

Pensions and Employment: Pensions Bulletin

15 December 2017 / Issue 20

Legal and regulatory developments in pensions

In this issue

The Watch List

Christmas greetings

Retirement

New Law

Trusts Registration Service deadline announcement [...more](#)

PPF - draft regulations to recognise bridging pensions [...more](#)

Master trust draft regulations consultation [...more](#)

Tax

VAT - treatment of pension fund management services [...more](#)

Finance (No.2) Bill 2017-19 [...more](#)

Cases

No VAT exemption for pension fund management services by non-insurers [...more](#)

Points in Practice

Chair's Statement guidance [...more](#)

PPF contingent asset guidance for 2018/19 [...more](#)

Inquiry into Defined Ambition/Collective DC schemes [...more](#)

There is no Employment/Employee Benefits Bulletin this week.

[Back issues](#)

[More about our pensions and employment practice](#)

[Details of our work in the pensions and employment field](#)

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](#)

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 th April, 2016	<p>Pensions Bulletin 16/06</p> <p>1.1 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.</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"> ◆ £110,000 “threshold” income, and ◆ £150,000 “adjusted” income. <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</p>

No.	Topic	Deadline	Further information/action
			<p>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 view of anti-avoidance provisions. Termination procedures should be reviewed to build in a process to identify and manage this point.</p>
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 th April, 2016	Pensions Bulletin 15/16
3.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 th April, 2016 and ongoing requirement	Pensions Bulletin 16/03

No.	Topic	Deadline	Further information/action
4.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th 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. Pensions Bulletin 16/04 .
5.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between 1st April, 2018 and 30th September, 2018. Publication available to clients on request from usual pensions contact.
6.	Chair’s annual governance statement	Within 7 months of end of scheme year	For example, schemes with a 31 st March year end must submit statement by 31 st October, 2017. Client note dated June, 2015 available from Dawn Holmes .
7.	DC Code of Practice 13 on governance and administration takes effect	28 th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code .
8.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 th April, 2015, has dropped	Retroactive effect from 6 th April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

No.	Topic	Deadline	Further information/action
	from £10,000 to £4,000 under Finance (No.2) Act 2017		
9.	GMP equalisation		
9.1	Part 8 action brought by female staff, trustee and Lloyds Trade Union	15 th May, 2017	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17 th May, 1990 to 5 th April, 1997.
		Trial window	Between 1 st June, 2018 and 31 st October, 2018
9.2	DWP publishes consultation proposing methodology for equalising GMPs	28 th November, 2016	Pensions Bulletin 16/19
	Government response published	13 th March, 2017	Pensions Bulletin 17/7
10.	Civil partner/same sex spouse pensions: retroactivity pre-5 th December, 2005		
10.1	CJEU decision in <i>Parris v. Trinity College, Dublin</i>	Decided on 24 th November, 2016	A 'death bed marriage' scheme rule did not indirectly discriminate on sexual orientation grounds. Pensions Bulletin 16/18

¹ Much of the Act is not in force yet, such as the prohibition on operating a master trust scheme unless authorised and,

No.	Topic	Deadline	Further information/action
10.2	Supreme Court ruling in <i>Walker v. Innospec</i>	12 th July, 2017	Survivor benefits for civil partners and same sex spouses must be based on all service, including before the Civil Partnership Act 2004 came into force. Judgments issued (Pensions Bulletin 17/12) 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.
11.	EMIR - Derivatives: New requirements to exchange variation margin	1 st March, 2017	If investment manager uses over-the-counter derivatives, check investment manager has arranged for trustee to comply. Pensions Bulletin 17/01 Pensions Bulletin 17/05 Trustees entering into OTC derivatives must perform an independent legal review of the enforceability of their netting and collateral arrangements. Briefing note ; FCA statement on timing
12.	New 25% tax charge on certain transfers to QROPS	9 th March, 2017	Transfers to QROPS in execution of requests made before 9 th March, 2017 are not subject to the new tax charge. QROPS managers must give HMRC undertaking by 13 th April, 2017 to preserve QROPS status.

consequently, provisions on the authorisation criteria and ongoing supervision.

