PENSIONS NEWS

MARCH 2015

IN THIS ISSUE

INTRODUCTION

Welcome to DLA Piper's Pensions News publication in which we report on developments in pension legislation, guidance and case law, as well as keeping you up to speed on what to look out for in the coming months.

This edition brings you the developments from March 2015 including the following.

- **Budget 2014 reforms:** the final form of various sets of regulations in relation to the reforms; draft guidance from the Regulator about changes to the Disclosure Regulations and the provision of generic risk warnings; and updates in relation to Pension Wise.
- **Budget 2015:** announcements in relation to the Lifetime Allowance; and an announcement and a consultation about extending flexibilities to existing annuity holders.
- **The Pensions Regulator:** an update on record-keeping; and the publication of its Corporate Plan for 2015 – 2018.
- **Legislation:** the Pension Schemes Act 2015 receiving Royal Assent; the final form regulations providing detail about the statutory power for employers to amend their schemes to offset increased costs when contracting-out ends in April 2016; new earnings thresholds for automatic enrolment; and the final form of regulations making technical amendments, including the introduction of exceptions, to the automatic enrolment legislation.
- **Charges and governance:** the final form of the regulations which were laid before Parliament in February; guidance from the DWP about the charges cap; and a joint DWP and FCA consultation about transparency and reporting of transaction costs.
- **Case law:** a further judgment in relation to holiday pay; a judgment about when the Regulator can rely on matters not raised in a Warning Notice in a subsequent referral to the Tribunal; a February judgment about the remedies available to members where the employer has breached the duty of good faith; and a February judgment which addresses when a scheme is frozen for the purposes of section 75.
- **HMRC:** an update about the evidence that meets the requirements for employers offering DB pension schemes to achieve VAT deduction in respect of the costs of pension fund management services; and the publication of the draft Pensions Tax Manual.
- **Public service pension schemes:** legislation in relation to increases and revaluation; the setting of the date for the Regulator's code of practice to come into force; and further regulations about the LGPS, civil service scheme, NHS Pension Scheme and teachers' pensions.
- **Other News:** the publication of an industry code and updated materials from the Regulator about pension scams and transfer requests; a consultation about employer debt in non-associated multi-employer DB schemes; and the final report of the FCA's retirement income market study.

If you would like to know more about any of the items featured in this edition of Pensions News or how they might affect you, please get in touch with your usual DLA Piper pensions contact or contact Cathryn Everest. Contact details can be found at the end of this newsletter.

BUDGET 2014 REFORMS

DB TO DC TRANSFERS

Whilst DB members will not be able to access the new flexibilities directly, they will be permitted (aside from members of unfunded public service schemes) to transfer their benefits to another scheme in order to do so. However, this will be subject to safeguards in the form of an advice requirement and updated guidance for DB scheme trustees from the Pensions Regulator.

Where a member or survivor has subsisting rights in respect of "safeguarded benefits" (that is, defined benefits) and wants to convert those benefits into flexible benefits (that is essentially, money purchase or cash balance benefits) or make a transfer with a view to acquiring a right to flexible benefits under another scheme, the Pension Schemes Act 2015 requires trustees to check that the person has received "appropriate independent advice" before making such a transfer.

Regulations were made in March which provide further detail about this advice requirement. We report on these regulations in our Pensions Alert dated 1 April 2015.

AMENDMENTS TO THE DISCLOSURE REGULATIONS

In March regulations were made which make amendments to the Disclosure Regulations with effect from 6 April 2015 by introducing new requirements in relation to members with flexible benefits and also amending some existing requirements. Further detail in relation to the amendments is provided in our Pensions Alert dated 16 March 2015.

ADDITIONAL PROTECTION – GENERIC RISK WARNINGS

In March the Pensions Regulator published "*Draft essential guide to communicating with members about pension flexibilities*" which is a guide for trustees, administrators and advisers of occupational pension schemes that provide flexible benefits.

The draft guide provides information about the changes made to the Disclosure Regulations reported above, and in addition sets out further information about the giving of generic risk warnings.

Background

On 27 February the Financial Conduct Authority published rules about additional protection which, in summary, state that when a consumer contacts their pension provider to access their pension, providers will have to further highlight the existence of Pension Wise and regulated advice, and will have to ask the consumer about key aspects of their circumstances that relate to the choice they are making in order to identify whether any risk factors are present. If risk factors are present, or if it is unclear whether a risk factor is present, then appropriate risk warnings must be given.

The FCA stated that the Regulator would be publishing complementary guidance for trustees setting out the Regulator's expectations of trustees in relation to the provision of information to their members on the generic risks of the decumulation options.

Draft guidance from the Pensions Regulator

The draft guide published in March therefore has a section about retirement options and generic risk warnings. Key points in this section include the following.

- The Regulator would encourage trustees to provide generic risk warnings in respect of the four main retirement options available to members (annuity, drawdown, taking the pension as cash in stages, and taking the whole pension as cash in one go) whether or not the scheme offers them.
- The Regulator would encourage trustees to provide these generic risk warnings at the point a member is required to make a final decision to take their retirement benefits in a particular form or to take a transfer to another scheme or provider in order to take their retirement benefits (this should be after the member has been sent their retirement wake-up pack and even if the member has used Pension Wise).

- At the same time as sending the generic risk warnings, the Regulator recommends that members are asked to sign a statement to confirm whether they have received Pension Wise guidance or regulated advice, and to confirm that they have read the generic risk warnings.
- Trustees should be careful to avoid giving advice to members when providing generic risk warnings, and should be prepared to direct members toward Pension Wise and/or an FCA-regulated financial adviser if they ask further questions about their retirement options. To avoid the risk of giving advice, the Regulator recommends that trustees do not provide specific risk warnings based on a member's individual circumstances.

The guidance goes on to set out:

- an illustrative example of a good practice process;
- some examples of generic risk warnings (although the Regulator states that these should be adapted as trustees see fit, to align with their existing retirement documentation and the specific circumstances of their scheme); and
- examples of the type of declarations that trustees may want to include in their retirement documentation for members to complete.

The Regulator states that the final guide will be published after the amended regulations come into force (6 April 2015).

Whilst the amendments to the disclosure regulations impose statutory requirements on trustees in relation to their scheme literature, the provision of generic risk warnings is not required by legislation. Trustees should nevertheless consider whether to make any changes to their retirement processes in order to incorporate the Regulator's draft guidance in relation to risk warnings and member confirmation. As the Regulator highlights, care needs to be taken with these communications to ensure that trustees do not stray into giving financial advice to members. If you would like assistance with drafting amendments to scheme literature or generic risk warnings, please get in touch with your usual DLA Piper pensions contact.

OTHER REGULATIONS

As well as the regulations in relation to DB to DC transfers and disclosure, several other sets of regulations in relation to the reforms were made in final form in March, most of which come into force on 6 April 2015. Issues which these regulations cover include the following.

Statutory modification power

Regulations will introduce a power for trustees to modify their scheme rules, with employer consent, by resolution for the purpose of offering certain benefits under the new flexibilities. Further detail is contained in our Pensions Alert dated 1 April 2015.

Other consequential and miscellaneous amendments

The regulations which contain the statutory modification power also make several other amendments including:

- an amendment to ensure that an occupational pension scheme which is, or has been, contracted-out since April 1997, can pay an uncrystallised funds pension lump sum (UFPLS) in respect of pension rights accrued since April 1997 when the scheme was contracted-out; and
- an amendment to add the UFPLS to the list of lump sums that may be paid in respect of short service benefit.

Amendments to the Transfer Values Regulations

Various consequential amendments are to be made to the regulations which provide additional detail on transfer processes to reflect the fact that the statutory transfer rights in the Pension Schemes Act 1993 will operate at a benefit category level from 6 April 2015, and that members will be able to transfer flexible benefits up to and beyond their scheme's normal retirement age. For example, the regulations ensure that where a member makes an application for a statement of entitlement that they receive a cash equivalent value for each category of benefit they hold (unless the request was for a particular category of benefits).

Provision of information

Amendments are made to the regulations governing provision of information in relation to the Finance Act 2004:

- to impose new requirements on scheme administrators who are transferring pension funds which represent dependants', nominees' or successors' drawdown funds to provide appropriate information to the receiving scheme administrator so that they can ensure that the correct tax treatment is applied to future payments; and
- so that the reporting requirements in connection with the payment of death benefits that are tested against the lifetime allowance include any designations into drawdown which will be subject to new Benefit Crystallisation Event 5C (which essentially occurs where a member dies under age 75 with uncrystallised funds and they are designated as available for drawdown within two years).

