

# Pensions and Employment: Pensions Bulletin

29 September 2017 / Issue 16

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 you normally deal at Slaughter and May or [Bridget Murphy](#)

## Forthcoming events

Our next Pensions Update Seminar will take place on Wednesday, 29<sup>th</sup> November, 2017, between 9.30am and 1.00pm.

We will be covering a broad range of topics, including:

- an update on recent tax developments,
- what schemes must do to prepare for the General Data Protection Regulation,
- the impact of the *Walker* decision on same sex spouses/civil partners, and
- recent case law (including the *IBM* ruling) on exercising employer and trustee discretions relating to pensions

Please click [here](#) to see the invitation and for information on how to book.

## 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 6 <sup>th</sup> April, 2016	<p><a href="#">Pensions Bulletin 16/06</a></p> <p>1.1 Since 6<sup>th</sup> 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.</p> <p>1.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of:</p> <ul style="list-style-type: none"> <li>◆ £110,000 “threshold” income, and</li> <li>◆ £150,000 “adjusted” income.</li> </ul> <p>1.3 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.</p> <p>1.4 There may be scope for timing taxable termination payments to straddle tax years but care would be needed in</p>

No.	Topic	Deadline	Further information/action
			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)	6 <sup>th</sup> April, 2016	<a href="#">Pensions Bulletin 15/16</a>
3.	Abolition of DB contracting-out: Rule amendments needed	6 <sup>th</sup> April, 2016	<p>If your scheme was contracted-out on 6<sup>th</sup> April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5<sup>th</sup> April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6<sup>th</sup> April, 2016 to prevent the inadvertent addition of an additional underpin to the accrued GMPs of those active members. See further <a href="#">Pensions Bulletin 16/03</a>.</p> <p>Note: Statutory power to amend, retrospective to 6<sup>th</sup> April, 2016, expired on 5<sup>th</sup> April, 2017</p>
4.	Put in place register of persons with significant	6 <sup>th</sup> April, 2016 and	<a href="#">Pensions Bulletin 16/03</a>

No.	Topic	Deadline	Further information/action
	control (“PSC”) for trustee company where trustee is a corporate	ongoing requirement	
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 <sup>th</sup> July, 2016 at the latest and ongoing requirement	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. <a href="#">Pensions Bulletin 16/04</a> .
6.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	For example employers with a 2014 staging date must complete cyclical re-enrolment process between December 2016 and June 2017. Publication available to clients on request from usual pensions contact.
7.	Chair’s annual governance statement	Within 7 months of end of scheme year	For example, schemes with a 31 <sup>st</sup> March year end must submit statement by 31 <sup>st</sup> October, 2017. Client note dated June, 2015 available from <a href="#">Dawn Holmes</a> .
8.	DC Code of Practice 13 on governance and administration takes effect	28 <sup>th</sup> July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised <a href="#">Code</a> .
9.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 <sup>th</sup> April, 2015,	Retroactive effect from 6 <sup>th</sup> April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

No.	Topic	Deadline	Further information/action
			is expected to drop from £10,000 to £4,000 under forthcoming Finance Bill 2017
10.	GMP equalisation		
10.1	Part 8 action brought by female staff, trustee and Lloyds Trade Union	15 <sup>th</sup> May, 2017	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17 <sup>th</sup> May, 1990 to 5 <sup>th</sup> April, 1997.  Trial window Between 1 <sup>st</sup> June, 2018 and 31 <sup>st</sup> October, 2018
10.2	DWP publishes consultation proposing methodology for equalising GMPs  Government response published	28 <sup>th</sup> November, 2016  13 <sup>th</sup> March, 2017	<a href="#">Pensions Bulletin 16/19</a>  <a href="#">Pensions Bulletin 17/7</a>
11.	Civil partner/same sex spouse pensions: retroactivity pre-5 <sup>th</sup> December, 2005		
11.1	CJEU decision in <i>Parris v. Trinity College, Dublin</i>	Decided on 24 <sup>th</sup> November, 2016	A ‘death bed marriage’ scheme rule did not indirectly discriminate on sexual orientation grounds. <a href="#">Pensions Bulletin 16/18</a>
11.2	Supreme Court ruling in		<b>Survivor benefits for civil partners and same sex</b>