No.	Topic	Deadline	Further information/action
			Pensions Bulletin 17/05
13.	Pensions Advice Allowance introduction date	6 th April, 2017 3 rd January, 2018	Pensions Bulletin 17/04 New financial advice definition. Pensions Bulletin 17/06
14.	Gender pay gap information regulations in force	6 th April, 2017 4 th April, 2018	Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See Pensions Bulletin 17/03 and Employment Bulletin 17/03 . Deadline for reporting above information.
15.	Pension Schemes Act 2017 receives Royal Assent ¹	27 th April, 2017	Existing master trusts have notification duty for triggering events on or after 20 th October 2016 Pensions Bulletin 17/09
16.	Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force	26 th June, 2017	Pensions Bulletin 17/11 Further guidance awaited from HMRC.
	Deadline for registering with HMRC for its Trusts Registration Service	31 st January after tax year in which tax paid, starting 31 st January, 2018	Pensions Bulletin 17/16 Pensions Bulletin 17/18

No.	Topic	Deadline	Further information/action
17.	HMRC's existing practice on VAT and pension schemes to continue indefinitely		Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. Pensions Bulletin 17/18
18.	DC bulk transfers without member consent: anticipated introduction of easements	6th April, 2018	Pensions Bulletin 17/18
19.	Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6th April, 2016 contracts where payment made on or after 1st October, 2017. Applies where scheme used as "qualifying scheme" for auto-enrolment purposes and some or all of benefits are money purchase.	1st May, 2018	If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes.

No.	Topic	Deadline	Further information/action
20.	Data protection: New Regulation: EU General Data Protection Regulation comes into force	25th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15 As data controllers, trustees will need to ensure that compliance with the EU General Data Protection Regulation is achieved by this date. A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.
21.	Further EMIR exemption extension for pension scheme arrangements Additional 3 year clearing extension proposed	16th August, 2018	Pensions Bulletin 17/01 Pensions Bulletin 17/10
22.	IORP II ² transposition deadline	12th January, 2019	Pensions Bulletin 16/11
23.	Brexit	By 29th 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 29th March, 2019.

Christmas greetings

This is our last Pensions Bulletin of 2017.

We send you all best wishes for the Christmas season.

Retirement

Philip Bennett will be retiring from the Slaughter and May partnership on 31st December, 2017.

Philip's contribution to Slaughter and May over the last 40 years has been tremendous and we will miss him.

As well as building up a wide-ranging pensions practice, Philip has played a major role in the development of the pensions legal profession, having been chair of the International Pension and Employee Benefits Lawyers Association and a member of the main Committee of the APL.

New law

I. Trusts Registration Service deadline announcement

HMRC has made an announcement, via an email sent to a number of organisations on 8th December, 2017, concerning the deadline for registering with the Trusts Registration Service ("TRS"):

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

“HMRC will not impose a penalty on the trustees of taxable relevant trusts if the trustees, or an agent acting on behalf of the trustees fail to register on TRS by 31 January 2018 but do so no later than 5 March 2018. This applies for both trusts which are already registered for Self-Assessment (SA) and those which do not require to be registered for SA.”

Comment: To read more about the requirement for trustees to register with the TRS, in order to comply with the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, please see [Pensions Bulletin 17/18](#).

II. PPF - draft regulations to recognise bridging pensions

1. The DWP issued, on 17th November, 2017, a further [consultation](#) on draft regulations³ regarding the PPF’s intention to recognise bridging pensions when calculating PPF compensation.
2. The consultation closed on 3rd December 2017.

Comment (1): Currently, PPF compensation payments do not take account of any scheduled changes to a member’s pension entitlement after the

date that the scheme enters the PPF assessment period.

Comment (2): This means that a pensioner in receipt of a bridging pension would receive PPF compensation at that, higher, rate for life.

3. The PPF has decided to abandon its earlier intention to recognise bridging pensions by smoothing the amount of PPF compensation over the individual’s lifetime (please see [Pensions Bulletin 17/15](#)).
4. Instead, the PPF plans to recognise bridging pensions by more closely aligning its approach with that which the pension scheme would have taken.
5. Trustees would be required to notify the PPF of the amounts of the basic and bridging elements of each pension at the PPF assessment date.
6. Trustees would also need to inform the PPF of the date on which the pension would decrease, in accordance with the scheme rules.
7. Where the decrease date or the bridging amount cannot be identified from the scheme rules, the PPF would have discretion to determine those.

8. The PPF compensation cap would be applied once, rather than recalculated when the compensation decreases.
9. The bridging element of the pension would be actuarially reduced, so that the cap takes account of the value across the member’s lifetime, rather than the initial, higher, rate of pension.
10. The consultation also covers proposals for the bridging pension treatment of spouses, civil partners and cohabittees.
11. The DWP proposes that those survivors would receive an amount equal to 50% of the member’s compensation in respect of the bridging element. The length of time during which that amount would be paid would depend on whether the member dies before or after reaching the scheme’s normal pension age.

