

Pensions Bulletin

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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 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.	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 from £10,000 to £4,000 under Finance (No.2) Act 2017	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
8.	GMP equalisation		
8.1	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
8.2	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
9.	Civil partner/same sex spouse pensions: retroactivity pre-5 th December, 2005		
9.1	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
9.2	Supreme Court ruling in <i>Walker v. Innospec</i>		Survivor benefits for civil partners and same sex spouses must be based on all service, including before the

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
		12 th 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	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
11.	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
12.	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

consequently, provisions on the authorisation criteria and ongoing supervision.

No.	Topic	Deadline	Further information/action
13.	DC bulk transfers without member consent: introduction of easements	6 th April, 2018	Pensions Bulletin 17/18 Pensions Bulletin 18/05
14.	Bulk transfers of contracted-out rights without consent: introduction of easements	6 th April, 2018	Pensions Bulletin 18/01 Pensions Bulletin 18/05
15.	Deferred debt arrangements become available	6 th April, 2018	Pensions Bulletin 18/05
16.	Disclosure of costs, charges and investments - new requirements	Mostly in force 6 th April, 2018	Pensions Bulletin 18/05
17.	Auto-enrolment total minimum DC contributions will increase to 5% (of which minimum employer contribution of 2%)	6 th April, 2018 to 5 th April, 2019	
18.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum	6 th April, 2019 onwards	

No.	Topic	Deadline	Further information/action
	employer contribution of 3%)		
19.	Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6 th April, 2016 contracts where payment made on or after 1 st October, 2017. Applies where scheme used as "qualifying scheme" for auto-enrolment purposes and some or all of benefits are money purchase.	1 st May, 2018	If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes.
20.	Data protection: New Regulation: EU General Data Protection Regulation comes into force	25 th 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.

No.	Topic	Deadline	Further information/action
21.	Further EMIR exemption extension for pension scheme arrangements Additional 3 year clearing extension proposed	16 th August, 2018	Pensions Bulletin 17/01 Pensions Bulletin 17/10
22.	IORP II ² transposition deadline	12 th January, 2019	Pensions Bulletin 16/11
23.	Brexit	By 29 th 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 th March, 2019.

New law

I. White Paper inquiry launched by Select Committee

1. The Work and Pensions Select Committee has [launched](#) an inquiry into the March, 2018 [White Paper 'Protecting defined benefit pension schemes'](#).

2. The inquiry seeks written submissions by 18th May, 2018 to the following questions:
 - 2.1 To what extent is improving the Regulator's effectiveness a matter of greater powers, better use of resources, or cultural change in the organisation?
 - 2.2 What can be done to strengthen the regime for clearing corporate transactions (like dividend payouts, selloffs, takeovers) that might weaken a pension scheme?
 - 2.3 Will a criminal offence provide a meaningful deterrent?
 - 2.4 What should "prudent" and "appropriate" scheme funding mean?
 - 2.5 How can consolidation of the fragmented DB landscape be best achieved?
 - 2.6 Given the difficulties facing DB schemes, is a faster legislative timetable warranted?
3. For a link to our client briefing on the White Paper please click [here](#).

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

II. Data protection charges and information regulations

1. Data controllers will need to familiarise themselves with the charges and information requirements set out in new regulations³ coming into force on 25th May, 2018, which is the date on which the EU General Data Protection Regulation takes effect.
2. Data controllers (subject to limited exemptions) will need to pay a charge and provide information to the Information Commissioner.
3. The deadline for compliance with the charges and information requirements is within 21 days of the 12 month anniversary of the last notification fee paid to the Information Commissioner under the Data Protection Act 1998. If a notification fee has not previously been paid the deadline is within 21 days of 25th May, 2018.

Comment: The new charges will replace the notification fee requirements contained in the Data Protection Act 1998, under which fees are set at £35 or £500, depending on the turnover and staff levels of the organisation.

4. The charges and information requirements will then need to be met

³ [Data Protection \(Charges and Information\) Regulations 2018 \(SI 2018/480\)](#)

within the first 21 days of each subsequent 12 month period.

