amount of pension contributions to the pension scheme, or a returnable surplus

[5] Public Financial Guidance Review: consultation on a single body

Harrington MP, Parliamentary Under Secretary of State for Pensions:

- that a review of auto-enrolment will take place; and
- the conclusions of its annual thresholds review.

A press release was issued on 12th December, 2016 by the DWP and Damian Green, MP, Secretary of State for Work and Pensions.

A. Review of Auto-enrolment

1. An auto-enrolment ("**AE**") review will take place during 2017. The Government plans to:

   1.1 engage with the pensions industry in early 2017, and

   1.2 publish a report setting out policy recommendations towards the end of 2017.

2. As a result, the Government does not expect to make policy decisions during 2017.

3. The review is expected to cover a broad range of issues, including:

   3.1 the AE thresholds and AE age criteria;

   3.2 the requirements for review set out in Sections 23A and 28 of the Pensions Act 2008 (covering the alternative quality requirements for DB schemes and certification requirements for DC schemes, respectively); and

   3.3 the charge cap level and whether transaction costs should be covered.

B. Annual thresholds review

1. The DWP has published its annual thresholds review analysis, dated December, 2016.

2. The AE earnings trigger determines at what point an eligible person is automatically enrolled into a workplace pension.

3. The review concludes that the AE earnings trigger will be frozen at £10,000 for 2017/18.

4. The qualifying earnings band sets minimum contribution levels for DC schemes. The minimum of the band is also relevant for defining who can opt in if they earn less than the earnings trigger.

5. The review concludes that band earnings should continue to be aligned with National Insurance contribution rates.

6. For 2017/18, the figure for the upper limit of the qualifying earnings band will be £45,000 and the lower limit will be £5,876.

VI. FCA consultation on FSCS compensation

1. The FCA is consulting on possible changes to the Financial Services Compensation Scheme ("**FSCS**").

2. Consultation paper CP16/42 was published on 14th December, 2016. The consultation closes on 31st March, 2017.

3. A further consultation, on specific proposals, is expected "in 2017".

4. The pensions aspects of the paper stem from the implications of the pensions freedoms introduced by the Government on 6th April, 2015.

5. The FCA notes that the compensation limit for drawdown products is capped at £50,000, whereas insurance-based annuities enjoy 100% cover under the FSCS.

6. A number of options for FSCS coverage of non-insurance pensions products are listed in the paper. The options range from doing nothing to increasing the £50,000 limit to £75,000, £100,000, £150,000 or £1 million, for example.

7. The paper acknowledges that any increase to the level of compensation for non-insurance pensions products could result in an increase in levies, however.

Comment: The FSCS is relevant to occupational pensions in 2 respects:

- in relation to investment by trustees in unit linked life policies and buy-in policies if the insurance company providing the policy becomes insolvent. Assuming the pension trustee is an eligible claimant, it is, in general, entitled to claim compensation of 100% of the sum insured with no limit; and

- in relation to non-insurance investments, in which case compensation is restricted to £50,000 per claim. For DB schemes, the claimant is the trustee. For DC schemes, the claimant is the member.

Tax

VII. Pension Schemes Newsletter 83

1. HMRC has published, on 12th December, 2016, Pension Schemes Newsletter 83.

2. Members can now amend the details of their lifetime allowance protection using the Lifetime Allowance Online Service but where a member loses his protection, he will need to notify HMRC in writing.

3. The Newsletter reminds schemes about what they need to do in the event of unauthorised borrowing, setting out a list of information that the scheme would need to provide to HMRC.

4. The Newsletter asks scheme administrators operating relief at source to contact HMRC if they have not yet received a notice requiring them to submit their annual return of individual information for tax year 2015/16.

5. HMRC confirms that QROPS online will cease to be available from April, 2017. Users are directed instead to HMRC's overseas pension scheme pages.

6. Reference is also made to the first annual release of statistics on transfers to QROPS, covering the period 2006/2007 to 2015/2016. Future releases are scheduled for July of each year.