III. Master trust draft regulations consultation

1. The DWP has [published](#), on 30th November, 2017, a consultation seeking views on draft regulations⁴ regarding the authorisation and supervision regime for master trust schemes.
2. The consultation closes on 12th January, 2018.

³ draft Pension Protection Fund (Compensation) (Amendment) Regulations 2018

⁴ Draft Occupational Pension Schemes (Master Trusts) Regulations 2018

3. The Pension Schemes Act 2017 (“the Act”) contains provisions to introduce a new authorisation and supervision regime for master trusts, to be run by the Pensions Regulator.

4. Anyone operating a master trust scheme without authorisation will be subject to a civil penalty of up to £5,000 in the case of an individual and £50,000 in any other case.

A. Master trust definition

1. The Act defines master trusts as, broadly, occupational pension schemes which provide money purchase benefits (alone or in conjunction with other benefits), to be used by at least 2 employers but not to be used only by connected employers. Certain public sector schemes are carved out from the definition.
2. We expressed our concerns about the master trusts definition to the DWP when the Pension Schemes Bill 2016/17 (from which the Pension Schemes Act 2017 originated) was published.
3. To read our briefing note, dated November, 2016, about the Pension Schemes Bill 2016/17, please click [here](#).
4. The Act provides that an employer participating in a multi-employer

scheme will not be treated as a connected employer if it does not fall within the parent/subsidiary relationship described in the Companies Act 2006. As a consequence, the scheme would be treated as a master trust scheme.

5. Examples of situations where that might be the case include:
 - 5.1 a joint venture company where the corporate group holds a minority stake, and
 - 5.2 a ‘joint employer’ comprising a group company and a trust established, for instance, by the founder of the company for charitable purposes.
6. The draft regulations amplify the concept of ‘connected employers’ so that the concept would include circumstances where, amongst other situations:
 - 6.1 an employer employs scheme members jointly with another employer, or with a group undertaking in relation to that other employer;
 - 6.2 one employer holds or controls, or has done in the previous 6 months, at least 33% of the voting power in the other employer;

6.3 one employer is, or has been in the previous 6 months, engaged in a joint venture with another employer, or with a group undertaking in relation to that other employer; and

6.4 active members are transferred to one employer from another employer, or from a group undertaking in relation to that other employer - those employers would be treated as connected for a 6-month period (starting from the date of the transfer), unless the transfer is a TUPE transfer.

7. Problem areas

7.1 Scenario 1

- Employers A and B are wholly owned by C.
- C sells 70% of its shares in B as part of a joint venture arrangement.

Note: As part of the joint venture it is agreed that B will continue in A’s scheme for B’s current employees who are active members. This participation will last indefinitely following the sale, for as long as the joint venture lasts.

- B's new employees are to go into a new scheme established by B.
- The benefit design of A's scheme has a DB component and a DC component.
- In this scenario, scheme A would appear to become a master trust.

7.2 Scenario 2

- The situation is as per scenario 1 but C sells all its shares in B.
 - A transitional period of longer than 6 months is arranged.
 - This means that the exemption from master trust classification will cease to apply beyond the first 6 months of the transitional period.
8. If the current wording of the draft regulations remains unaltered, it seems likely that some schemes in some circumstances could be classified as master trusts in situations to which the regime clearly ought not to apply.

Action point: Schemes and employers should consider their

position carefully and make representations to the DWP in response to their consultation by the 12th January, 2018 deadline.

9. The draft regulations also set out a number of exemptions from the master trust regime for certain schemes which provide both DB and DC benefits. DB schemes which only provide DC benefits through additional voluntary contributions "made by or on behalf of non-money purchase members" would be exempt.

Comment (1): This language does not embrace the salary sacrifice arrangements that many employers operate in relation to AVCs. This is because salary sacrifice arrangements must genuinely reduce the employee's salary, meaning that the employer is making payments as a principal, not as an agent making payments on behalf of the employee.

Comment (2): ~Representations on this point could usefully be made to the DWP.

B. Authorisation

1. The draft regulations anticipate new master trusts paying an application fee of 'no more than' £24,000. Existing master trust schemes would be expected to pay 'no more than' £67,000, however.

2. The draft regulations flesh out the requirements which will apply under each of the authorisation criteria contained in the Act.
3. For example, to meet the 'fit and proper persons' requirement, individuals would be expected to meet an integrity test (which includes looking at a person's credit history), a conduct requirement which looks back to the previous 5 years, and a competency test.