No.	Topic	Deadline	Further information/action
	<i>Walker v. Innospec</i>	12 <sup>th</sup> July, 2017	<b>spouses must be based on all service, including before the Civil Partnership Act 2004 came into force.</b>  Judgments issued ( <a href="#">Pensions Bulletin 17/12</a> )  If necessary, affected schemes should correct the position for pensions already in payment, update the trust deed and rules and update member booklets and other member communications as necessary.
12.	EMIR - Derivatives: New requirements to exchange variation margin	1 <sup>st</sup> March, 2017	If investment manager uses over-the-counter derivatives, check investment manager has arranged for trustee to comply.  <a href="#">Pensions Bulletin 17/01</a> <a href="#">Pensions Bulletin 17/05</a>  Trustees entering into OTC derivatives must perform an independent legal review of the enforceability of their netting and collateral arrangements.  <a href="#">Briefing note</a> ; <a href="#">FCA statement on timing</a>
13.	New 25% tax charge on certain transfers to QROPS	9 <sup>th</sup> March, 2017	Transfers to QROPS in execution of requests made before 9 <sup>th</sup> March, 2017 are not subject to the new tax charge.  QROPS managers must give HMRC undertaking by 13 <sup>th</sup> April, 2017 to preserve QROPS status.  <a href="#">Pensions Bulletin 17/05</a>
14.	Pensions Advice Allowance introduction date	6 <sup>th</sup> April, 2017  3 <sup>rd</sup> January, 2018	<a href="#">Pensions Bulletin 17/04</a>  New financial advice definition.

No.	Topic	Deadline	Further information/action
<a href="#">Pensions Bulletin 17/06</a>			
15.	Gender pay gap information regulations in force	6 <sup>th</sup> April, 2017	Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See <a href="#">Pensions Bulletin 17/03</a> and <a href="#">Employment Bulletin 17/03</a> .
		4 <sup>th</sup> April, 2018	Deadline for reporting above information.
16.	Pension Schemes Act 2017 receives Royal Assent <sup>1</sup>	27 <sup>th</sup> April, 2017	Existing master trusts have notification duty for triggering events on or after 20 <sup>th</sup> October 2016 <a href="#">Pensions Bulletin 17/09</a>
17.	Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force	26 <sup>th</sup> June, 2017	<a href="#">Pensions Bulletin 17/11</a> Further guidance awaited from HMRC.
	Deadline for registering with HMRC for its Trusts Registration Service	31 <sup>st</sup> January after tax year in which tax paid, starting 31 <sup>st</sup> January, 2018	See item IV below

<sup>1</sup> Much of the Act is not in force yet, such as the prohibition on operating a master trust scheme unless authorised and, consequently, provisions on the authorisation criteria and ongoing supervision.

No.	Topic	Deadline	Further information/action
18.	HMRC's existing practice on VAT and pension schemes ends (please see our item on this in <a href="#">Pensions Bulletin 16/13</a> )	31 <sup>st</sup> December, 2017 (but may be extended - tbc)	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. Possible further extension may be granted by HMRC to the existing practice ( <a href="#">Pensions Bulletin 17/13</a> ).
19.	Data protection: New Regulation: EU General Data Protection Regulation comes into force	25 <sup>th</sup> May, 2018	<a href="#">Pensions Bulletin 16/05</a> <a href="#">Employment Bulletin 16/15</a> As data controllers, trustees will need to ensure that compliance with the EU General Data Protection Regulation is achieved by this date.
20.	Further EMIR exemption extension for pension scheme arrangements Additional 3 year clearing extension proposed	16 <sup>th</sup> August, 2018	<a href="#">Pensions Bulletin 17/01</a>  <a href="#">Pensions Bulletin 17/10</a>
21.	IORP II <sup>2</sup> transposition deadline	12 <sup>th</sup> January, 2019	<a href="#">Pensions Bulletin 16/11</a>

<sup>2</sup> Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision

<sup>3</sup> Pensions Act 2014 (Commencement No. 11) and the Pension Schemes Act 2015 (Commencement No. 2) Regulations (SI 2017/916)

No.	Topic	Deadline	Further information/action
22.	Brexit	By 29 <sup>th</sup> March, 2019, unless extended	UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless:  (a) European Council and UK unanimously decide to extend period, or  (b) UK withdraws, if able to do so, its Article 50 notice before 29 <sup>th</sup> March, 2019.