Cases

VIII. Gleeds v Briggs - compromise

A. Overview

1. It appears that the Gleeds v Briggs case has settled.

2. On 11th October, 2016 Lewison LJ ruled in the Court of Appeal that Section 91 of the Pensions Act 1995 would not invalidate the compromise proposed.

B. Facts

1. In a High Court ruling given on 15th April, 2014, Newey J decided that the employer's attempts to cut DB pension costs by closing the scheme to future accrual and cutting the rate of pension increases, among other things, were ineffective (Pensions Bulletin 14/7).

2. The partners in Gleeds, who are both employers and members, were entitled to additional benefits because the deeds of amendment in question had not been properly executed. Those additional benefits vary in amount considerably as between the various partners.

3. The settlement of the appeal would require the partners to surrender those additional benefits in return for £100.

C. Decision

1. Citing the cases of IMG v German in the Court of Appeal and Bradbury v BBC in the High Court, Lewison LJ confirmed that a disputed right does not come within the ambit of Section 91 of the Pensions Act 1995.

2. Amongst other things, Section 91 provides that an agreement to surrender of a pension, or a right to a future pension, under an occupational pension scheme is unenforceable.

3. Lewison LJ also ruled that the nominal consideration of £100 would not undermine the validity of the compromise. The real consideration was that each side was giving up the right to pursue the matter in court.

4. The ruling also notes that it is necessary for a compromise to be made in good faith.

Points in practice

IX. PPF Levy Determination for 2017/18

1. The PPF has confirmed , on 15th December, 2016, its (largely finalised) levy determination for 2017/18.

2. Although the determination is not final, the PPF intends to restrict any further changes to the situation where an eligible scheme ceases to have a substantive sponsoring employer after a restructuring. There are plans to introduce a levy rule recognising the risk profile of a scheme in that scenario.

3. The PPF website states that the final 2017/18 determination will be published by 31st March, 2017 "at the latest".

4. The determination published on 15th December, 2016, includes a mechanism for stakeholders to notify Experian where the move to new UK accounting standard FRS102 would otherwise cause an artificial movement in their rating.

5. The levy rules extend the opportunity to certify impacts from FRS102 where accounts from different years are compared but have been calculated on different bases.

6. The PPF states that it will consider "more substantial changes" for the next triennium starting on 1st April, 2018, the consultation for which is intended to take place in Spring 2017.

7. The submission deadline for most of the certificates that may be required and for the scheme return is midnight, 31st March, 2017.

8. The deadline differs, however, in respect of:

    8.1 data to Experian regarding Monthly Experian Scores, which must be submitted 1 calendar month prior to the Score Measurement Date (although accounts for new guarantors can be provided up to midnight on 31st March, 2017);

    8.2 deficit-reduction contribution certificates, which must be submitted on Exchange by 5pm on 28th April, 2017; and

    8.3 the certification of full block transfers, which must be completed on Exchange or sent to the PPF (in limited circumstances) by 5pm on 30th June, 2017.

9. To read more about the 2017/18 PPF Levy Determination, please see our briefing note and action plan.

X. EMIR exemption for pensions - further extension confirmed

1. In its Daily News press release of 20th December, 2016, the European Commission has announced that it is further extending transitional relief for Pension Scheme Arrangements (PSAs) from central clearing for their over-the-counter ("**OTC**") derivative transactions until 16 August 2018.

2. The Commission has decided that central counterparties need the additional time provided by the extension to find a solution for PSAs.

3. The extension takes the form of a Delegated Act under the European Market Infrastructure Regulation ("EMIR").

4. The European Parliament and the Council have three months to examine the Delegated Act. It is the second time that the Commission has extended the temporary clearing exemption for PSAs.

5. We have produced a briefing note on the requirements to exchange variation margin that will apply from 1st March, 2017 as a result of the Delegated Regulation (EU 2016/2251) on risk-mitigation techniques for OTC derivative contracts. Pension trustees are urged to talk to their investment managers and legal advisers about the new rules.