C. Supervision

1. The draft regulations set out an extensive list of 'significant events' which must be reported to the Regulator by trustees, scheme funders, scheme strategists, and advisers, amongst others.
2. Such events would include:
- 2.1 contravention by people subject to the 'fit and proper person' requirement of 'any of the requirements and standards of a regulator, including the Regulator';
- 2.2 an investigation of the scheme, or of a person involved in the scheme, by a regulator inside or outside of the UK;
- 2.3 a significant failure to meet a key milestone, target, estimate

or assumption in the scheme's business plan; and

- 2.4 a significant change to the statement of investment principles.
3. Fixed penalty notices for breach of Section 72 of the Pensions Act 2004, which requires the provision of information to the Pensions Regulator on request, would be set at £500.
4. However, the list of escalating penalties by reference to such a breach would be steep. These penalties would start at £1,000 on day 1, doubling with each day up to the first 10 days, then set at £10,000 for each additional day thereafter.

D. Triggering events

1. The Act provides for action to be taken if a 'triggering event' happens. The Act lists 10 such events, such as the withdrawal of authorisation by the Pensions Regulator, or where the scheme funder experiences an insolvency event.
2. The draft regulations set out further detail on the timescales for compliance with the triggering event notification requirements imposed on trustees and others under the Act.
3. When a triggering event occurs, trustees must either:

- 3.1 transfer members' accrued rights and benefits out to another pension scheme and then wind up the master trust scheme ('**Continuity Option 1**'), or
- 3.2 they must attempt to resolve the triggering event ('**Continuity Option 2**').
4. The draft regulations set out further detail on implementing Continuity Option 1.
5. On Continuity Option 2, however, the draft regulations merely state that trustees must notify the Regulator within 14 days of the date on which the trustees consider the triggering event to have been resolved.

Tax

IV. VAT - treatment of pension fund management services

1. HMRC has, on 20th November, 2017, [updated](#) 'Revenue and Customs Brief 3 (2017): VAT - treatment of pension fund management services'.
2. The update announces a change to the date on which HMRC will end the ability of insurers to treat as VAT exempt insurance their supplies of pension fund management services to non-special investment funds.

Comment: As most pension fund management services provided by insurers are supplied for DC pension funds, HMRC acknowledges that those services will still qualify for exemption as special investment funds, following the CJEU decision in *ATP (C-464/12)*.

3. The implementation date for this policy change is now 1st April, 2019.

Comment (1): HMRC had initially announced, on 5th October, 2017, that this change in policy would apply from 1st January, 2018 (please see [Pensions Bulletin 17/17](#)).

Comment (2): This policy change concerns schemes with assets which are directly managed by an insurance company.

Comment (3): Schemes invested solely in a unit linked life policy will be unaffected by HMRC's announcement.

V. Finance (No.2) Bill 2017-19

1. The [Finance \(No.2\) Bill 2017-19](#) was introduced on 1st December, 2017.
2. The Bill (under Schedule 3) provides for HMRC to have the power to refuse to register, or to de-register:
 - 2.1 occupational pension schemes with a sponsoring employer which has been dormant for a continuous period of 1 month during the 1-year period ending with the refusal

to register or decision to de-register; and

- 2.2 master trust schemes which are not authorised under the Pension Schemes Act 2017.
3. 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.
4. 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](#).

Cases

VI. No VAT exemption for pension fund management services by non-insurers

The High Court (Warren J) has ruled, on 30th November, 2017, that pension fund management services provided by non-insurers were not VAT-exempt under Article 135(1)(a) of the Principal VAT Directive.

A. Facts

1. The claimants sought to recover from HMRC VAT which they had paid to various investment managers in respect of pension fund investment management services.
2. VAT was paid in respect of the period between 1st January, 1978 and 30th September, 2013.
3. Pension fund management services had been treated by HMRC as exempt supplies when provided by insurers but as standard rated supplies when provided by non-insurers.
4. Until 1st January, 2005 this difference in treatment was reflected by the Value Added Tax Act 1994. The legislation was amended from that date to remove the difference in treatment but HMRC continued to treat insurers and non-insurers differently.

5. The claimants argued that supplies made by non-insurers were insurance transactions for the purposes of the 6th Council Directive (77/388/EC) and the Principal VAT Directive (EC) 2006/112, thus attracting mandatory exemption from VAT which the UK legislation failed to provide for.