## New law

### I. Disclosure of transaction costs - regulations and policy statement

- Regulations<sup>3</sup> have been made to introduce an enabling power requiring the Secretary of State to legislate about the disclosure of transaction costs and administration charges.
- Disclosure will need to be made to, amongst others, members, beneficiaries and unions.
- The FCA Conduct of Business sourcebook will be amended<sup>4</sup> from 3<sup>rd</sup> January, 2018 so that fund managers will be compelled to provide information on transaction

<sup>4</sup> Pension Schemes (Disclosure of Transaction Costs and Administration Charges) Instrument 2017 (FCA 2017/53)

costs and administration charges to trustees. A Policy Statement<sup>5</sup> published by the FCA, on 20<sup>th</sup> September, 2017, sets out further detail on those requirements.

4. The transaction costs will need to be calculated to a common standard and broken down.
5. Asset managers will be required to provide administration charge and transaction cost information on request, to pension schemes that invest directly or indirectly in their funds.

**Comment (1):** To read about the FCA's consultation paper CP16/30 regarding this, please see [Pensions Bulletin 16/15](#).

**Comment (2):** Legislation<sup>6</sup> requires the Chair's statement to set out details of charges and transaction costs and explain the trustees' assessment of the extent to which those represent good value for members.

**Comment (3):** The main variable in the growth of a member's retirement account is the performance of the investments. It may be that higher transaction costs are worth paying if the investments perform better than those featuring lower transaction costs.

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<sup>5</sup> Policy Statement PS17/20 'Transaction cost disclosure in workplace pensions'.

## II. Pension freedoms inquiry launched

1. The Work & Pensions Select Committee has [announced](#), on 20<sup>th</sup> September, 2017, the launch of an inquiry into whether and how far the pension freedom reforms are achieving their objectives and whether policy changes are required.

2. There are particular concerns about pension scams.

**Comment:** To read about the Government consultation on scams, please see [Pensions Bulletin 17/15](#).

3. The Select Committee is inviting evidence to be submitted in response to its call for evidence by 23rd October, 2017.

## TAX

### III. Finance Bill 2017-18

1. The Finance Bill 2017-18 was published on 8th September, 2017.

2. As expected, the Bill contains:

- 2.1 a provision exempting from income tax the first £500 of

pensions advice arranged or paid for by employers, if certain conditions are met; and

- 2.2 the reduction in the money purchase annual allowance from £10,000 to £4,000.

3. As previously announced, both changes will take effect retroactively from 6th April, 2017.

**Comment (1):** These provisions were originally contained in the Finance Bill that resulted in the Finance Act 2017 but the Bill was significantly shortened to enable its passage ahead of the dissolution of Parliament in the run up to the General Election.

**Comment (2):** Member communications should include a warning note that the reduction in the money purchase annual allowance is expected to take retroactive effect, from 6th April, 2017.

4. HMRC and HM Treasury [published](#), on 13<sup>th</sup> September, 2017, a policy paper and draft legislation ([Schedule 1](#) to the draft Finance Bill 2017-18) regarding HMRC's powers to register and de-register:

- 4.1 master trusts which are not authorised under the Pensions

<sup>6</sup> Occupational Pension Schemes (Scheme Administration) Regulations 1996 - as amended by the Occupational Pension Schemes (Charges and Governance) Regulations 2015

Regulator's new authorisation and supervision regime; and

- 4.2 schemes established with a sponsoring employer which has been a dormant company for one month in the last 12 months.
5. The master trust changes are contemplated as coming into force on the day on which Section 3 of the Pension Schemes Act 2017 comes into force, or, if later, the day on which the Finance Bill is enacted. Once brought into force, Section 3 of the Pension Schemes Act 2017 will require master trusts to be authorised.
6. The provisions regarding schemes established with a dormant sponsoring employer are expected to come into force on 6th April, 2018.

**Comment (1):** Schemes with a principal employer that no longer employs individuals may be treated as dormant. A keen eye should therefore be kept on this risk.

**Comment (2):** In the recent *IBM* ruling, it was discovered that the principal employer did not employ any of the employees who were active members of the pension plan in question. This meant that a number of breaches found against that company in earlier proceedings were read as references to the entity which employed the active members. To read more about the *IBM* ruling, please see [Pensions Bulletin 17/13](#).