5. The charges structure is divided into 3 tiers:
 - 5.1 **Tier 1** - micro organisations - £40 charge - these include small occupational pension schemes (broadly, schemes with fewer than 12 members who are all trustees of the scheme or directors of the scheme's sole corporate trustee), charities, organisations with a turnover not exceeding £632,000, or organisations with no more than 10 members of staff
 - 5.2 **Tier 2** - small and medium organisations - £60 charge - these are organisations with a turnover not exceeding £36 million, or with no more than 250 members of staff
 - 5.3 **Tier 3** - large organisations - £2,900 charge - these are organisations not in Tier 1 or Tier 2
6. The information requirements relate to confirmation of the turnover and staff thresholds referred to above, as well as confirmation of the data controller's

name and address and whether it is a public authority.

7. The regulations are to have effect as if made under the Data Protection Bill, once enacted. The Bill specifies that fixed penalties for failure to comply will need to be set out in a document to be published by the Information Commissioner and laid before Parliament. The maximum amount of such a penalty may be 150% of the highest charge payable by a controller.

Tax

III. HMRC digital platform for pension schemes

1. Scheme administrators should note the contents of HMRC's [Manage and Register Pension Schemes service newsletter - April 2018](#), which explains HMRC's plans to introduce a new digital platform for pension schemes.
2. The newsletter says that HRMC will:
 - 2.1 provide a new digital platform for managing and registering pension schemes;
 - 2.2 provide a digital account for all pension schemes and reporting;

- 2.3 issue all HMRC notifications regarding registration through the new service; and
- 2.4 hold details of existing pension schemes, pension scheme administrators and pension practitioners following migration from the existing Pension Schemes Online service.
3. The new digital platform for new pension scheme registrations will be introduced under 'Phase One', from 8th May, 2018.
4. For existing pension schemes, the migration across to the new digital platform will happen in 2019.

Cases

IV. Replacement of principal employer - Court of Appeal

Employers and trustees may be interested in a decision concerning the effective date of the substitution of a scheme's principal employer. The Court of Appeal's ruling is fact-specific but it also contains commentary on points of wider interest such as the presumption of regularity doctrine and when a parent company can take decisions on behalf of a subsidiary.

A. Facts

1. The High Court had decided that a deed of amendment executed in 1999 had the effect of appointing the

previous principal employer's holding company to the role of principal employer. This was despite the fact that the previous principal employer was not a party to the deed.

2. The uncertainty about the effective date of the appointment arose because a number of documents stated or implied that the change of principal employer took effect in 1994.

Comment: To read about the High Court's decision, please see [Pensions Bulletin 16/11](#).

3. The previous principal employer (Viavi Solutions UK Ltd) appealed the High Court's decision, arguing that the parties involved were under the misapprehension that the change of principal employer had taken place in 1994 and that the 1999 deed could not therefore constitute, or provide evidence of, the necessary agreement and consent to the change of principal employer in 1999.

B. Decision

1. The appeal was dismissed. The state of knowledge and conduct of those involved was sufficient to amount to the necessary agreement and consent to a change of principal employer in 1999. This was reflected in the 'important' trustees' annual report,

to which the High Court should have given more weight.

2. The ruling contains commentary on a number of points that were not central to the decision reached but which may, nevertheless, be of interest.
3. The court noted that the 'presumption of regularity' doctrine was a common sense, rebuttable, statement about the appropriate inference that may normally be drawn where evidence in a given situation is lacking.
4. That presumption was directed at situations where the formalities (such as a requirement for changes to be made in writing) have not been met. It was not directed at situations where evidence of intention was being sought (in this case, evidence that the subsidiary consented to its parent company becoming principal employer in its stead).

Comment: A 2017 Scottish case applied the presumption of regularity in deciding when pension ages were equalised. To read more about *Knight v Sedgwick Noble Lowndes* please see [Pensions Bulletin 17/05](#).

5. The Court of Appeal also expressed the view that it would not have applied *Re Duomatic* in the way that

the High Court did. The High Court had decided that as the outgoing principal employer was a wholly owned subsidiary of the new principal employer, the parent company could take decisions on behalf of its subsidiary without the latter having to pass a resolution.

6. The Court of Appeal concluded that the parent company had not applied its mind, as shareholder, to the issue of its subsidiary's consent to its replacement as principal employer (as required under the rules). The parent company's decision to become the new principal employer was not, of itself, enough to impute the subsidiary's consent to that change. The *Re Duomatic* principle did not, therefore, apply here.