Amendments are also made by these regulations to the information that must be provided to HMRC when a scheme changes its structure or range of number of members, in order to enhance HMRC's compliance activities to combat pension liberation.

Annuities and transfers

Regulations come into force on 6 April 2015 which remove scope for members to take unintended advantage of the new flexibilities in relation to annuities by transferring an old annuity to one issued on or after 6 April 2015.

Transfers from funded public service schemes

Whilst transfers will be permitted from funded DB public service schemes so that members can take advantage of the flexibilities in another scheme, the Pension Schemes Act 2015 states that regulations can specify that transfer values being made in these circumstances must be reduced if it is considered that there is an increased likelihood of payments out of public funds, or increased payments out of public funds, having to be made so that the scheme can meet its liabilities.

The Act provides further detail about how this reduction mechanism will operate which essentially involves the relevant Minister designating the scheme as one to which reductions will apply. Regulations were made in March which set out the requirement to reduce the cash equivalent and how the amount of the reduction is to be determined.

The Explanatory Memorandum states that the Treasury does not expect the power to designate schemes to be used imminently, however, as the power to designate together with the regulations are intended to protect the public purse in the event that this proves necessary, it is important that the regulations come into force as soon as possible after the flexibilities become available. The regulations therefore come into force on 16 April 2015.

Overseas pension schemes

Regulations were made in March, which come into force on 6 April 2015, to align provisions for overseas pension schemes more closely with those for registered pension schemes following changes made by the Taxation of Pensions Act 2014. This includes the following.

- Some of the information requirements that arise from the flexibilities for registered pension schemes are mirrored for overseas pension schemes.
- Provision is made so that in order to be able to accept transfers of UK tax-relieved pension savings free of UK tax, all schemes will need to provide that pension benefits from the transferred funds are payable no earlier than they would be under the rules of a registered pension scheme. This is intended to discourage people from transferring to overseas schemes so that they can access their UK tax-relieved pension savings before they would be able to under a registered pension scheme.

The draft version of these regulations published in December 2014 proposed the removal of the requirement that, in order for UK tax relief to be available, some overseas schemes must provide in their scheme rules that at least 70% of UK funds must be used to provide the individual with an income for life. This was proposed because otherwise there would not be alignment with the legislation for registered pension schemes once flexibility is introduced. However, this amendment is not included in the final form of the regulations. The Explanatory Memorandum states that, following consultation on the draft regulations, the 70% rule remains in place temporarily so that, the legislation to replace this rule can be targeted more precisely to ensure that the principles behind allowing transfers to be made free of UK tax can continue to operate as Parliament intended.

TAXATION OF DEATH BENEFITS – ANNUITIES

The Finance Bill 2015 was published on 24 March, completed all of its Parliamentary stages on 25 and 26 March, and received Royal Assent on 26 March 2015.

In relation to pensions, the Act contains the legislation to give effect to the announcement made in the December 2014 Autumn Statement that the Government would go further with changes to the taxation of death benefits so that from April 2015:

- if an individual dies under the age of 75 with a joint life or guaranteed term annuity, beneficiaries will be able to receive any future payments from such policies tax free if no payments have been made to the beneficiary before 6 April 2015; and
- where the individual was over 75, the beneficiary will pay tax at marginal rate or at 45% if the funds are taken as a lump sum (although it is intended to tax lump sums at marginal rate from 2016/17).

Final form of the provisions

The final form of these provisions is largely in the same form as was published in draft for comment on 18 February. As well as some minor drafting changes, other changes made to the draft version include the following.

- The statutory override which allows trustees to make certain payments even where the rules of the scheme prohibit this has been expanded to include the purchase of a nominees' annuity or a successors' annuity.

- The definition of unused drawdown funds (which features in the provisions on nominees' and successors' flexi-access drawdown) is amended to add an additional condition that since the member's death the funds have not been used to provide benefits for a beneficiary.
- The paragraphs that provide that, subject to certain exceptions, payments of a dependants' short-term annuity or a nominees' short-term annuity bought from a drawdown fund where the member died on or after 3 December 2014 and before age 75 will be tax-free, have been amended to also cover dependants' and nominees' annuities bought from a drawdown fund in these circumstances. Corresponding amendments are also made in relation to the provisions about successors.

Draft regulations

On 25 March two sets of draft regulations were published for comment which make amendments to support the changes made in relation to annuities by the Finance Act 2015. These amendments include the following.

- Amendments to ensure that nominees' or successors' annuities are treated in the same way as dependants', nominees' and successors' short-term annuities, so they may only be transferred to another nominees' or successor's annuity respectively, and if they are transferred to any other type of annuity or pension arrangement, the sums or assets transferred will be treated as unauthorised payments.
- The introduction of new requirements on insurance companies who are transferring sums and assets funding an annuity to another insurance company to provide appropriate information so that the receiving insurance company can ensure that the correct tax treatment is applied to future payments.
- Amendments to reporting requirements in connection with the payment of death benefits that are tested against the lifetime allowance to include any purchase of a beneficiaries annuity which will be subject to the new Benefit Crystallisation Event 5D introduced by the Finance Act 2015.

The closing date for comments is 29 May 2015 although the regulations are expected to have effect from 6 April 2015.

These amendments are predominantly an issue for annuity providers rather than for occupational pension schemes. However, the introduction of nominees and successors as potential recipients of annuities is something that could have an impact on occupational pension schemes. If scheme rules restrict members to purchasing annuities to be paid to the member and to their spouse or dependants following their death, they may want to consider whether to update the rules to provide that members can purchase annuities that are payable to a nominee or successor following their death.

PENSION WISE

During the course of March 2015 there were various developments in relation to Pension Wise including the following.

- Citizens Advice (which will provide face to face Pension Wise sessions) announced six more delivery centres for Pension Wise. It also explained that the completed network of 50 centres (the other 44 having been announced in January) will coordinate Pension Wise sessions from their own premises, outreach locations and other bureaux, and each delivery centre will work with a different number of sites according to their own local geography, making guidance available at more than 500 locations.
- The Pension Wise telephone appointment booking system went live.
- Regulations were made on 4 March and came into force on 26 March which provide for exclusions from regulated activities to ensure that those providing the Pension Wise service are not carrying out a regulated activity.
- The Financial Conduct Authority published the final form of the standards for the providers of Pension Wise. The standards cover the areas of free at the point of delivery, delivering the guidance, professional standards, communications, systems and controls,

complaints management, content of the guidance session, next steps, and a record of the guidance session.

- The Financial Conduct Authority published a consultation on its rate proposals for fees and levies for 2015/16.
  - This includes a report on the feedback to the FCA's November 2014 consultation about the levy on regulated financial services firms to fund the cost of providing Pension Wise.
  - As proposed the FCA will use an existing fee framework (its 'A' fee-block framework) for collecting the levy from the type of firms that, given the regulated activities they carry out, may benefit from the provision of retirement guidance, and the levy will apply to five A fee-blocks.
  - However, the distribution of the levy across these five fee-blocks is different to that proposed in November. The November proposal was that the costs would be allocated equally across the five fee-blocks but with a 50% reduction for the A.13 block (advisory arrangers, dealers or brokers) because firms that provide financial advice have less potential to benefit than the product providers in the other four fee-blocks.
  - Whilst an adjustment in relation to A.13 is included in the final proposals, a further adjustment from the equal allocation is also included so that the A.9 block (managers and depositaries of investment funds, and operators of collective investment schemes or pension schemes) will have a reduced allocation of 16%. This is to reflect the fact that there is some overlap with another of the fee-blocks.
  - There is a facility on the FCA's website so that firms can calculate their 2015/16 levy based on the draft rates in this latest consultation.
  - The consultation also includes proposals for the pensions guidance providers' levy rates for 2015/16. This is the levy which the FCA will use to recover its pensions guidance costs (such as the costs of setting the standards and monitoring compliance) from the designated Pension Wise guidance providers.
  - The consultation closes on 18 May 2015 and the FCA expects to confirm changes to its fees in the summer.
- The Financial Conduct Authority is required to monitor the compliance of the designated providers of Pension Wise with the standards set by the FCA. Where these have been breached, it may make recommendations to the designated providers and the Treasury where appropriate.
  - On 25 March the FCA published a consultation in relation to its recommendation policy which looks both at the recommendation process and when the FCA might make a recommendation.
  - In relation to the latter point, in general terms, the FCA will consider making recommendations where it identifies consumer detriment or a risk of consumer detriment arising from the failure of a designated provider to comply with the standards. The draft policy sets out some of the other considerations to which it will generally have regard although, depending on the circumstances, it may take into account other factors.
  - The consultation closes on 8 May 2015 and the FCA plans to publish a Policy Statement on the finalised recommendations policy and feedback in the summer.