#### IV. Trusts Registration Service

1. HMRC is expecting pension scheme trustees to use its Trusts Registration Service ("TRS") as the means by which they are to submit beneficial ownership information to HMRC as required under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the Regulations").
2. The [HMRC Trusts and Estates Newsletter: September 2017](#) (updated 14<sup>th</sup> September, 2017) includes an item on the TRS, which was launched in July, 2017.
3. The Newsletter confirms that schemes subject to the beneficial ownership information requirements of the Regulations will need to register by the 31st January after the end of the tax year in which it incurs a relevant tax liability.
4. This will not apply to:
  - 4.1 schemes wholly invested in unit linked life policies; or
  - 4.2 registered life cover only schemes which only hold a life cover insurance policy.
5. For unregistered life cover only schemes established under trust, it is expected that the obligations under the Regulations will only apply in circumstances in which the payment of

death benefits attracts an inheritance tax exit charge, or the 10 year IHT charge applies.

**Comment:** These IHT charges can apply in limited circumstances. For example, the exit charge can apply where value builds up in the trust due to insurance policies being contributed at a time when a person covered suffers ill health and their life expectancy is less than the policy term.

6. In that event, the 31st January deadline (after the end of the relevant tax year) will apply.

#### V. Pension Schemes Newsletter 90

1. HMRC has published, on 31<sup>st</sup> August, 2017, [Pension Schemes Newsletter 90](#).
2. The newsletter reminds scheme administrators that they will soon be issuing annual allowance pension savings statements for the tax year 2016/17 to members contributing more than their annual allowance.
3. The newsletter also announces a change to HMRC's previously stated position in its Pension Schemes Newsletter 89 (please see [Pensions Bulletin 17/14](#)) regarding the new Pensions Online Digital Service that HMRC plans to launch.
4. Newsletter 89 stated that existing scheme administrator data would be transferred to the new service in April,

2019. HMRC are now intending to transfer that data across by April, 2018.

5. HMRC is therefore asking all pension scheme administrators to log onto Pensions Schemes Online as soon as possible to check that their scheme administrator details are complete and up to date.

## Cases

### VI. BA Court of Appeal hearing dates set

1. There is an [announcement](#), dated 11<sup>th</sup> August, 2017 by the Airways Pension Scheme Trustee (on [www.mybapension.com](http://www.mybapension.com)) stating that the Court of Appeal has fixed BA's appeal to be heard over 3 days, starting on 1<sup>st</sup> May, 2018.
2. To read about the High Court ruling, which examined the Trustees' decision to unilaterally amend the scheme to grant themselves unilateral power to give discretionary increases, and their subsequent award of such an increase, please see [Pensions Bulletin 17/11](#).

## Points in practice

### VII. FCA market investigation reference for investment consultants

1. The FCA has announced, in a [press release](#) dated 14<sup>th</sup> September, 2017, its [Final Decision](#) to make a Market

Investigation Reference to the Competition and Markets Authority in relation to investment consultancy and fiduciary management services.

2. The FCA has identified a number of features as preventing, restricting or distorting competition in those areas.
3. For example, the FCA considers that there is a weak demand side, with trustees relying heavily on investment consultants but having limited ability to assess the quality of their advice or compare services, resulting in low switching rates.
4. The FCA's Final Decision paper identifies potential remedies which could be imposed by the CMA, including:
  - 4.1 requiring consultants to provide more standardised performance information to their clients and introduce a template for reporting this information, to enhance transparency and assist investors' decision-making;
  - 4.2 requiring consultants to make their performance and fee information publically available (for example, on their websites or other publically accessible databases) so that investors can compare across the market;
  - 4.3 prohibiting certain fee structures that may misalign incentives for

consultants when they are advising clients;

- 4.4 improving redress mechanisms when consultants underperform or an investor is not satisfied with the advice they have received;
- 4.5 requiring trustees to periodically review and re-tender contracts with their investment consultants; and
- 4.6 making recommendations to trustees and employers on best practices when managing their investments or managing their schemes.

**Comment (1):** The FCA's report entitled "Asset Management Market Study (MS15/2.3)", published on 28<sup>th</sup> June, 2017, identified concerns about competition in investment consultancy services. It therefore announced a consultation on its provisional decision to reject undertakings in lieu put forward by Aon Hewitt, Mercer and Willis Towers Watson.

**Comment (2):** The aim of those undertakings would have been to avoid a market investigation reference (please see [Pensions Bulletin 17/12](#)).