Comment (1): Central counterparties require the posting of collateral in order to mitigate their credit risk and they accept only highly liquid assets, such as cash.

Comment (2): Pension scheme arrangements generally minimise their cash positions, holding higher yielding investments such as bonds or shares, in part, to try to match more closely to the way their liabilities are valued and in part to try to reduce the cost of funding the scheme's benefits.

Comment (3): Requiring such arrangements to clear OTC derivative contracts centrally would therefore lead to divesting a significant proportion of their assets for cash in order for them to meet the ongoing margin requirements of central counterparties, with a consequential increase in cost.

XI. Regulator announces Coats settlement

1. The Pensions Regulator has announced in a press release, dated 16th December, 2016 that it has reached a settlement with Coats, following the issue of warning notices in 2013 and 2014.

2. Pending the outcome of the Regulator's case, Coats agreed to suspend intended payments to shareholders of the proceeds from the sale of its former investments.

3. The warning notices concerned 3 pension schemes sponsored by companies in the Coats group and related to the possibility of financial support directions being issued.

4. The settlement relates to 2 of the 3 schemes: the Coats Pension Plan ("**CPP**") and the Brunel Holdings Pension Scheme ("**BHPS**") and covers approximately 90% of the total membership.

5. Under the settlement:

    5.1 payments totalling £255.5 million will be paid upfront into the 2 schemes, including agreed recovery plan contributions paid to the BHPS since 1st January, 2016;

    5.2 the statutory employer for both schemes will be Coats Limited (described as representing an improved employer covenant); and

    5.3 a full guarantee will be provided from Coats in respect of both schemes' liabilities.

6. A "comparable offer" has been made to the trustees of the third scheme, the Staveley Industries Retirement Benefits Scheme ("**SIRBS**").

7. The estimated deficit as at 1st April, 2015, on a scheme specific funding basis, is over £400 million in the CPP and approximately £80 million in BHPS.

8. The estimated deficit in the SIRBS, as at 31st December, 2013, is just under £85 million on a scheme specific funding basis.

XII. 21st Century Trusteeship - Regulator's response

1. The Regulator has published, on 16th December, 2016, a response to its discussion paper on 21st Century Trusteeship, dated July, 2016 (Pensions Bulletin 16/12).

2. The Regulator states that it does not intend to impose new standards, but it will undertake a targeted education drive, in Spring 2017.

3. The Regulator acknowledges that it needs to clarify the standards expected of chairs and professional trustees. A consultation on the Regulator's penalty policy 'in the first part of next year' is expected to elaborate on the definition of 'professional trustees'.

4. In the interests of board diversity, employers are to be encouraged to allow lay trustees to have time off for preparation and board meetings, and to provide the additional financial support needed for them to receive effective training.

    Comment: Under the Employment Rights Act 1996 (Section 58) employers must allow employees who are trustees (or directors of the trustee company) of the employer's occupational pension scheme to take a reasonable amount of paid time off work to perform those duties or to undergo training. This is subject to the circumstances of the employer's business and the impact of the employee's absence.

5. Guidance on good investment governance is to be published 'in the first part of next year'.

6. The Regulator plans to improve access to its material by overhauling its website and consolidating its guidance.

7. As regards enforcement, data will be used to help the Regulator target riskier schemes.

8. Trustees falling short of governance and administration standards will be encouraged to consider alternative approaches, such as consolidating their scheme into another scheme.

9. The Regulator plans to engage with the DWP and industry to identify barriers to consolidation.

10. Mandatory qualifications will not be imposed on trustees at this stage. However, introducing a 'fit and proper' regime will be considered after Regulator assesses the impact of its increased targeted enforcement and its communication of clearer standards.

11. Having focused on governance in the context of DC schemes, the Regulator plans to consider with the DWP how best to encourage good DB scheme governance, perhaps through the scheme return or a governance statement.

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn or your usual Slaughter and May adviser.