FCA CONSULTATION ON TRANSFER RULES

In connection with the new requirements for "appropriate independent advice" to be received before making a DB to DC transfer or conversion, on 4 March the Financial Conduct Authority published a consultation on proposed changes to its transfer rules. In the consultation the FCA proposes to:

- amend its rules to incorporate the new specified activity of advising on conversions or transfers of safeguarded benefits to flexible benefits; and

- require that all advice on DB to DC pension transfers be provided or checked by a "Pension Transfer Specialist".

On the second point, the FCA explains that:

- its rules currently require that advice on pension transfers must be provided by, or checked by, a Pension Transfer Specialist and firms wishing to provide advice on pension transfers and pension opt outs must apply for and obtain special permission to carry out that activity;
- in 2011 in a factsheet entitled "*Pension transfers – who can do what and when?*", the FSA indicated that the requirement for advice of a Pension Transfer Specialist prior to a transfer from a DB to a DC arrangement did not apply where there was evidence that the transfer was for the purpose of crystallising benefits; and
- given that the Budget reforms will make advising on pension transfers significantly more complex, the FCA now wishes to require the Pension Transfer Specialist qualification for advice on all transfers from DB schemes to DC arrangements regardless of when the transferred benefits are being crystallised.

The FCA is seeking feedback on the proposals in the Consultation Paper and the closing date for responses is 15 April 2015. The FCA will consider the feedback and publish its rules in a Policy Statement in June 2015.

BUDGET 2015

KEY PENSIONS ANNOUNCEMENTS

On 18 March, the Chancellor delivered the Budget 2015, which contained the following key announcements in relation to pensions.

Lifetime Allowance

The Government will reduce the Lifetime Allowance for pension contributions from £1.25 million to £1 million from 6 April 2016, and transitional protection for pension rights already over £1 million will be introduced alongside this reduction.

The Lifetime Allowance will be indexed annually in line with CPI from 6 April 2018.

The legislation for these measures will be introduced in a future Finance Bill. However, an overview document in relation to the Finance Bill 2015 stated that the protections will have the same effect as those introduced for previous changes to the Lifetime Allowance, and the Government will work with industry to ensure that these protections are implemented in the simplest way possible.

Trustees will need to be ready to administer their schemes in line with the new Lifetime Allowance when the first change comes into force in April 2016. It will be interesting to see the proposals for protection once these are published although the statements made so far suggest that a further form of fixed protection and individual protection may be introduced. In the meantime schemes may want to update any literature that refers to the amount of the lifetime allowance to refer to the proposed increases.

Flexibility for existing annuities

From April 2016, the Government will change the tax rules to allow people who are already receiving income from an annuity to sell that income to a third party, subject to agreement from their annuity provider. The proceeds of the sale could then be taken directly or drawn down over a number of years, and would be taxed at their marginal rate, in the same way as those taking their pension after April 2015. Further information on these proposals was set out in a consultation document issued on the same day, which is reported in the article below.

CONSULTATION ON SECONDARY ANNUITY MARKET

On 18 March HM Treasury and the DWP published a joint consultation (which closes on 18 June 2015) about the proposals to give increased flexibility to existing annuity holders from April 2016. Key points in the consultation include the following.

Overview

The Government's main reforms will be to:

- change the tax treatment in relation to annuity holders wishing to realise the value of their annuities, including the removal of the unauthorised payment tax charge, with individuals being taxed on the payment they receive in return at their marginal rate; and
- work with the FCA to ensure appropriate consumer protection is in place for annuity holders as they consider their options.

The Government thereby intends to create the conditions for a secondary market in annuities to develop. In summary the proposals involve the following.

- An annuity holder who wants to take advantage of the flexibilities would, with the consent of their annuity provider, assign the rights to the income stream to a third party in return for a lump sum. (However, it is not currently proposed that individuals would be allowed to agree with their original annuity provider to access the value of the annuity by terminating the contract.)

- Individuals who assign their annuity will have three options – lump sum cash payment, flexi-access drawdown fund, and flexible annuity – and will be taxed on payments at their marginal rate.
- When an assignment takes place, the annuity provider will continue to hold the underlying assets and pay the annuity income to the third party for the lifetime of the annuity holder.
- The third party buyers could include asset managers, pension funds, insurers, and intermediaries.
- The third party buyers will offer a price to consumers for the assignment of their annuity income which will be based on various factors, including their estimate of the actuarial value of the annuity, transaction costs and a profit margin. The consultation notes that, depending on how the market develops, many institutional investors may only want to purchase in bulk and there may therefore be a need for intermediaries to enter the market in order to purchase individual annuities, repackage them, and sell them on to the end investor.

The Government proposes that the £10,000 annual allowance will apply to individuals who assign their annuity to a third party, and that where individuals have assigned their annuities, the tax treatment of any death benefits will be in line with changes being made in this area with effect from 6 April 2015.

A note on occupational pension schemes

The Government is proposing that only annuities in the name of the annuity holder and held outside an occupational pension scheme are within the scope of this new flexibility. The Government is **not** proposing that annuities bought by the trustee of an occupational pension scheme as an asset of the scheme will be allowed to be assigned. There is no indication that the proposals will extend to existing scheme pensions.

Consumer protection

The Government recognises that in coming to a decision to assign their annuity to a third party, individuals will have to take into account a wide range of factors, and that judging the value of an annuity in payment is particularly difficult and complex and subject to behavioural biases.

The Government will therefore work with the FCA to ensure that safeguards are in place so that people have the information they need to decide whether they want to assign their annuity. It is considering a number of potential safeguards: a requirement to take financial advice; free and impartial guidance (which could involve extending the scope of Pension Wise); and regulatory interventions such as risk warnings. However, this list of possible measures is not an exhaustive list and the Government states that is **not** formally consulting over these measures at this stage.

Other issues

The consultation also considers the tax treatment in the hands of the third party buyer, preventing aggressive practices, ensuring a competitive price (which states that there needs to be a means of helping consumers determine a fair value for their annuity), and protecting dependants. It is also noted that the final legislation is likely to include provisions to protect against tax avoidance.

These changes will primarily be relevant to annuity providers who, from April 2016, may be faced with requests from annuity holders to assign their policies. It will be interesting to see how the proposals develop but key for trustees of occupational pension schemes is the fact that the proposals will not extend to any annuities held in the name of the scheme and neither are there any proposals to extend this flexibility to scheme pensions.

THE PENSIONS REGULATOR

RECORD-KEEPING

On 26 March the Regulator published a follow-up report to its thematic review on record-keeping.

Background

In phase one of the thematic review, the Regulator asked a sample of 237 schemes to provide basic information relating to their 'common data' measurements. The Regulator then investigated 36 of these schemes during phase two, and by the time the March 2014 report on the review was published 7 case investigations had been opened. After the report was published a further 4 cases were opened because the Regulator was not satisfied that trustees had taken adequate action, bringing the total to 11.

Case outcomes

In the latest update report the Regulator states that following more intensive engagement with the trustees, 10 of these cases have been concluded without resorting to the use of enforcement powers (the other case remains open). The report looks at the case outcomes and how the Regulator's intervention helped schemes improve their data processes. For example, it reports on cases where data cleanse exercises were undertaken to address the Regulator's concerns, a case where tracing exercises reduced the missing address data to single figures, and improvements in trustee knowledge and understanding.

Looking ahead

The report also highlights a number of reasons why good record-keeping must be a priority for trustees. This includes upcoming developments such as: the new minimum governance standards for DC schemes being introduced from 6 April 2015; the new DC flexibilities whereby members will need information about their benefits to fully access and understand the guidance available from Pension Wise; the plans for a system of automatic transfers from October 2016; and the end of contracting-out in April 2016. It also notes more general factors such as that the failure to hold accurate records can result in inaccurate valuations for DB schemes, and that effective de-risking (particularly buy-out, buy-in, longevity swaps and other arrangements involving a third party taking on scheme risk) is dependent on complete and accurate data.

