

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](#)

New law

I. Government proposals on Pensions Regulator powers

1. Those involved in running DB schemes should note that the Government has issued its first [consultation paper](#) derived from its [White Paper](#)¹ on DB schemes, focusing on the powers of the Pensions Regulator.
2. The consultation proposes broad changes which are more extensive than might be expected from reading the White Paper. Significantly more detail will be required before a full assessment of the implications of those changes can be made.
3. The closing date for comments is 21st August. Further consultation papers are to come in relation to the other aspects of the White Paper, such as scheme funding.
4. To see our client briefing on the White Paper, please click [here](#).

¹ *Protecting defined benefit pension schemes - 19th March, 2018*

A. Declarations of intent

1. The Government envisages imposing a duty on ‘*corporate planners (usually the Board of the company)*’ to send a Declaration of Intent to the scheme trustees and Regulator where risk-based criteria (such as the scheme’s funding level) are met and the transaction is one of the following:
 - 1.1 sale of controlling interest in a scheme employer;
 - 1.2 sale of the business or assets of a scheme employer; or
 - 1.3 granting of security in priority to scheme debt.
2. The Declaration would be sent after due diligence and after transaction financing has been finalised but before the sale and purchase agreement has been signed, ‘*although we would expect employers’ engagement with trustees to start at the earliest opportunity*’.

3. The Declaration would need to:

- 3.1 explain the nature of the planned transaction;
 - 3.2 confirm that the corporate planner has consulted on its terms with the trustees and confirm the trustees’ agreement (or otherwise) to the planned transaction; and
 - 3.3 explain any detriment to the scheme and how this is to be mitigated.
4. The paper envisages that where the Regulator has concerns it would use its enhanced suite of powers (see below).

B. Regulator’s powers

Extensive changes are proposed in relation to the Regulator’s Contribution Notice (‘CN’) and Financial Support Direction (‘FSD’) powers, including:

1. creating an additional limb to the CN ‘material detriment’ test,

- assessed by reference to the weakening of the employer;
2. providing the Regulator with power to impose a CN on any person associated or connected with the recipient of an FSD;
 3. allowing FSDs to be issued to a broader range of individuals associated or connected with the sponsoring employer;
 4. possibly increasing the FSD 'lookback' period beyond 2 years, in which event 'appropriate protections' would be introduced for businesses brought within scope as a result;
 5. providing that the financial support required under FSDs must be in the form of either a cash payment or a type of statutory guarantee;
 6. providing the Regulator with power to issue FSDs after a scheme has entered the PPF;
 7. creating a single-stage FSD process;
 8. amending the FSD reasonableness test to clarify that the actions of a target in creating or increasing risk are a relevant (but not necessary) factor; and
 9. amending the CN "reasonableness" test so that there is a stronger focus

on the loss or risk caused to a scheme by the 'act' when assessing the amount to be demanded under a CN.

Comment: The consultation paper does not refer to the proposals floated in the White Paper that the Regulator should be given power to compel employers, trustees and 'other relevant parties' to attend interviews, and that this should apply to professional advisers regardless of client confidentiality concerns.

C. New sanctions

1. The Government is proposing that the Regulator should have discretion to impose a new civil penalty or to bring a prosecution by reference to new criminal sanctions.
2. The new civil penalty would be of an amount up to £1,000,000 'to deter behaviours which are more serious in nature and have resulted in actual harm to the pension scheme or have the potential to do so if left unchallenged'. The Regulator would have discretion to set the amount of the fine, 'based on the seriousness of actions'.

Comment: The consultation quotes from the White Paper extensively, including the reference to 'highly punitive' fines possibly being applied retroactively to acts or omissions after the date of the White Paper

(19th March, 2018). The consultation paper does not, however, contain anything further on retroactivity.

3. Criminal sanctions, which could include unlimited fines or custodial sentences, would be introduced '*in the most serious of cases of wrongdoing*' to punish the following, although the new civil penalty may be applied in the alternative:
 - 3.1 wilful or grossly reckless behaviour in relation to a defined benefit pension scheme;
 - 3.2 non-compliance with a CN; or
 - 3.3 failure to comply with the notifiable events framework (see below).
4. The paper envisages the range of possible targets for the new civil penalty and criminal sanctions should include '*all those who have responsibility to the pension scheme. This includes directors, sponsoring employers and any associated or connected persons, and in some circumstances trustees*'.
5. The paper contains a table setting out (non-exhaustive) examples of how the new sanctions might operate. For example, the new civil penalty might apply where there has been:

- 5.1 non-compliance with elements of the DB funding code;
- 5.2 non-compliance with the requirement to provide a Declaration of Intent;
- 5.3 deliberate provision of false information to the Regulator; or
- 5.4 deliberate provision of false information, or failing to provide required information, to trustees.

