SLAUGHTER AND MAY

Pensions Bulletin

28 June 2019 / 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

New law

I. Further requirements for SIPs

1. Trustees will have to get in touch with their asset managers so that they can be in a position to comply with further changes being introduced to the requirements for Statements of Investment Principles[1]. The changes are intended to implement the Shareholder Rights Directive II.

2. From 1st October 2020 trustees will need to make sure that their SIP covers certain details about their arrangements with an asset manager (or explain why any of those details are not included), those being:

   2.1 how the asset manager is incentivised to align its investment strategy and decisions with the trustees' policies on a range of issues, such as risk, return, and ESG (to the extent it is taken account of);

   2.2 how the asset manager is incentivised to make decisions based on assessments about medium to long-term financial and non-financial performance of an issuer of debt or equity and to engage with those issuers in order to improve their performance;

   2.3 how the method and period for evaluating the asset manager's performance and remuneration are in line with the trustees' policies;

   2.4 how the trustees monitor portfolio turnover costs, and how they define and monitor targeted portfolio turnover or turnover range; and

   2.5 the duration of their arrangement with the asset manager.

Comment (1): Regulations made in 2018[2] require trustees to update their SIP by 1st October 2019 in a number of ways, one of which includes coverage of how financially material considerations (such as ESG and climate change matters) are taken into account when investing. To read about the SIP changes covered in the 2018 regulations please see Pensions Bulletin 18/13.

Comment (2): As part of its push for greater transparency the FCA has published PS19/13 , which requires (amongst other things) that asset managers provide certain information to asset owners, including how their investment strategies contribute to the medium to long term performance of the assets. The requirement takes effect from 10th June 2019 but the FCA recognises that this is only a few days after publication and is therefore willing to accept (for an initial period) an explanation from firms about what they are doing in order to get to a position of compliance.

3. **Non**-money purchase schemes will need to make publicly available on a website,

   - from 1st October 2020, the latest SIP
   - from 1st October 2021, a statement about:
     - how, and the extent to which, their policies on stewardship and engagement have been followed during the year; and
     - their voting behaviour (including the most significant votes cast by them or on their behalf) during the year, and any proxy voter services used.

[1] under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 (SI 2019/982)

[2] Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 (SI 2018/988)

Comment: The 2018 regulations require money purchase schemes to publish their SIP on a publicly available website by 1st October 2019 and publish a statement about how the SIP policies were implemented by 1st October 2020. Under the new (2019) regulations, from 1 October 2021 money purchase scheme implementation statements will need to include the trustees' voting behaviour and refer to the use of any proxy voter services.

II. Fiduciary management and investment consultants: CMA Order made

1. The CMA has announced that the Order[3] required to implement changes concerning fiduciary management and investment consultancy has been made on 10th June 2019. The key provisions come into effect 6 months from the date of the Order.

2. The key changes mean that trustees will face new duties regarding their relationship with their investment consultants and fiduciary managers, including mandatory tendering where over 20% of the scheme assets are delegated to a fiduciary manager, and a requirement to set objectives for their investment consultants.

3. Other changes include a requirement for fiduciary management firms to provide clearer information on fees and performance, while investment consultants will have to separate out marketing of their fiduciary management service from their investment advice.

4. To read about the changes please see Pensions Bulletin 19/01.

Tax

III. Hymanson fixed protection case: HMRC withdraws its appeal

1. HMRC has withdrawn its appeal in the *Hymanson* case, where the tax payer succeeded in persuading the First-tier Tribunal (Tax Chamber) (**FTT**) to accept a mistake argument in relation to pension contributions made after fixed protection had been claimed, enabling him to maintain the protection. The facts were quite unusual: rent payments were continuing to be made to one pension scheme, which the FTT accepted confused the member, such that he genuinely did not believe there was a problem with continuing to make pension contribution payments to two other schemes.

2. Commentators have speculated as to whether the fact that HMRC appears to have admitted defeat in this case hands other tax payers who have made similar errors a lifeline. It seems likely that, in practice, HMRC will want to limit the impact of the case, and may rely on the relatively unusual fact pattern to help them in that.