The Regulator states that it is calling on schemes to manage record-keeping as part of their internal controls framework, understand the risks and potential high costs associated with poor data, and to take action to address any issues. Over the next 12 months the Regulator intends to reinforce its expectations in this area and continue to reflect them in the material it publishes wherever relevant.

Whilst the Regulator notes that larger schemes continue to outperform small schemes in the measurement of common data, this is nevertheless a timely reminder for all schemes of the importance of good record-keeping and that it continues to be a focus for the Regulator.

CORPORATE PLAN 2015 – 2018

On 25 March the Regulator published its Corporate Plan for 2015 to 2018 setting out how it intends to continue to improve standards in workplace pension schemes and enable good outcomes for retirement savers. Key priorities for the Regulator for 2015-16 in relation to each of its corporate priorities are noted in the Plan and these include the following.

To promote good governance and administration of work-based pension schemes

- Revising the DC code and guidance in light of the new minimum governance standards and charge controls, the Regulator's experience of operating the current code and the evolving landscape.

- Continuing to help trustees of DB schemes to better understand the overall risk facing their schemes by encouraging them to consider the areas of employer covenant, funding plans and investment strategy in the round through the Regulator's educational material and casework interventions.

To promote security and good outcomes for members of work-based pension schemes

- The cornerstone of work in relation to DC will be the new flexibilities and charge controls, and the Regulator will: respond to the flexibilities by providing guidance where necessary to its regulated community to protect the security of member benefits; roll out its regulatory approach to charge controls; and monitor the developing market for DB to DC transfers.
- In relation to DB, the Regulator states that its experience over the last 10 years of DB regulation means that it can be more targeted in its approach to recovery and contributions cases, and that its priority is to have a flexible model to balance its resources as it sees the risks evolve.

To promote employer compliance with their pension responsibilities

- Continuing to focus on education and raising awareness among employers with fewer than 50 workers of their duties, using enforcement powers where necessary.
- For employers with an existing DB scheme, the Regulator will pay due regard to its sustainable growth objective and the DB code of practice in assessing appropriate funding outcomes. The Regulator also reports that increasingly it sees a group of schemes which, due to their relative size, are not sustainable in the long term due to continued weakness of the sponsoring employer. In line with its sustainable growth objective and its obligation to protect the PPF, the Regulator will develop strategies for this group which could lead it to intervene in more cases as appropriate to help them address these challenges.

LEGISLATION

PENSION SCHEMES ACT 2015

The Pension Schemes Act 2015 received Royal Assent on 3 March. In relation to the Budget reforms the Act contains provisions:

- that amend the legislation on transfers so that the statutory transfer right will operate at benefit category level rather than scheme level;
- to introduce the requirement for trustees to check that members have received "appropriate independent advice" before making DB to DC transfers or conversions;
- to prohibit transfers from unfunded DB public service schemes for the purpose of taking advantage of the new flexibilities;
- so that transfers from funded DB public service schemes for the purpose of taking advantage of the new flexibilities may be reduced in specified circumstances; and
- setting out the framework for Pension Wise, including making it a criminal offence for anyone to pass themselves off as providing the official Pension Wise service.

The Act also contains provisions which will enable the development of Defined Ambition and collective schemes. These provisions largely contain a framework with further detail to be set out in regulations. It is expected that these provisions will be brought into force in time for the end of contracting-out in April 2016. We will report further on the provisions in relation to Defined Ambition and collective schemes as the Government's proposals develop.

END OF CONTRACTING-OUT

Background

In May 2014 draft regulations were published for consultation providing further detail about the statutory power of amendment contained in the Pensions Act 2014 **("Act")** which will allow employers to make amendments to their schemes to offset the increased National Insurance costs which they will face when contracting-out ends in April 2016. In March 2015 the response to consultation and the final form of the regulations was published. The regulations come into force on 6 April 2015 so that the power of amendment can be used from that date, although the amendments cannot take effect before 6 April 2016.

Statutory or scheme amendment power

In explaining the policy background to the regulations, the Explanatory Memorandum notes that some employers are limited in their ability to amend scheme rules either by legislation or by the scheme rules which may give the trustees control over amendments.

It goes on to state that the DWP anticipates the statutory amendment power being used only where the employer and trustee cannot come to an agreement on how to mitigate for the increased National Insurance cost. It is also notable on this point that the response to consultation states that the DWP's view is that trustees should, where appropriate, make it a condition of any amendments made under the normal power of amendment where the intention is for the employer to recoup the increase in National Insurance costs, that the employer does not subsequently use the statutory override power, and obtain the employer's written consent to this.

Other circumstances where the power cannot be used

The Act states that the power cannot be used to amend a public service scheme, and cannot be used in relation to "protected persons" in relation to the scheme, that is, employees of former nationalised industries whose benefits were protected on privatisation by legislation. The regulations define what groups are "protected persons" for these purposes.

It is also notable that the response to consultation states that sponsors of schemes providing DC benefits with a DB underpin (so the member receives a "better of" outcome) will not be able to use this amendment power to reduce DC benefits.

The extent of the amendments

The Act states that: the power may be used to increase employee contributions of relevant members or alter future accrual but only to the extent required to offset the additional employer National Insurance contributions; and that it cannot be used in a way that would or might adversely affect subsisting rights. The regulations set out further detail about this requirement including the following.

- The calculations must be completed by an actuary and the employer must appoint the actuary. Whilst the consultation document had stated that the actuary could, with trustee consent, be the scheme actuary, the response states that the scheme actuary is unlikely to be able to advise the employer on these amendments because it could create a conflict of interest.
- In summary, completing the calculations involves the following.
  - The employer chooses a calculation date which can be any date after 31 December 2011.
  - Assuming that the proposed amendments took effect on the calculation date, the actuary estimates what the increase in employee contributions, reduction in liabilities as a result of alteration to future accrual and increase in employer National Insurance contributions, would be in the one year beginning with the calculation date.
  - The general position is that the calculations are completed using earnings data for the period of one year ending with the calculation date, although provision is made to look at a three year period where the earnings data for the one year period is "significantly abnormal".
  - The assumptions used for the calculation will be those used to calculate the scheme's technical provisions, although if the calculation date is not a valuation date, the methods and assumptions from the previous valuation are used but updated to take account of changes in market conditions. The employer can instruct the actuary to adjust any assumptions to remove the margin for prudence. Following responses to consultation, reference is no longer made to the assumptions recorded in the Statement of Funding Principles, and it will be possible to remove the margin for prudence in relation to only some assumptions.
  - If the power is used more than once, the actuary must use the same calculation date and in aggregate the changes cannot recoup more than the increased National Insurance costs.

The actuary's certificate

The Act states that the power may only be used if an actuary has certified that the proposed amendments comply with specified requirements of the legislation. The regulations specify that this is the requirement that the increase in employee contributions or reduction in liabilities does not exceed the increase in the employer's National Insurance contributions. The certificate must be issued before any amendments are made.

The consultation draft of the regulations had also stated that the certificate should confirm compliance with the requirement that the power has not been used in a way that would or might adversely affect subsisting rights. However, following responses to consultation stating that this is more a question for legal advisers, this requirement for the certificate has not been included in the final version of the regulations.

The final version of the regulations also makes it clear that the Schedule to the regulations sets out the information which must be included in the certificate (rather than specifying the form of the certificate) and the response makes it clear that the certificate could include additional information.

Information requirements

The regulations impose an obligation on trustees to provide any information which the employer reasonably requests in connection with the use of the power.

The consultation draft stated that this information would have to be provided within four weeks. However, the final version of the regulations requires it to be provided within such reasonable period as agreed with the employer. In the response document the DWP states that it has not defined "reasonable" which has its usual meaning. However, as an indication, it states that:

- where the calculation date is the same as a triennial valuation date and that valuation has already been completed, all relevant information should be able to be provided within eight weeks;
- the trustees might need longer if the valuation is still in progress or if the calculation date is not a triennial funding valuation date.

Multi-employer schemes

The regulations make provision about how the power will apply to multi-employer schemes with the following principles applying:

- where a scheme is segregated, each section of the segregated scheme is treated as a separate scheme; and
- where there is more than one employer in a scheme or section, the power is exercisable by the principal employer.