### VIII. Regulator's scheme governance surveys

1. The Pensions Regulator has [published](#), on 7<sup>th</sup> September, 2017, the results of its DC and DB surveys on scheme governance.
2. In its [response](#) document the Regulator states that it will be “undertaking more proactive casework”.
3. It also states that it will “*consider opening a DB scheme investigation where unfair treatment is apparent, particularly if recovery plan end dates are being extended unnecessarily or where the employer covenant is constrained and total payments to shareholders are being prioritised.*”
4. The response confirms that the Regulator is “*taking a tougher approach if schemes fail to submit their valuations on time ... we are more likely to take enforcement action in relation to the breach of law in this area, when delays could have been predicted, or where trustees do not engage with us regarding the breach*”.
5. Key findings from the surveys include:
  - 5.1 The poorest performing area for DC schemes was the prompt and accurate processing of core financial transactions, such as the investment of contributions or the transfer of members' funds to a different arrangement - only 54% of members are in schemes meeting this requirement.

- 5.2 One-third of DC schemes research member preferences and needs and take this into account when assessing value for members.
- 5.3 Two-thirds of DB trustees said their scheme had a policy for assessing new trustee fitness and 60% reported their trustee board carried out regular board performance evaluation.

### IX. Nortel report

1. The Pensions Regulator has [announced](#) on 13<sup>th</sup> September, 2017, the publication of its [report](#) on the way in which it applied its moral hazard powers under the Pensions Act 2004 in respect of the Nortel Networks UK Pension Plan.
2. The Nortel group's main operating companies entered insolvency proceedings in their local jurisdictions on 14<sup>th</sup> January, 2009. This included Nortel Networks (UK) Limited (“**NNUK**”), the principal employer of the Nortel Networks UK Pension Plan (“**the Plan**”). NNUK remains in administration.
3. The Plan has approximately 31,000 members and has been in an assessment period with the PPF since January, 2009.
4. The Pensions Regulator's Determinations Panel decided that financial support directions should be issued to several Nortel group companies in the US and the

EMEA region, as well as to the parent company based in Canada.

5. Litigation on the allocation of over US\$7 billion raised from the sale of Nortel's assets has taken place over several years in Canada and the US. The UK pension scheme had sought \$3 billion. The report outlines the history of that litigation.
6. A settlement agreement was reached in October, 2016 between global creditors. The agreement became legally effective on 8th May, 2017.
7. Under the global settlement, a series of payments estimated to total over £1 billion will be made to the Plan. The hope is that this will enable members' benefits to be bought out above PPF compensation levels.

### X. Regulations on insolvency proceedings

1. The recast Regulation on insolvency proceedings ([EU 2015/848](#)) came into effect on 26<sup>th</sup> June, 2017.
2. The Regulation amends the definition of ‘establishment’ in article 2(10). The definition has been extended to include the economic activities of the debtor in the 3 months prior to the request to open insolvency proceedings, not just at the date that the insolvency proceedings started.



3. It is hoped that this will reduce the likelihood of a situation similar to that experienced by *Olympic Airlines*.<sup>7</sup>
4. The Supreme Court in that case decided that the airline did not have an ‘establishment’ in England when the petition to wind up was presented. As a result, there was no insolvency event and the scheme was not eligible to enter the PPF. Bespoke regulations were therefore made in order to allow the scheme to enter the PPF (please see [Pensions Bulletin 15/09](#)).

#### XI. GDPR - ICO guidance consultation on processor contracts and liabilities

1. The Information Commissioner’s Office (“ICO”) has published, on 13<sup>th</sup> September, 2017, a [consultation](#) on draft guidance on contracts and liabilities between controllers and processors under the General Data Protection Regulation (“GDPR”). The consultation closes on 10<sup>th</sup> October 2017.
2. The ICO intends to publish the final form guidance ‘later in 2017’, subject to ‘developments at the European level’.
3. The draft guidance sets out what must be included in controller-processor contracts and processors’ responsibilities

and liabilities, with checklists included for both aspects of the GDPR.

4. The document notes that, whilst the GDPR allows the use of standard contractual clauses, no standard clauses are currently available.
5. Also noted is the possibility under the GDPR for processors to adhere to an approved code of conduct or certification scheme, to demonstrate that the processor has provided ‘sufficient guarantees’ that it will process data in line with the GDPR. No code or certification scheme has been approved yet.

**Note:** As mentioned at the beginning of this Bulletin, our next Pensions Update Seminar, on 29th November, 2017, will include a slot on what schemes must do to prepare for the GDPR.

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<sup>7</sup> *Olympic Airlines SA Pension and Life Assurance Scheme Trustees v Olympic Airlines SA*

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.

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