SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

20 April 2018 / Issue 06

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

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 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. 1.2 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. 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. 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.
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.	Put in place register of persons with significant control ("PSC") for trustee company where trustee is a corporate	6th April, 2016 and ongoing requirement	Pensions Bulletin 16/03
4.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5th 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 31st March year end must submit statement by 31st October, 2017. Client note dated June, 2015 available from Dawn Holmes.
7.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017	Retroactive effect from 6th April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

No.	Topic	Deadline	Further information/action
8.	GMP equalisation		
8.1	Part 8 action brought by female staff, trustee and Lloyds Trade Union	15th May, 2017 Trial window	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997. Between 1st June, 2018 and 31st October, 2018
8.2	DWP publishes consultation proposing methodology for equalising GMPs Government response published	28th November, 2016 13th March, 2017	Pensions Bulletin 16/19 Pensions Bulletin 17/7
9.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
9.1	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
9.2	Supreme Court ruling in *Walker v. Innospec*		Survivor benefits for civil partners and same sex spouses must be based on all service, including before the
		12th July, 2017	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.
10.	EMIR - Derivatives: New requirements to exchange variation margin	1st 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
11.	Pensions Advice Allowance introduction date	6th April, 2017 3rd January, 2018	Pensions Bulletin 17/04 New financial advice definition. Pensions Bulletin 17/06
12.	Gender pay gap information regulations in force	6th April, 2017	Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See Pensions Bulletin
		4th April, 2018	17/03 and Employment Bulletin 17/03. Deadline for reporting above information.
13.	Pension Schemes Act 2017 receives Royal Assent[1]	27th April, 2017	Existing master trusts have notification duty for triggering events on or after 20th October 2016 Pensions Bulletin 17/09
14.	Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force Deadline for registering with HMRC for its Trusts Registration Service	26th June, 2017 31st January after tax year in which tax paid, starting 31st January, 2018 but no penalty if done by 5th March, 2018	Pensions Bulletin 17/11 Further guidance awaited from HMRC. Pensions Bulletin 17/16 Pensions Bulletin 17/18 Pensions Bulletin 17/20
15.	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
16.	DC bulk transfers without member consent:	6th April, 2018	Pensions Bulletin 17/18 See **Pensions Bulletin 18/05**

[1] 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
	introduction of easements		
17.	Bulk transfers of contracted-out rights without consent: introduction of easements	6th April, 2018	Pensions Bulletin 18/01 See **Pensions Bulletin 18/05**
18.	Deferred debt arrangements become available	6th April, 2018	See **Pensions Bulletin 18/05**
19.	Disclosure of costs, charges and investments - new requirements	Mostly in force 6th April, 2018	See **Pensions Bulletin 18/05**
20.	Auto-enrolment total minimum DC contributions will increase to 5% (of which minimum employer contribution of 2%)	6th April, 2018 to 5th April, 2019	
21.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6th April, 2019 onwards	
22.	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.
23.	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.
24.	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
25.	IORP II[2] transposition deadline	12th January, 2019	Pensions Bulletin 16/11
26.	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.

New law

I. Pensions White Paper

1. The Government is planning to introduce a number of changes to DB scheme regulation, described in high level terms in a White Paper.

2. Changes requiring amendments to primary legislation are unlikely to be made before 2019-20 "at the earliest".

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

3. Our client briefing on the White Paper is here.

4. The changes include:

- greater scrutiny of corporate activity, requiring statements of intent on pensions ahead of transactions, new powers for the Regulator to impose punitive fines (potentially retroactively to acts or omissions after 19th March, 2018), and a new criminal offence for "wilful or grossly reckless behaviour";

- wider Regulator powers to gather information, potentially compelling professional advisers to attend an interview;

- "clearer funding standards" in a revised, enforceable, funding Code of Practice, with the emphasis on long-term funding when setting the scheme funding objective;

- a requirement for scheme funding decisions to be reported in a Chair's Statement;

- possible improvements to the process for Regulated Apportionment Arrangements; and

- new commercial consolidation vehicles.

5. A number of potential changes identified in the Green Paper on DB schemes, such as easements to facilitate lower indexation costs, have been rejected at this stage.

II. Master trusts new regime - Government response and draft Code consultation

1. Those involved in running and advising master trusts will need to familiarise themselves with the Pensions Regulator's Code of practice and guidance on the new authorisation and supervision regime once those documents have been finalised. The new Pension Schemes Act 2017 regime is expected to come into operation on 1st October, 2018.

2. The Government has recently issued its response to the draft master trust regulations consultation and is now consulting on a draft Code of practice. A revised draft of the regulations has not been published at this stage, however.

A. Government response

1. The Government has confirmed in its response to consultation that it does not propose to introduce any new "*complete disapplications*" in relation to the master trusts regime.

2. One aspect of the master trust definition (in the draft regulations) involves establishing that the scheme is **not** to be used only by connected employers.

3. The response confirms that the Government plans to stick with its proposal that one way to establish connection would be for an employer to hold or control at least 33% of the voting power in the other employer. Calls to use the wider definition of 'connected' employers set out in the scheme administration regulations[3] have been rejected. Under that wider definition, for example, the voting power threshold is 20%.

4. The response document confirms that the fees for master trusts applying for authorisation will be £23,000 for new schemes and £41,000 for existing schemes (the figures proposed in the consultation paper were £24,000 and £67,000, respectively).

5. To read about the consultation paper, please see Pensions Bulletin 17/20.

[3] Occupational Pension Schemes (Scheme Administration) Regulations 1996

B. Draft Code of Practice consultation

1. The Pensions Regulator has published its draft master trusts Code of practice. The accompanying consultation paper says that information about the Regulator's risk-based approach to master trust supervision will be published separately from the Code, however.