The definition of principal employer has been amended since the consultation draft of the regulations so that:

- anyone nominated to act on behalf of the employers to agree scheme funding matters with the trustees would be able to use the statutory override power on behalf of the employers; and
- where there is no person nominated, the employers can nominate someone to act on their behalf for the purposes of the use of this power.

Schemes with different rules for different members

The consultation draft had provided that, where a scheme has different levels of benefits or different rates of contributions for different groups of members, the power will apply to each group as if that group was a separate scheme. This draft provision was intended to prevent cross-subsidy.

However, following responses to the consultation, the DWP has concluded that it is not possible to satisfactorily regulate for this situation, and therefore it has removed this provision. However, in the response document, the DWP states that it would expect employers to explain clearly to employees, as part of the consultation process, how different groups of employees are affected by the proposed amendments.

Consultation of trustees

A new provision is included in the regulations which requires the employer to consult the trustees about the timing for the amendments to come into effect. This consultation must take place following the issue of the actuary's certificate.

As can be seen, there are strict requirements which must be complied with in order to make an amendment under the employer's statutory power of amendment, with the DWP expressing the view in the response document that amendments which fail to comply with the requirements would be void. It may therefore be preferable for employers to make any amendments to offset the increased National Insurance costs using the scheme's power of amendment and, indeed, the DWP's view is that where this is possible, it is the scheme power which should be used.

There is much for employers who intend to make scheme amendments to do in advance of April 2016 in terms of deciding which power can be used and what amendments they propose to make, taking actuarial advice and consulting affected members, and the DWP states that it would expect employers to already be in discussions with trustees about how to make scheme arrangements for the end of contracting-out.

There will be further legislation to come in relation to the rules about administering accrued contracted-out rights and this will be another issue that employers and trustees will need to consider, including whether any rule amendments are required. The response to consultation on these regulations is expected to be published in the summer.

AUTOMATIC ENROLMENT – EARNINGS BAND

The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2015 was made on 2 March 2015 and comes into force on 6 April 2015. This sets out the new limits of the qualifying earnings band which will apply for 2015/16.

- The lower limit of the band of qualifying earnings on which the minimum contribution requirements are measured will increase from £5,772 to £5,824. This is also the earnings threshold which workers who are eligible to opt in rather than be automatically enrolled must exceed if they are to be entitled to an employer contribution.
- The upper limit of the band of qualifying earnings on which the minimum contribution requirements are measured will increase from £41,865 to £42,385.

The earnings trigger which jobholders have to exceed in order to qualify for automatic enrolment will remain at £10,000.

Employers will need to ensure that they adapt their processes in relation to the thresholds that are changing in order to ensure compliance from 6 April 2015.

AUTOMATIC ENROLMENT – TECHNICAL AMENDMENTS

Introduction

Following the publication of a consultation in December 2014 on technical amendments to the automatic enrolment legislation, in March the Government response was published and the final form of the regulations was made, with the amendments coming into force on 1 April 2015. The amendments cover three areas, and in this article we provide an overview of the changes.

Exceptions to the duties

The regulations turn the employer's automatic enrolment and automatic re-enrolment duty into a power in the following circumstances.

- Notice of termination of a worker's employment is given before the end of six weeks beginning with the automatic enrolment date or automatic re-enrolment date. In addition, the statutory opt in rights will not apply during a notice period.
- An individual has chosen to cancel membership of a qualifying scheme or has opted out under the statutory right within the period of 12 months before the automatic enrolment or automatic re-enrolment date. As a result of responses to the consultation, this provision has been simplified since the draft

version so that it applies to anyone who cancelled membership of a qualifying scheme be they a worker, non-eligible jobholder or eligible jobholder at the time of cancellation.

- The employer has reasonable grounds to believe that the worker has primary protection, enhanced protection, fixed protection 2012, fixed protection 2014 or individual protection. The response document states that the Government will work with HMRC to ensure their guidance is appropriately amended as stated in the consultation document so that workers are aware of the exception and what needs to be done, and the Regulator will also update its employer guidance to reflect this exception.
- A worker has been paid a winding-up lump sum by the employer in the last 12 months and since that payment was made the worker has ceased to be employed and been re-employed by that employer.

It is important to note that because the duty is turned into a power, the employer could choose to continue to automatically enrol or re-enrol all eligible workers. If the employer does choose to enrol workers in these circumstances, the relevant legislation is to be read as if the employer was discharging a duty so that the employer can be enforced against in relation to those duties.

Whilst large employers will already have reached their staging dates and therefore had to implement the reforms without the benefit of the exceptions, they may nevertheless be useful as these employers start to reach their first three yearly automatic re-enrolment date, and as part of their preparations for re-enrolment, it would be useful for employers to consider what approach they will take to the exceptions.

Information requirements

Whilst some amendments have been made to the proposals as a result of the responses to consultation, the aims of these amendments are still to reduce the employer's obligation to make an ongoing assessment of all categories of workers, facilitate one individualised communication which suits all circumstances and reduce the information requirements to a basic minimum that would be appropriate for all types of worker.

The response document states that the Government wishes to make it clear that employers can continue to comply with the current information requirements and use existing systems if that is easier and/or more cost effective. It also notes that the Regulator has made arrangements, including amending the employer guidance and letter templates, to communicate the messages about the changes in the most appropriate way for different employers.

If you are considering amending your processes and would like further information in relation to the changes or a review of your standard communications, please get in touch with your usual DLA Piper pensions contact.

Alternative DB quality requirements

When DB contracting-out ends in April 2016, without changes to the legislation, DB schemes would have to meet the test scheme standard in order to be qualifying schemes for automatic enrolment purposes. In light of the complexities of assessing whether this standard is met, the regulations use a power in the Pensions Act 2014 to introduce an alternative quality requirement which is based on the cost to the scheme of future accrual. Essentially, this alternative requirement will be met if the cost to the scheme of the future accrual of active members' benefits is equal to at least 10% of qualifying earnings, or 9% if the scheme does not provide dependant pension benefits. (There are also variations to the test as the percentage may differ in cases where the scheme pays contributions based on a definition other than qualifying earnings.)

Following responses to the consultation, some changes have been made to this alternative quality requirement to ensure the policy intention is delivered. The response also notes that the DWP will update its guidance in relation to meeting the DB quality requirement to reflect the changes to the legislation.

In addition, following responses to consultation, a further alternative DB quality requirement has been introduced. This further alternative will act as a transitional provision so that certain schemes will be able to meet the existing quality requirement for DC schemes. However, it is intended that this ability to use the DC quality requirement will be revoked once rules in relation to Shared Risk Schemes are developed as a result of the new scheme categories created by the Pension Schemes Act 2015.

We would expect it to be welcome news for employers whose schemes are currently contracted-out that they will not have to meet the test scheme standard when contracting-out ceases in 2016. However, employers will still need to ensure that they are satisfied that the alternative quality requirement is met and therefore employers should include consideration of this issue in the work they undertake in preparation for the end of contracting-out.

GMP INCREASE ORDER

The Guaranteed Minimum Pensions Increase Order 2015 was made on 2 March 2015 and comes into force on 6 April 2015. This Order specifies the increase to apply to the part of any GMP that is attributable to earnings factors for the tax years 1988/89 to 1996/97 and payable by a contracted-out DB occupational pension scheme.

The Pension Schemes Act 1993 requires the increase to be the lower of the actual percentage increase in the general level of prices (CPI is used for these purposes) in the period under review and 3%. The increase specified in the Order is 1.2%.

AUDITED ACCOUNTS – DRAFT REGULATIONS

On 25 March HMRC published the draft Registered Pension Schemes (Audited Accounts) (Specified Persons) (Amendment) Regulations 2015 for comment.

These draft regulations relate to an amendment which was made to DWP legislation in 2014. That amendment provided an exemption for very large trust-based multi-employer schemes with 500 or more employers from the prohibition on sponsoring employers being the scheme's auditor. The amendment was made because such schemes found it difficult to find someone to act as a statutory auditor who met the independence requirements.

These latest regulations make similar changes to the tax legislation, and it is intended that they will have effect from 6 April 2014 (which is the date that the amendments to the DWP legislation came into effect).

The closing date for comments on the draft regulations is 29 May 2015.