D. Notifiable events, and notifiers, to be extended

- 1. The following new notifiable events would be added to the list of events about which the Regulator would need to be notified:
 - 1.1 the sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme's liabilities;
 - 1.2 granting security of a debt to give it priority over debt to the scheme;

- 1.3 significant restructuring of the employer's board of directors and certain senior management appointments; and
- 1.4 the sponsoring employer taking independent pre-appointment insolvency/restructuring advice (such as an independent business review).

- 2. The paper also proposes to extend the existing 'breach of banking covenant' notifiable event to include covenant deferral, amendment or waiver.
- 3. The Government plans to bring the timing for notification forward and extend the reporting obligation to other parties, such as the directors of a sponsor's parent company who are planning a transaction.
- 4. In particular, the Government would like to be notified no later than when the Heads of Terms agreement is first put in place for the following transactions:
 - 4.1 sale of controlling interest in a sponsoring employer;

- 4.2 sale of the business or assets of a sponsoring employer; and
- 4.3 granting of security in priority to scheme debt.

E. Clearance

The Regulator plans to review its guidance on clearance and clarify or expand certain areas, including the 'material detriment' definition and how applicants and trustees should approach the test.

Comment: Companies can voluntarily seek clearance from the Regulator that it does not consider it reasonable to use its FSD or CN powers in the circumstances set out in the clearance application. The Green Paper raised the possibility of making clearance mandatory but the White Paper rejected such a step.

II. DWP consults on ESG and stewardship

- 1. Trustees should note that the DWP has launched a [consultation](#) (closing on 16th July, 2018) on draft regulations² proposing that trustees be required to reveal the extent to which they consider 'financially material considerations' including those relating to Environmental,

² draft Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2018

Social and Governance ('ESG') issues and stewardship.

2. By 1st October, 2019, trustees would need to:

2.1 include in their Statement of Investment Principles ('SIP') their policies in relation to:

- (a) financially material considerations, including (but not limited to) those arising from ESG considerations, including climate change; and
- (b) the stewardship of the investments, including engagement with, and monitoring of, investee firms, investment managers and shareholders of an investee company (on matters including performance, strategy, risk, social and environmental impact and corporate governance) and the exercise of rights, including voting rights,

associated with the investment; and

2.2 trustees of schemes which, broadly, provide (non-AVC) money purchase benefits would need to publish their SIP on a website available to the public.

3. From 1st October, 2019, when they next prepare or update the SIP for their scheme, trustees would also be required to prepare a statement about the extent to which the SIP will take account of members' views, including their views on ethical and social impact matters, and matters relating to the 'present and future quality of life of members'. This would need to be included in the annual report. For schemes which, broadly, provide (non-AVC) money purchase benefits that statement would also need to be included on a publically available website.

4. From 1st October, 2020, trustees would need to set out in their annual report how they implemented the SIP. Trustees of schemes which, broadly, provide (non-AVC) money purchase benefits would also need to publish that information on a website available to the public.

5. The Government has decided not to include the concept of social impact

investment as it is concerned that to do so might 'create new confusion', although it intends to monitor developments on that front.

Comment: In its (June 2018) [response](#) to an Advisory Group Report on social impact investing³ the Government outlined its plans for social impact investment for savings, pensions and investments. The response included commitments on strengthening schemes' ability to consider member concerns about investments and clarifying how schemes should engage with the firms in which they invest, alongside voting.

- 6. Failure to comply with the requirements being introduced would result in a penalty of up to £5,000 (for individuals) or £50,000 (in other instances).
- 7. The consultation documents include [draft marked-up revisions](#) to the DWP's February 2018 guidance '*Cost, charge and related information reporting: guidance for trustees and managers of occupational schemes*' which are intended to reflect the proposals in the draft regulations.

III. Government final response to social investment Law Commission report

- 1. Trustees may wish to note that the Government, Pensions Regulator and FCA

³ *Growing a Culture of Social Impact Investing in the UK - Advisory Group chaired by Elizabeth Corley*

have issued their [final response to the Law Commission report: Pension funds and social investment](#) (June 2018).

