ALLEN & OVERY

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Pensions: what's new this week

Welcome to your weekly update from the Allen & Overy Pensions team, bringing you up to speed on all the latest legal and regulatory developments in the world of occupational pensions.

DB superfunds: new consultation and guidance | GMP equalisation update | PPF publishes 2019/20 final levy determination | Reminder: is your scheme a master trust? | CMA: final report on investment consultants, fiduciary management | Data protection: new ICO guidance | Illiquid investments: FCA consults on rule changes | Latest HMRC newsletter | Update: Welsh income tax rates

DB superfunds: new consultation and guidance

The government is consulting on DB consolidation, seeking input on a proposed framework for authorising and regulating DB 'superfunds'. A basic superfund structure will include a corporate body as the statutory employer of a DB pension scheme, which would be eligible for entry into the Pension Protection Fund; the 'employer covenant' would be replaced by a capital buffer. The consultation closes on 1 February 2019. The Pensions Regulator (TPR) has also released new guidance for trustees, employers and superfunds in advance of the new authorisation regime.

You can read more about the consultation and new guidance in our eAlert 'DB superfunds: a new option for legacy pension liabilities?'.

GMP equalisation update

The Department for Work and Pensions (DWP) has provided an update on its ongoing work on GMP equalisation in the DB superfunds consultation (see above). Briefly it states that:

- Guidance from an industry working group on GMPs and GMP conversion should be finalised 'in the near future'.
- The DWP is 'hoping' to provide guidance on GMP equalisation following the *Lloyds* judgment.
- The DWP is working with HMRC to consider if any changes to tax legislation are required in relation to those who might be negatively affected by GMP conversion.

PPF publishes 2019/20 final levy determination

The Pension Protection Fund (PPF) has published its final levy determination for 2019/20 together with the associated guidance and policy statement. The key deadlines are available on this page.

As expected, the levy estimate is confirmed at £500 million, and the levy scaling factor and scheme-based levy multiplier will remain unchanged. Note that the deadline for hard copy documentation supporting contingent assets has been extended from 29 March 2019 to 1 April 2019.

The levy policy statement also includes guidance on the effect of the *Lloyds* case. The PPF does not believe that it would be appropriate to allow an adjustment for the impact of the decision (to prevent a worsening of insolvency risk score), and will not adjust data items where an employer makes an accounting adjustment for GMP equalisation. The PPF has also provided new guidance on the impact of the case for section 179 valuations.

Trustees should also confirm whether their scheme is affected by new requirements for type A and B contingent assets (guarantees and security over assets). Contingent assets with a fixed sum maximum amount element will only be recognised for the purposes of the 2019/20 levy if they are on new standard form agreements (published in January 2018). This affects both schemes with existing contingent assets and those seeking to certify new ones – if your scheme is affected, please contact your usual A&O adviser as soon as possible (if you have not already done so).

To read more about the consultation version and the new requirements for contingent assets, see WNTW, 24 September 2018.

Reminder: is your scheme a master trust?

TPR has reminded pension scheme trustees to check if their scheme falls within the definition of a 'master trust', as master trusts have until 31 March 2019 to apply for authorisation. TPR has also released a flow chart to help trustees assess their scheme's status. Trustees of schemes which fall within the definition, or where the scheme's status is unclear, should seek legal advice urgently.

CMA: final report on investment consultants, fiduciary management

The Competition and Markets Authority (CMA) has published its final report following its investigation into the investment consultancy and fiduciary management sectors. An overview of the final report is also available. The provisional report was published in the summer (WNTW, 23 July 2018).

The CMA plans to impose the following requirements via an order:

- Pension scheme trustees must run a tender when first purchasing fiduciary management services in relation to 20% or more of scheme assets, and must run a tender within five years if they have already awarded a fiduciary management mandate above the threshold without doing so. Where this applies, fiduciary management firms will be prohibited from accepting customer mandates unless the customer has confirmed that it was competitively tendered.

- Pension scheme trustees will also be required to set objectives for their investment consultants (to assess the quality of investment advice received).

- Investment consultants must market fiduciary management services separately from investment advice, and inform pension scheme trustees of the duty to tender (as above).

- Fiduciary management firms must provide better (and comparable) information on fees and performance.

- Investment consultancy and fiduciary management providers must meet requirements for reporting performance of recommended asset management products or funds (using basic minimum standards).

The CMA has also stated that it will ask TPR to provide greater support for trustees when running tenders for investment consultancy and fiduciary management services, and to provide guidance for trustees. It is also recommending that the government make the necessary legislative changes to enable TPR to oversee trustee compliance with the above remedies, and to extend the FCA's regulatory perimeter to include all of the main activities of investment consultants.

The CMA will consult on the order in early 2019, and expects most of the requirements to be in place by the end of 2019.

Data protection: new ICO guidance

The Information Commissioner's Office (ICO) has published new guidance on controllers and processors, and contracts and liabilities between controllers and processors, as well as a blog post with advice about a 'no deal' Brexit.

There are two sets of new guidance (including checklists) to help organisations identify whether they are a data controller (or joint controller) or a data processor. Identifying the applicable category is a fundamental part of ensuring compliance with data protection obligations.

More detailed guidance on contracts and liabilities between controllers and processors is now available, covering when a contract is required (and what should be included), as well as the responsibilities and liabilities of controllers and processors. The ICO has also updated its existing short-form guidance on contracts. Trustees should already have reviewed and amended data processor contracts to ensure compliance with the GDPR. Data processors should note that the guidance confirms that where data is processed other than in line with the written instructions of the data controller, the processor will be considered to be a controller in respect of that processing. The guidance also includes commentary on a controller's (for example a trustee's) responsibilities for selecting and monitoring its processors.

The ICO's blog post includes a useful six-step checklist for data protection compliance in the event of a 'no deal' Brexit, as well as other guidance. For more information on preparing for Brexit, read our briefing 'Data protection post-Brexit: what to expect and how to prepare'.

Illiquid investments: FCA consults on rule changes

The Financial Conduct Authority (FCA) is consulting on changes to its rules to remove barriers to investment by retail investors in a wider range of long-term assets in unit-linked funds. Some of the outcomes the FCA is seeking are to enable a wider range of investment by DC pension schemes where members invest via unit-linked funds, and to increase confidence and participation in the market by providing protection for investors in illiquid or high-risk patient capital assets within unit-linked funds.

The FCA consultation follows recommendations made by the Law Commission in relation to pension schemes and social investment (WNTW, 30 June 2017), and engagement with the government on the issues of patient capital. It has also published a related discussion paper on patient capital. These are the latest in a series of measures on patient capital, including new TPR investment guidance (WNTW, 5 November 2018).

Responses to the consultation and discussion paper are due by 28 February 2019.

Latest HMRC newsletter

HMRC has released an update on its recent Manage and Register Pension Schemes service. The newsletter contains guidance for scheme administrators that have been unable to complete the registration process online. It also provides information on how to file accounting for tax returns and scheme wind-ups, and includes details of features that have been recently added (or are due to be added shortly).

Update: Welsh income tax rates

Welsh rates of income tax will be introduced from April 2019. HMRC recently consulted on consequential changes to legislation, including provisions of the Finance Act 2004 that deal with relief at source and the annual allowance charge. The government has now published further versions of the instruments. The proposed changes to the Finance Act 2004 are contained in a draft order, which has been laid before Parliament for approval.

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