NEST RESTRICTIONS

In March the final legislative changes were made which, from 1 April 2017, will remove NEST's annual contribution limit and transfer restrictions.

One of the statutory instruments to give effect to this – the National Employment Savings Trust (Amendment) Order 2015 – was made on 9 February 2015 and comes into force on 1 April 2017.

The other amendment required is to revoke the Transfer Values (Disapplication) Regulations 2010 and reinstate a member's statutory right to transfer their pension funds out of NEST to another pension scheme (rather than the limited circumstances in which this right applies at the moment to members of NEST). This amendment was included in the regulations which make consequential amendments to the transfer legislation in relation to the Budget reforms (reported in the Budget 2014 reforms section of this newsletter), although this element of the regulations will not come into force until 1 April 2017.

The DWP has previously stated that it retains the option to remove the individual transfer restrictions to coincide with the introduction of automatic transfers of small pension pots, although this is not included in the Order or draft Regulations at this stage.

BANKING REFORM REGULATIONS

Following the draft regulations being laid before Parliament in January 2015 and the response to consultation having been published in February 2015, the Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015 were made on 4 March and came into force on 5 March 2015.

These regulations give effect to the recommendation of the Independent Commission on Banking that ring-fenced banks should not have liabilities to group-wide pension schemes.

The ring-fenced banks are not required to have the necessary arrangements in place until 1 January 2026 or, if later, by the end of the period of five years beginning with the day on which the body becomes a ring-fenced bank. However, the regulations have been brought into force to allow the banks and their trustees to begin planning and implementing this restructuring.

DC CHARGES AND GOVERNANCE

FINAL FORM REGULATIONS

In the February 2015 edition of Pensions News, we reported that the draft Occupational Pension Schemes (Charges and Governance) Regulations 2015 had been laid before Parliament. On 23 March these regulations were made in final form, with the provisions (aside from those in relation to Active Member Discounts) coming into force on 6 April 2015.

The final form of the regulations is the same as the draft that was laid before Parliament in February. However, following a short consultation which ran between 18 and 24 March 2015, a further set of regulations also come into force on 6 April 2015 making a minor amendment to the main regulations to ensure that they achieve the policy intention for AVCs and charges.

In summary, the key provisions of the regulations which come into force on 6 April 2015 are as follows.

Charges

In summary, the charges provisions apply to default arrangements of relevant DC schemes being used as qualifying schemes for the purposes of automatic enrolment. The legislation contains definitions as to how to identify relevant members, default arrangements and relevant schemes.

The regulations provide that:

- the only permitted charging structures will be a single charge structure or certain combination charge structures; and
- there will be a charge limit which in relation to a single charge structure is 0.75% annually of the value of the member's rights under the default arrangement (with an adjusted amount applying for permitted combination charge structures).

The amendment to the main regulations relates to AVCs and the charge cap. The February 2015 response to consultation in relation to the main regulations explained that the only circumstance in which AVCs could be subject to the charge cap was where a particular arrangement is, first, used by a qualifying scheme to fulfil an employer's automatic enrolment duties in respect of at least one employee, and second, meets one of the three tests to be a default arrangement. Where this happens, workers of that employer who have chosen to make AVCs which are invested in the same arrangement would also be protected by the cap. This is intended to ensure parity of treatment, such that employees of the same employer, contributing to the same arrangement in the same scheme should pay the same charges.

However, in the consultation issued on 18 March the DWP reported that it had come to light that there is an additional scenario in which AVCs may be subject to the default fund charge cap which is where:

- they are money purchase AVCs which are made within a qualifying scheme used for automatic enrolment;
- they are made to an arrangement which only receives AVCs; and
- the members making AVCs were not required to make a choice as to the arrangement in which these contributions were invested.

The DWP states that it understands that this is an unusual scenario because, in most cases, members making AVCs are required to choose the arrangement in which they are invested.

The amendment (which is contained in the Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2015) therefore expressly provides that an arrangement is **not** a default arrangement if "*it provides no benefits other than benefits which are attributable to additional voluntary contributions*".

In the consultation the DWP stated that it still intends for AVCs to be subject to the charge cap where they are made to an arrangement which is designated as a default arrangement for other workers of that employer.

Governance standards

The minimum governance standards will apply to occupational pension schemes which provide money purchase benefits, although there are a number of exceptions, most notably schemes which provide no money purchase benefits other than benefits attributable to AVCs.

In summary, the governance standards cover: a duty to appoint a chair; the processing of financial transactions; the assessment of value for members of charges and costs; the design and review of default arrangements; and a requirement for an annual statement signed by the chair which reports on compliance with the standards as well as describing how trustee knowledge and understanding requirements have been met. The regulations also prevent certain restrictions from being placed on the appointment of service providers in the trust deed or scheme rules. Additional governance requirements are also included for relevant multi-employer schemes.

Further detail in relation to the charges and governance measures can be found in the February 2015 edition of Pensions News. Trustees will need to take steps to ensure that they are compliant with the new requirements and that they are ready to produce their first annual governance statement in accordance with the regulations. If you would like further information or training on the new requirements, please get in touch with your usual DLA Piper pensions contact.

GUIDANCE – CHARGES

On 2 March the DWP published guidance for trustees and managers of occupational schemes about the charge cap. This has sections on what schemes are affected by the cap, which scheme members will be covered by the cap, the restrictions on charge structures and levels, what costs and charges are capped, how to identify a default arrangement, and how to assess the charges borne by members.

Of particular note in the guidance is the section which sets out the DWP's expectations in relation to the assessment of charges. The DWP states that the guidance explains in detail how trustees may calculate the maximum permitted level of charges. However, it goes on to state that:

- it is not the DWP's expectation that trustees will need to carry out individual-level calculations or reporting on a member-by-member basis;
- trustees will instead need to ensure sufficient levels of monitoring and controls to provide certainty that the cap is not exceeded for any member;
- the extent of monitoring and controls of charge levels which will be necessary will depend to a large degree on how close the charges are to the 0.75% cap (or equivalent combination charge), for example, where trustees intend to charge exactly 0.75%, this will give no margin of safety in the event of unexpected charges, or aspects of the scheme's charges regime which result in some members being faced with higher charges due to their joining or leaving date. However, a scheme which aims to charge only an annual funds under management charge of say 0.50% will have considerably more latitude in complying with the charge cap.

FCA FINAL RULES

Following its October 2014 consultation, on 2 March the Financial Conduct Authority published a Policy Statement setting out its final rules to introduce the following measures in qualifying workplace personal pension schemes.

- A cap on the charges within default funds equivalent to 0.75% per year of funds under management from 6 April 2015.
- Preventing firms from paying or receiving consultancy charges from 6 April 2015.
- Preventing firms from paying commission or other charges for advice that are not initiated by scheme members from 6 April 2016.
- Preventing firms from using differential charges based on whether the member is currently contributing or not from 6 April 2016.

CONSULTATION ON TRANSPARENCY

The charges and governance regulations contain the first phase of introducing transparency of costs and charges by requiring trustees (and Independent Governance Committees (IGCs) for workplace personal pensions) to include information about costs and charges in the annual governance statement.

The DWP and FCA have previously stated that they would be looking at measures to further increase transparency and a joint Call for Evidence was published in relation to this second phase on 4 March. This second phase will build on the first phase reporting requirements to require disclosure of information about transaction costs and administration charges in a standardised, comparable format.

Whilst this second phase will cover both administration charges and transaction costs, it is recognised that administration charges (which are subject to the charge cap from April 2015 for default arrangements) are more readily identifiable and disclosed. The Call for Evidence therefore focuses on the identification and reporting of transaction costs information. It looks at how that information could be usefully presented to trustees and IGCs, and ensuring that they have all the information they need in a format that helps them assess value for money for scheme members.

The Call for Evidence therefore explores:

- what costs should be included in transaction cost reporting;
- how such costs should be captured and reported;
- whether information about other factors that impact on investment return should also be provided; and
- how IGCs and trustees will receive costs information and whether additional disclosure requirements on other parties are necessary to enable this.

Whilst the main focus of the Call for Evidence is on the identification and reporting of transaction cost information from providers and asset managers to IGCs and trustees, it also explores when, how and in what format members and/or other prescribed persons should receive transaction cost information. On this point, it is stated that it is not likely to be appropriate to provide transaction cost information to employers and members at the level of detail given to IGCs and trustees, and feedback is therefore sought on what information employers and members should receive on transaction costs, and how this should be provided, in addition to the annual governance statement.