B. Decision

1. Pension fund management services provided by non-insurers were not VAT-exempt under Article 135(1)(a) of the Principal VAT Directive.
2. Under the principle of fiscal neutrality, supplies of goods or services which are identical or similar must be taxed in the same way.
3. The court considered that, following the principle of fiscal neutrality, it would be preferable to deny exemption to pension fund management services supplied by insurers too.
4. Had pension fund management services provided by non-insurers been VAT-exempt, the court considered that it would not have been impossible or excessively difficult for the claimants to obtain reimbursement from the non-insurers.
5. Any right to reimbursement which the claimants would have had against

the non-insurers was not dependent on whether the non-insurers would have had any right of recovery from HMRC.

6. If the court was wrong in reaching the above conclusions, the claimants would have a remedy against HMRC but any such claim would be time-barred under the 4-year limitation period under Section 80(4) of the Value Added Tax Act 1994.
7. The court decided that there was no need to make a reference to the CJEU. The judge considered that his conclusion that there was no VAT exemption available in respect of pension fund management services provided by non-insurers was *acte clair*.

(1) United Biscuits (Pension Trustees) Limited (2) United Biscuits Pension Investments Ltd v Commissioners for HMRC

Points in practice

VII. Chair's Statement guidance

1. The Pensions Regulator has [published](#), on 13th November, 2017, '[A quick guide to](#)

⁵ Occupational Pension Schemes (Scheme Administration) Regulations 1996, Regulation 23

[the Chair's statement](#)', dated November, 2017.

2. The guide sets out detailed illustrations of good and poor approaches to each area required to be covered in the Chair's statement under legislation⁵ (for example, the trustee's approach to the scheme's default fund investment strategy).
3. The guide describes the illustrations as having been inspired by real-life Chair statements.

Comment(1): The expectation in the guide that the Chair's statement will set out a 'full explanation' on various aspects of scheme governance appears to demonstrate the Regulator's concern, as expressed in its [Code of practice 13](#)⁶ and its accompanying [Guide to communicating and reporting](#), that the statement should "*provide a meaningful narrative of how, and the extent to which, the governance standards have been complied with*".

Comment (2): When describing their approach to scheme governance in the Chair's statement, trustees should take care to avoid any overstatement of steps taken or procedures in place. To do

otherwise could result in the document creating a hostage to fortune.

VIII. PPF contingent asset guidance for 2018/19

1. The PPF has confirmed, by email on 28th November, 2017 (480214368), that it has yet to publish any draft contingent asset guidance for the 2018/19 levy year.
2. Guidance on contingent assets is usually published alongside the draft PPF levy determination in September.
3. Although there is a [draft document](#) entitled "Guidance on Contingent Assets"(dated 27th September, 2017), this relates solely to the new certification of guarantor strength required for schemes with Type A contingent assets which secure a levy saving of £100,000 or more.
4. The PPF anticipates that guidance covering other issues in respect of contingent assets will be published alongside the final determination for the 2018/19 levy in December, 2017.

IX. Inquiry into Defined Ambition/Collective DC schemes

1. The Work and Pensions Select Committee has [launched](#), on 24th November, 2017, its

⁶ Governance and administration of occupational trust-based schemes providing money purchase benefits, dated July, 2016

inquiry into Collective DC (“CDC”) pension schemes, also known as ‘Defined Ambition’ schemes.

2. The announcement anticipates CDC schemes targeting, but not guaranteeing, a particular level of index-linked pension, with scope to redefine benefits if, for example, adverse economic circumstances require.

Comment (1): The Pension Schemes Act 2015 contains a number of provisions that, once brought into force, would introduce shared risk schemes.

Comment (2): The Government [announced](#) via a Ministerial Statement⁷, on 15th October, 2015, that it was postponing the implementation of the shared risk scheme provisions in the Pension Schemes Act 2015.

3. A number of questions are posed in the announcement, seeking views on, for example, how CDC schemes would be

regulated and whether employers have any appetite for such arrangements.

4. Responses are sought by 8th January, 2018.

Comment (1): We have been at the forefront of thinking in relation to how CDC schemes might be introduced.

Comment (2): For example, we have produced:

- a [paper](#), by Philip Bennett and Sandeep Maudgil, dated 9th June, 2014, entitled ‘Amendments to UK legislation required to enable defined ambition pension schemes to be set up’; and
- a [paper](#), dated 29th December, 2014, based on a talk on CDC schemes given by Sandeep Maudgil at the 2014 APL Annual Conference.

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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