3. To date, HMRC'S Pensions Tax Manual guidance has focused on errors made by third parties. Furthermore, that guidance does not expressly set out any legal principle underlying the position that HMRC takes. The development in the *Hymanson* case was that a **mistake argument** was accepted by the FTT in circumstances where the **member** made the mistake.

4. It remains to be seen whether HMRC will now be willing to update the Pensions Tax Manual guidance, having withdrawn the appeal.

5. Pending any update, any tax payer who had claimed fixed protection and who hopes to persuade HMRC of their mistake where contributions have continued, is likely to have to make their case in a non-statutory clearance application, to test HMRC's approach.

[3] Investment Consultancy and Fiduciary Management Market Investigation Order 2019

Cases

IV. Adequacy of PPF Compensation: Advocate General's Opinion in Bauer

1. Advocate General Hogan has delivered an opinion in relation to PSV, the German equivalent of the PPF, suggesting that Article 8 of the EU Insolvency Directive (which requires protection of rights conferring pension benefits on an employer's insolvency) requires protection of **all** pension rights rather than just a specified percentage.

2. The CJEU decided in last year's *Hampshire* case that compensation equal to at least 50% of each recipient's benefits was sufficient to comply with Article 8 (please see Pensions Bulletin 18/13). But Advocate General Hogan has now called for "*a full re-appraisal of the case-law of the Court to date*".

3. He also took the view that the Directive has direct effect against member states and insolvency insurance institutions such as the PPF and PSV.

Comment (1): Subject to an overall cap on PPF compensation per individual, the PPF currently provides 90% of the original pension where the individual is under normal pension age when the employer becomes insolvent (where the member has reached NPA the compensation is 100% of the pension, subject to the overall cap). It also restricts pension increases.

Comment (2): If the CJEU upholds the Opinion, PPF compensation may have to be increased, probably, as in *Hampshire*, with retrospective effect, and potentially impacting on schemes winding-up outside the PPF.

PSV v. Bauer: Advocate General's Opinion - 8th May, 2019

Points in practice

V. Regulator's funding analysis - trend for higher dividends than DRCs continues

1. The Pensions Regulator has published its funding analysis for Tranche 14 schemes (schemes with valuation dates between September 2018 and September 2019).

2. The analysis points out that the ratio of dividends to deficit repair contributions has increased amongst FTSE350 companies - the median ratio in 2012 was 9.2:1, but is now 14.2:1.

Comment (1): The Regulator's 2019-22 corporate plan announced that it would be more proactive on this front, promising to engage '*with more schemes than before to ensure … that disproportionate dividends are not being paid at the expense of cash to repair pension deficits*' (please see item VI below).

Comment (2): The Regulator's focus on dividends has consistently been mentioned in its recent Annual Funding Statements (2019, 2018, and 2017) and is likely to feature more prominently in its interactions with schemes.

Comment (3): There is also the (albeit limited) risk of a contribution notice being issued where excessive dividends have been paid, as outlined in Pensions Bulletin 16/11.

Comment (4): BEIS has been looking at the issue too. Its August 2018 response to consultation on insolvency and corporate governance concluded that there should not be an automatic bar on dividend payments where the company is sponsoring a pension scheme in deficit, but also pointed out that it would consider '*ways in which directors could provide stronger reassurances … that proposed dividends will not undermine the affordability of any deficit reduction payments agreed with pension fund trustees*'.

VI. TPR corporate plan: DB funding, governance, and savers' decision-making

1. The Pensions Regulator's corporate plan for 2019-2022 reveals the following areas of focus over the next 3 years, and likely actions this year. The Regulator plans to:

   1.1 publish the revised DB Funding Code for consultation '*later this year*';

   1.2 engage with more schemes than before to ensure that "*disproportionate dividends are not being paid at the expense of cash to repair pension deficits*". Action in this regard will include contacting trustees of a number of schemes, before their upcoming valuation, where the Regulator is concerned about possible unfair treatment of the scheme relative to the shareholders;

1.3 consult on a new Code of Practice later this year to set out its expectations for effective scheme governance in the light of the changes made by the EU IORP II Directive;

Comment: The deadline for the UK to implement IORP II was 12th January 2019. The DWP has previously made it clear that any changes to be made by pension schemes are likely to be modest and would be dealt with by way of Regulator Codes of Practice.