The closing date for comments is 4 May 2015. The FCA and DWP will carefully consider all comments received and use these to inform the development of proposed rules and regulations.

Whilst at this stage only a call for evidence has been published and no immediate action is therefore required by trustees (beyond what will be needed to comply with the new charges and governance requirements that come into force on 6 April 2015), it is worth bearing in mind that there are likely to be future developments in this area.

CASE LAW

HOLIDAY PAY

A further judgment was issued in March on the issue of holiday pay, this time in relation to whether or not commission should be included in the calculation.

Background

The relevant case is *Lock v British Gas Trading Limited* which concerns an employee who earned a basic salary but with substantial potential for commission (up to 60% of overall remuneration). During periods of annual leave, Mr Lock was paid basic salary plus commission earned in previous weeks, however, on return from holiday, his remuneration would be lower as he had not had the opportunity to earn commission whilst absent on leave.

Mr Lock brought a claim for the unpaid holiday pay and the Employment Tribunal asked the Court of Justice of the European Union (CJEU) whether commission should be included in holiday pay. In May 2014 the CJEU issued a judgment concluding that it should be, although it stated that it is up to the national courts or tribunal to decide how the commission entitlement during annual leave is calculated.

March 2015 judgment

The latest judgment relates to the Employment Tribunal's consideration of whether the UK legislation is capable of being read to be consistent with the CJEU's judgment.

The Tribunal regarded itself as bound by the decision of the Employment Appeal Tribunal (EAT) in the case of *Bear Scotland* in which it was held that it is possible to interpret UK law to give effect to the conclusion that non-guaranteed overtime must be included in holiday pay. The Tribunal also held in the alternative that it agreed with the reasoning of the EAT in any event.

This judgment therefore confirms that UK law can be interpreted in such a way as to give effect to the requirement that commission should be included in holiday pay. The Tribunal also agreed that this decision is relevant only to the 4 weeks' leave required by European law, and not to the additional 1.6 weeks of leave under UK legislation.

However, this latest judgment leaves unanswered the question of precisely how holiday pay should be calculated. There will be a further Tribunal hearing in this case to determine how much the claim is worth, which may provide some practical guidance.

This case could have pensions implications if the definition of pensionable pay in a scheme includes commission and an employer has not been paying holiday pay in respect of the commission. As well as claims for underpaid holiday pay, there could also be claims for a shortfall in pension contributions, and, in the case of DB schemes, an underpayment of benefits. (In relation to claims for back payments, it is worth noting that for claims made on or after 1 July 2015, a statutory limitation period is being introduced which will mean that claims cannot stretch back further than two years.) Looking ahead, if the employer makes any alterations to the calculation of holiday pay, this may also have an impact on the level of members' pensionable pay for the scheme. Employers may therefore want to include pensions issues in their consideration of the holiday pay issue.

BOX CLEVER FSD

Background

In December 2011 the Determinations Panel of the Pensions Regulator made a determination that five companies from the ITV group (**"Targets"**) should be the subject of a Financial Support Direction (FSD) in respect of the Box Clever Group Pension Scheme (**"Scheme"**). The Targets challenged the determination by making a reference to the Upper Tribunal. In December 2013 the Upper Tribunal issued a judgment covering procedural directions, one of which was a strike out application by the Targets against responses of the Regulator and the Trustee to the reference which effectively required the Targets to answer a new case based on the allegation that there has been misconduct or fault on their part in the manner in which the Box Clever Joint Venture was structured and managed.

The Upper Tribunal dismissed the Targets' strike out application. The Targets appealed against this decision and the Court of Appeal's judgment was published on 24 March 2015.

The Court of Appeal's decision

The Court of Appeal took the view that the exercise of the Upper Tribunal's discretion to allow the Regulator to raise a new case should depend on a consideration of all the relevant factors in the case, and the Upper Tribunal has to weigh up all the facts and circumstances. The Court stated that it would be impossible to provide a comprehensive list of those facts and circumstances, but gave a few examples including the nature of the new allegations, why the case was not previously put forward, whether the targets will be able to deal with the new allegations or are prejudiced in some other way, and the conduct of the Regulator including any delay on its part. The appeal was allowed and the case was remitted to the Upper Tribunal to reconsider the Targets' application in light of this judgment.

EMPLOYER'S DUTY OF GOOD FAITH

In the April 2014 edition of Pensions News we reported on a case about whether IBM had breached its duty of good faith in making changes in respect of certain of its pension plans (**"Plans"**) including closure to future accrual, procuring that members enter into non-pensionability agreements in 2009, and changes to the early retirement policy. In summary, the court held that no reasonable employer in the position of IBM in 2009 would have adopted the proposals in the form that they took and, viewed as a whole, the changes gave rise to a breach of the *Imperial* duty (the term often used to refer to the duty of good faith in a pensions context) and the contractual duty of trust and confidence.

In February 2015 a judgment was issued about the remedies available to members in relation to these breaches. The judgment is lengthy (running to nearly 200 pages) and looks in detail at thirty separate issues in relation to remedies, many of which are specific to the facts of this particular case. In this article, we provide a brief summary of what we think are the key points which may be of relevance to other employers in understanding the possible consequences of breaching this duty.

Closure of the Plans to future accrual

The closure to future accrual from 6 April 2011 was implemented by IBM giving "Exclusion Notices" to exercise powers within the Plans' rules to direct that specified classes of persons shall not be eligible to be members or shall cease to be members. In February 2015, the judge held that the Exclusion Notices are voidable, and therefore liable to be set aside in their entirety, with each affected member having to elect to have the Exclusion Notice set aside in respect of themselves.

In addition, the judge held that affected members can seek remedies for breach of the *Imperial* duty (equitable compensation) or remedies for breach of contract (typically damages). However, the judge did not think it appropriate to reach a conclusion at this hearing about the measure of damages, essentially because this will be for the court to consider if any affected members bring claims.

This means that, to the extent that any affected members elect to have the Exclusion Notices set aside, the trustees should administer the Plans on the footing that pensionable

service is continuing, but to the extent that they do not, should administer the Plans on the footing that the Exclusion Notices were effective from 6 April 2011.

If IBM wishes to terminate pensionable service going forward by using the Plans' exclusion powers, the court held that it would have to serve fresh Exclusion Notices with prospective effect and carry out a further consultation in respect of them.

Non-pensionability agreements (NPAs)

In 2009 IBM had procured that members of the Plans enter into NPAs by which any future salary increases would not be pensionable as long as the employee remained in a DB plan.

The judgment looks in detail not only at the 2009 NPAs which includes noting some differences in the analysis depending on whether the member sent a "protest e-mail" in relation to the agreements, but it also looks at whether there were any breaches of duty by the employer in respect of NPAs entered into in 2010 and in 2011. However, the key general points to note on NPAs are that, the court held that the non-pensionability term was invalid and can essentially be severed from the rest of the agreement, with the members entitled to keep all of the salary increases which have been awarded and entitled in the future to continue to be paid salary incorporating those increases. Where members had entered into partial NPAs in 2006 as part of previous changes, these partial NPAs will continue to apply to these later salary increases.

In addition, the judge held that members are entitled in principle to damages from having entered into the NPAs.

In relation to the members who did **not** enter into the NPAs, the judge did not think that they could claim (pensionable) salary increases equal to the (purportedly non-pensionable) salary increases awarded to the members who did enter into the NPAs. However, he did think that they could claim damages for breach of contract.

Introduction of a new early retirement policy

Another part of the changes that were the subject of the April 2014 judgment was the introduction of a new early retirement policy on 6 April 2010 whereby IBM would only consent to early retirement on terms more favourable than cost-neutral in exceptional circumstances.

Separate consideration was given in the February 2015 judgment to members who left service under various redundancy programmes. In this summary we do not cover these points but instead focus on the general conclusions that apply to members other than those leaving under these programmes.

It was concluded that the new policy cannot be relied on by IBM in relation to an eligible member who would, had the old policy remained in force, have been entitled to benefits in accordance with that old policy. It was also stated that the trustee should proceed on the basis that either consent was not required or that it is to be treated as having been given.

In the April 2014 judgment it was concluded that previous statements made by IBM had given members certain Reasonable Expectations about when changes might be made. In the February 2015 judgment, it was held that the constraint on early retirement imposed by the Reasonable Expectations came to an end on 31 March 2014 and after that date IBM was entitled to adopt a new policy. However, whether it can adopt such a policy without giving notice or, if not, the duration of notice required, will be decided after a further hearing.