2. The consultation runs from 27th March to 8th May, 2018 and also includes a draft decision-making procedure, outlining the Regulator's approach to applications for authorisation.

3. The draft Code contains the usual wording about Codes of practice not being enforceable. That wording appears to be at odds with the draft regulations which explicitly demand that the requirements of the Code be met in a number of respects.

4. One aspect of the draft regulations on which clarity has been sought relates to whether every master trust must have a scheme funder.

5. The draft Code states that master trusts operating from their own resources without support from a 3rd party or participating employers may not have a scheme funder. Equally, some master trusts may have more than one scheme funder.

6. There will also be guidance to accompany the Code. The guidance is expected to contain "*more practical information*" about meeting the authorisation criteria. The Regulator intends to publish 'the first tranche' of guidance during the consultation period, with further guidance to be published following the Regulator's 'forthcoming readiness review'.

   Comment: The readiness review is, in effect, a dummy run for master trust draft applications which is expected to be available from May, 2018 for 6 weeks. Master trusts wishing to take part would be able to submit draft applications in order to obtain feedback from the Regulator on any weaknesses in the application drafted.

7. The draft regulations contained an extensive list of 'significant events' which must be reported to the Regulator by trustees, scheme funders, scheme strategists and advisers, amongst others.

8. The draft Code states that the requirement to report significant events 'as soon as reasonably practicable' will normally mean notification within 5 working days of awareness of the event, although in a number of instances the notification deadline will be within 1 working day of the person becoming aware of the event.

9. To read about the November 2017 consultation on the draft regulations please see Pensions Bulletin 17/20.

III. Auto-enrolment qualifying earnings band limits for 2018/19

1. The Government has decided to retain the link between the auto-enrolment qualifying earnings band limits and the limits used for National Insurance Contributions.

2. For the 2018/19 tax year the upper limit of the qualifying earnings band will be £46,350 and the lower limit will be £6,032 (the 2017/18 figures were, respectively, £45,000 and £5,876).

3. Auto-enrolment contributions are based on qualifying earnings between the lower and upper limits of the qualifying earnings band.

4. The changes were made by the Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2018 (SI 2018/367).

Tax

IV. Finance Act 2018

1. The Finance (No.2) Bill 2017-2019 received Royal Assent on 15th March, 2018.

2. The Finance Act 2018 contains provisions giving HMRC power to refuse to register, or to de-register:

   - 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 day on which the decision is made to refuse registration or to de-register; and

   - master trust schemes which are not authorised under the Pension Schemes Act 2017.

3. The provisions regarding schemes with dormant sponsoring employers came into force on 6th April, 2018.

4. The master trust changes will come into force when the authorisation regime under Section 3 of the Pension Schemes Act 2017 is brought into force, which is expected to be 1st October, 2018.

Points in practice

V. Regulator's Annual Funding Statement for 2018

1. Trustees and employers running DB schemes will need to familiarise themselves with the Pensions Regulator's 2018 Annual Funding Statement.

2. The Regulator's preoccupation with dividends being paid in circumstances where there is a pension fund deficit continues, with regulatory action promised '*if a scheme is not treated fairly*'.

3. The Statement is aimed at schemes undertaking valuations with effective dates in the period 22 September 2017 to 21 September 2018 (known as Tranche 13 valuations), but is considered relevant to all DB schemes.

4. The Regulator considers that affordable contributions should be considered in light of distributions to shareholders. Trustees are expected to assess the impact of dividends on the employer covenant and whether the scheme is being treated fairly in light of what it needs to pay the promised benefits. The Statement says that trustees should expect to receive sufficient access to the employer's budgets and cash flow forecasts and should negotiate robustly to secure a fair deal.

   Comment (1): The Pensions Regulator's 2017 Annual Funding Statement (please see Pensions Bulletin 17/10) also expressed concerns about employers paying dividends in excess of deficit reduction contributions, stating that it would open an investigation if the recovery plan was not 'relatively short' and underpinned by an investment strategy which was not excessively reliant on investment performance.

   Comment (2): The Government's Green Paper on private sector DB pensions suggested the possibility of introducing a requirement for trustees to be formally consulted when the scheme is severely underfunded and the employer is considering making dividend payments (please see Pensions Bulletin 17/05), but that suggestion was not taken forward in the subsequent White Paper (please see item I above).

5. The 2018 Funding Statement includes an expanded version of the table contained in the 2017 Statement which sets out the Regulator's expectations for schemes with different levels of strength in relation to the employer covenant and scheme funding levels.

6. Where the employer is weaker with limited affordability, the Regulator expects scheme liabilities to be prioritised over shareholder returns.

7. For strong, or tending to strong, employers whose dividends '*and other forms of covenant leakage*' are disproportionate to deficit reduction contributions, the Regulator expects a short recovery plan. The Regulator cites intra-group loans, business asset transfers at less than fair value, or other trading mechanisms moving cash from the employer as '*other forms of covenant leakage*'.

8. The Statement notes that shareholder distributions may be materially detrimental to the scheme in some circumstances and that the Regulator will consider its anti-avoidance powers in that event.

   Comment: Payment of excessive dividends might result in the Regulator using its power to issue a 'contribution notice' under Section 38 of the Pensions Act 2004 (please see Pensions Bulletin 16/11).

9. Where employers are holding back cash by extending the recovery plan as a result of Brexit uncertainty the Regulator expects trustees to make sure that shareholders '*are also sharing the burden proportionately*'.

10. As regards the late submission of valuations the Statement acknowledges that where trustees have acted responsibly and taken all reasonable steps to finalise their valuation, but there remains a genuine reason why it cannot be finalised, the Regulator may choose not to impose a fine.

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.