Shannan v Viavi Solutions UK Ltd

V. Auto-enrolment fixed penalty notice - whether reasonable excuse for non-compliance

1. Employers interested in how the Regulator may exercise its discretions under auto-enrolment legislation may be interested in an Upper Tribunal decision on the point.
2. The Upper Tribunal decided that in exercising its discretion to issue a fixed penalty notice the Pensions Regulator could consider whether there was 'reasonable excuse' for the

employer's failure to send an auto-enrolment declaration of compliance, regardless of whether the legislation referred to the concept of 'reasonable excuse'.

A. Facts

1. Employers subject to auto-enrolment duties under the Pensions Act 2008 must provide the Regulator with a "declaration of compliance" within 5 months of their staging date. Failure to comply may result in the Regulator issuing a compliance notice. If the employer fails to comply with that notice the Regulator may issue a fixed penalty notice.
2. The Regulator may review notices issued by it, including compliance notices and a fixed penalty notices, on the written application of the recipient of the notice or if the Regulator otherwise considers a review to be appropriate. Recipients of fixed penalty notices may then refer the matter to the First-tier Tribunal.
3. Employees of the Strathmore Medical Practice ("SMP") had been auto-enrolled but the declaration of compliance had not been filed with the Regulator by the statutory deadline.
4. A compliance notice was sent out by the Regulator, followed by a penalty

notice issuing a £400 penalty. SMP made the declaration of compliance the following day and also sought a review of the notice, arguing that the new practice manager was still learning about auto-enrolment.

5. The Regulator confirmed the penalty, noting that reliance on one employee was not sufficient to mitigate the failure to comply.
6. The matter was referred to the First-tier Tribunal, which concluded that the Regulator had closed its eyes to its ability to revoke its decision to impose a penalty. The legislation did not require the Regulator to establish that the employer had a reasonable excuse for non-compliance. The First-tier Tribunal set aside the penalty notice.

B. Decision

1. The Regulator appealed to the Upper Tribunal, which concluded that correspondence from the Regulator to SMP indicated that it was aware of its discretion to revoke a penalty notice and that it did not close its eyes to that possibility.
2. The First-tier Tribunal has endorsed the concept of 'reasonable excuse' in a number of auto-enrolment penalty notice cases.

3. Although the legislation does not refer to the employer having to demonstrate that it had a ‘reasonable excuse’ for non-compliance, that does not prevent the Regulator or First-tier Tribunal from having regard to that concept.
4. The Regulator also argued that it should be entitled to approach its auto-enrolment enforcement powers in a way which supported the deterrent effect of imposing penalty notices. The Upper Tribunal agreed, while noting that the Regulator should consider each individual case on its own merits.

Pensions Regulator v Strathmore Medical Practice - 29th March, 2018

Points in practice

VI. Insolvency and Corporate Governance consultation

1. BEIS has published a [consultation](#) on Insolvency and Corporate Governance. The consultation closes on 11th June, 2018.
2. The consultation paper contains several references to companies paying dividends in circumstances where there is a large pension fund deficit.
3. The paper notes that some large companies continue to pay out large dividends in the period immediately

before their insolvency and that this raises questions about whether reform is needed.

4. The Government is seeking views on whether the definition of “distributable profits” remains fit for purpose. It is also looking at whether there is sufficient transparency and accountability to shareholders and others for decisions taken by companies on how to allocate capital between competing demands, such as returns to shareholders and, amongst other things, contributions to pension funds.

Comment (1): The Pensions Regulator’s 2018 Annual Funding Statement focuses on trustees negotiating ‘*robustly to secure a fair deal*’ when assessing affordable contributions in light of distributions to shareholders (please see [Pensions Bulletin 18/06](#)).

Comment (2): In its 2017 Annual Funding Statement (please see [Pensions Bulletin 17/10](#)) the Regulator expressed concerns about employers paying dividends in excess of deficit reduction contributions and promised that the Regulator would consider opening an investigation unless the recovery plan was ‘relatively short’ and underpinned by an investment strategy which was not excessively reliant on investment performance.

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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