1.4 launch a joint review with the FCA, focusing on value for members by examining how disclosures and information from pension schemes combines with guidance and advice services to help consumers make well informed decisions.

2. The Regulator also notes that it will be regulating compliance with the new trustee obligations resulting from the CMA Investment Consultants Market Investigation (please see item II above).

TPR's Corporate Plan 2019-2022

VII. HMRC announces delay in issue of GMP reconciliation data

1. Countdown Bulletin 45 (May, 2019) announces that HMRC's final GMP Scheme Reconciliation Service data cuts will not now be available until mid-to-late November, 2019.

2. Fully-reconciled data is necessary before schemes can properly start on their equalisation exercises so the delay is likely to have a knock-on effect on those exercises.

VIII. Pension scams Code of Good Practice updated

The Pension Scams Industry Group has updated its Code of Good Practice[4]. Changes include:

1. a reference to trustees not '*unduly delaying*' a transfer to a valid arrangement;

   Comment: This has perhaps been included following the Ombudsman determination about taking a proportionate approach to due diligence following a transfer request (the revised Code refers to that determination further on: PO-19383 - please see Pensions Bulletin 18/16);

2. a section on the emergence of claims firms encouraging scam victims to bring actions against transferring schemes – the Code encourages schemes to respond '*robustly*' and points out that these firms may seek to obtain information via GDPR[5] subject access requests made by members;

3. an extended 'initial analysis' section (this part of the Code sets out the kinds of questions that trustees could ask);

4. two new case studies about 'international SIPPs' (these UK SIPPs, which target both non-UK and UK residents, grew in popularity following the impact of the transfer charge imposed on QROPs in 2017); and

5. a guide about how to use the Action Fraud Expert Reporting Tool.

[4] further change in this area is expected so PSIG anticipate that another version of the Code will be issued '*within 12 months*'

[5] General Data Protection Regulation

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	6th April, 2016 and ongoing requirement	Pensions Bulletin 16/03
2.	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.
3.	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.
4.	GMP equalisation		
4.1	Part 8 action brought by female staff, trustee and Lloyds Trade Union Judgment published Clarificatory judgment published	15th May, 2017 26th October, 2018 6th December, 2018	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. Pensions Bulletin 18/15 Pensions Bulletin 18/17
4.2	Government response **to** consultation on GMP equalisation published	13th March, 2017	Pensions Bulletin 17/7
5.	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
6.	DC bulk transfers without member consent: introduction of easements	6th April, 2018	Pensions Bulletin 17/18 Pensions Bulletin 18/05 Pensions Bulletin 18/08
7.	Bulk transfers of contracted-out rights without consent: introduction of easements	6th April, 2018	Pensions Bulletin 18/01 Pensions Bulletin 18/05
8.	Deferred debt arrangements became available	6th April, 2018	Pensions Bulletin 18/05
9.	Disclosure of costs, charges and investments - new requirements Chair's statement and website must publish costs and charges information	Mostly in force 6th April, 2018 Within 7 months of scheme year end falling on or after 6th April, 2018	Pensions Bulletin 18/05
10.	Existing EMIR exemption extension for pension scheme arrangements ended EU Parliament confirms further extension of pensions exemption, with further extensions possible	16th August, 2018 12th June, 2018	Pensions Bulletin 17/01 Pensions Bulletin 18/12 Pensions Bulletin 18/10
11.	CJEU decides PPF compensation must equal at least 50% of each recipient's benefit (*Hampshire - Case C-17/17)*	6th September, 2018	Pensions Bulletin 18/13

No.	Topic	Deadline	Further information/action
12.	Master trusts new authorisation and supervision regime introduced	1st October, 2018	Pensions Bulletin 18/12 Pensions Bulletin 18/13 (note: SI later re-issued as SI 2018/1030)
13.	IORP II transposition deadline	12th January, 2019	Pensions Bulletin 16/11
14.	Trustees must ensure Statement of Investment Principles meets new requirements on ESG and stewardship	**Various requirements phased in: 1st October, 2019, 2020, and 2021**	Pensions Bulletin 18/13 **See Item I above.**
15.	Pensions Regulator consultation on draft DB Funding Code of Practice expected	Spring 2020	

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.