2. The response contains several references to the proposals put forward in the [DWP consultation](#) on the draft Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2018 (please see item II above).
3. In a bid to reconcile the requirement to process transactions promptly with the benefits of holding some illiquid assets, the Pensions Regulator promises to consider issuing further guidance to clarify how trustees should promptly realise investments from funds with longer dealing cycles.
4. The Regulator also intends to provide further guidance by the end of 2018 on how trustees' investment strategies can include illiquid assets in a diverse portfolio.
5. The response also sets out the Government's plans on commercial DB scheme consolidation, following on from the White Paper⁴ proposals on the topic. The Government intends to consult towards the end of 2018 on the design of a legislative framework and authorisation regime applicable to all forms of commercial DB scheme consolidation. It

⁴ *Protecting Defined Benefit Pension Schemes*

also plans to consult on proposals for a new accreditation regime to apply to existing forms of consolidation.

Points in practice

IV. Regulator issues revised quick guide on Chair statements

1. Trustees of schemes required to draw up a Chair's statement (broadly, schemes which provide non-AVC money purchase benefits) should note that the Pensions Regulator has revised its [quick guide to the Chair's statement](#) (June 2018).
2. The updated version takes the form of a checklist for each area required to be covered in the Chair's statement under legislation⁵, followed by examples of good practice and common mistakes.
3. The revised version states "*Where an explanation is required, it should be meaningful and not simply state a conclusion. If there is a reason why the trustees have not been able to comply with a particular requirement, you should state where they have missed out information and why*".

Comment: When describing their approach to scheme governance in the Chair's statement, trustees should take care to avoid any overstatement of steps

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

taken or procedures in place. To do otherwise could result in the document creating a hostage to fortune.

4. The revised guide also states that the original statement should have a physical signature.

Comment: This would appear to rule out the use of any form of electronic signature.

V. Pension scams code updated

1. Trustees should note that '*Combating Pension Scams: A Code of Good Practice*' (produced by the Pension Scams Industry Group) has been [updated](#) on 22nd June, 2018.
2. Compliance with the Code is voluntary but those involved in conducting transfers may find it useful to look at the tips on how to conduct due diligence when considering a transfer request.
3. Among other things, the revised Code now includes text regarding the QROPS transfers legislation and steps for reporting suspicious cases to Action Fraud, the UK's national fraud reporting centre.

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.	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
2.	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 .
3.	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.
4.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 th April, 2015,	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
			has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017
5.	GMP equalisation		
5.1	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 17th May, 1990 to 5th April, 1997. Trial commenced 5th July, 2018
5.2	Government response to consultation on GMP equalisation published	13 th March, 2017	Pensions Bulletin 17/7
6.	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
7.	DC bulk transfers without member consent: introduction of easements	6 th April, 2018	Pensions Bulletin 17/18 Pensions Bulletin 18/05 Pensions Bulletin 18/08
8.	Bulk transfers of contracted-out rights without consent: introduction of easements	6 th April, 2018	Pensions Bulletin 18/01 Pensions Bulletin 18/05

No.	Topic	Deadline	Further information/action
9.	Deferred debt arrangements become available	6 th April, 2018	Pensions Bulletin 18/05
10.	Disclosure of costs, charges and investments - new requirements	Mostly in force 6 th April, 2018	Pensions Bulletin 18/05
11.	Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%)	6 th April, 2018 to 5 th April, 2019	
12.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6 th April, 2019 onwards	
13.	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	1 st 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
	scheme used as “qualifying scheme” for auto-enrolment purposes and some or all of benefits are money purchase.		
14.	Data protection: New Regulation: EU General Data Protection Regulation in force	25 th May, 2018	<p>Pensions Bulletin 16/05 Employment Bulletin 16/15</p> <p>As data controllers, trustees will need to ensure that compliance with the EU General Data Protection Regulation is achieved by this date.</p> <p>A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.</p>
15.	Existing EMIR exemption extension for pension scheme arrangements ends	16 th August, 2018	Pensions Bulletin 17/01
	EU Parliament confirms further extension of	12 th June, 2018	Pensions Bulletin 18/10

No.	Topic	Deadline	Further information/action
	pensions exemption, with further extensions possible		
16.	IORP II transposition deadline	12 th January, 2019	Pensions Bulletin 16/11
17.	Brexit	By 29 th March, 2019, unless extended	<p>UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless:</p> <ul style="list-style-type: none"> (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.

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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