It was therefore held that the old policy applies to all members who left service prior to 31 March 2014 and does so in relation to all of their pension. However, no decision was made in relation to those leaving service after that date as the position depends on the notice required.

The early retirement window

As part of the introduction of the new early retirement policy, an early retirement window was opened in November to December 2009 during which time members could seek IBM's consent to retire on the then existing (more generous) basis.

In this latest judgment, it was held that members who retired in this window and who can prove that as a result of this window and/or the impending introduction of the new policy, they retired earlier than they would otherwise have done, are in principle entitled to damages or equitable compensation. However, the judge did not consider it appropriate to give any further ruling as to the measure of damages or compensation, taking the view that issues such as causation, remoteness and mitigation that might arise would best be dealt with in proceedings between IBM and the affected members.

Consultation

In the April 2014 judgment it was also held that the way in which the employer consulted the members about the changes amounted to a breach of the implied duty of trust and confidence. In this latest judgment, it was held that members are in principle entitled to damages as a result of this.

A caveat to the judgment

It should be noted that the judgment is stated to be provisional insofar as it relates to certain matters of contractual liability. This is because of a point raised by Counsel for IBM as to which IBM entity has the contractual duty to the members. This point will be dealt with at a further hearing.

Further issues and appeal

There remain a number of issues in the case which are not addressed by this judgment but will be the subject of a further hearing in late April. A permission to appeal hearing has also been scheduled for 8 June 2015 and therefore the conclusions in this case could be subject to change. Given the continued uncertainty, the trustee has reported that the parties have agreed to defer implementation of the judgments until any appeal proceedings are resolved.

The key point for employers to note is that this judgment demonstrates that a breach of the duty of good faith can prove costly – closure to accrual may not have taken effect when it was thought to have done, members may be entitled to salary increases under NPAs without the corresponding non-pensionability taking effect, and members may be entitled to bring claims for damages. In addition, the complexity of the issues and the need for individual members to bring claims on certain issues can make the process of dealing with the issue lengthy. It is therefore important to ensure that any changes are implemented effectively and without breach to try to avoid such issues arising. If you are planning any changes to your scheme and would like advice in respect of the impact of the duty of good faith please get in touch with your usual DLA Piper pensions contact.

AMENDMENT TO CONTRIBUTION RULES AND SECTION 75

In February a judgment was issued in relation to the Merchant Navy Ratings Pension Fund (**"Fund"**), which is a non-sectionalised industry-wide DB occupational pension scheme. The judgment concerns an application by the trustee of the Fund seeking court approval to an amendment to the Fund rules to introduce a complex new contribution regime. In addition, the court was asked to determine a number of issues about the status of the Fund, principally for the purposes of section 75.

The new contribution regime

Whilst court approval was not required for an amendment of the Fund to be valid and neither had the trustee surrendered its discretion to the court, the trustee sought the court's blessing to the proposed amendments because the decision is far reaching and has serious consequences.

By way of background, a contribution regime introduced in 2001 (when the Fund also closed to future accrual) had placed the liability to contribute on "Current Employers", that is, 40 participating employers which as at 31 October 1999 employed active members or persons eligible to join the Fund. There were no obligations to contribute on the other (around 200) participating employers (referred to as "Historic Employers").

In short, the proposed new contribution regime would:

- augment the pool of employers who can be required to pay deficit contributions to include all participating employers (whether Current Employers or Historic Employers);
- give credit for all past deficit contributions previously made by participating employers including those made under the 2001 regime; and
- be implemented by use of a methodology devised and recommended by the trustee's covenant adviser.

A number of challenges were made relating to whether the trustee was acting within its powers in making this amendment, and the process by which it had decided to make the amendment. In relation to the specific points addressed, some notable points made in the judgment include the following.

- The "best interests of the beneficiaries" should not be viewed as a paramount standalone duty and should not be treated as if it were separate from the "proper purposes" principle. Rather, the purpose of the trust defines what the best interests are and they are opposite sides of the same coin.
- As long as the primary purpose of securing the benefits due under the Fund rules is furthered and the employer covenant is sufficiently strong to fulfil that purpose, it is reasonable and proper should the trustee consider it appropriate to do so, to take into account the employers' interests both when determining whether to widen the pool of those liable to contribute and when considering whether to seek to reduce the element of cross-subsidy.

Overall, the court concluded that the trustee had dealt with the matter in a meticulous manner and sought all relevant and proper advice upon which it quite properly relied. The court was also satisfied that there was nothing to show either that the trustee proposes to exercise the power of amendment in a way which exceeds its scope or that decisions have been made at which a reasonable trustee could not have arrived. The court was also satisfied that all relevant and no irrelevant matters had been taken into consideration. It therefore approved the proposed exercise of the power of amendment.

Section 75 issues

The second part of the judgment looks at a number of issues concerning the status of the Fund. Whilst many of these issues relate to the particular rules of the Fund, the principles raised by one of the issues are potentially relevant to other schemes.

The Fund closed to new members and future accrual of years of service on 31 May 2001 (at the same time that the 2001 contribution regime was introduced). The trustee has administered the Fund on the basis that it became a frozen scheme on 31 May 2001 and accordingly that no section 75 debts have arisen since that point.

However, in these proceedings, some employers questioned this point. This was on the basis that revaluation is applied at a preferential rate to certain categories of member (referred to in the judgment as "Specified Members"), including those employed by a Current Employer on 31 May 2001, while they remain in that category. It was therefore argued that the Fund did not become frozen on 31 May 2001 and that when an employer ceases to employ Specified Members, an employment cessation-event (ECE) occurs, triggering a section 75 debt.

The drafting of the legislation as to when an ECE occurs has changed over the relevant period but essentially for the Fund to be regarded as **not** being frozen such that ECEs could occur, it would need to be the case that the members to whom the preferential revaluation rate applies are in service to which the scheme relates.

In short, the court concluded that these Specified Members are not in service to which the Fund "relates" but rather the preferential revaluation applies to service to which the Fund "related". That is, the right to the revaluation is inherent in the benefits accrued as at 31 May 2001. The court also thought that this was supported by the fact that in order to have a right to the preferential revaluation rate, it is not necessary to be in employment at all.

In addition, the court noted that its conclusion was consistent with the legislation on increases, revaluation, preservation and cash equivalents.

It was therefore concluded that the Fund is frozen with no active members in the statutory sense.

These conclusions may have implications for schemes which are closed to future accrual but with a final salary link. However, this is a complex issue and we would suggest that any schemes with final salary links or preferential revaluation rates seek advice about any potential implications for their scheme. If you would like further information please get in touch with your usual DLA Piper pensions contact.

HMRC

VAT AND DB PENSION SCHEMES

Background

In July 2013 the Court of Justice of the European Union issued its judgment in the case of *PPG Holdings BV* holding that an employer was entitled to recover the VAT charged by a service provider on the ongoing costs of the administration and the management of its employee pension fund provided there was a direct and immediate link between those services and the employer's economic activities as a whole. This followed established general VAT principles. It was left to the referring Member State to decide whether there was such a link on the facts.

Following a previous announcement of a new policy in February 2014, in November 2014 HMRC issued Brief 43(2014) (**"Previous Brief"**) setting out further changes to its policy on recovery of input tax in relation to the costs of management of DB pension schemes in light of the *PPG* judgment. The policy aimed to explain when HMRC would regard the employer as receiving the services and therefore entitled to recover the VAT.

However, it was clear that the policy in the Previous Brief could not be easily applied, because HMRC seemed not to take account of the regulatory requirement for the pension fund trustees to commission certain services, and be party to the contract. Accordingly, following further consultation, on 26 March HMRC published Brief 8(2015) (**"Latest Brief"**) which outlines the evidence that HMRC accepts meets the requirements set out in the Previous Brief for employers offering DB pension schemes to be treated as receiving the services and obtain the right to a VAT deduction in respect of the costs of pension fund management services notwithstanding that the pension fund trustees may also need to be a party to the contract.

Tripartite contracts

In summary, the Previous Brief had stated that as a result of the *PPG* judgment, HMRC will no longer differentiate between the administration of a pension scheme and the management of its assets. Rather, in each case the employer will potentially be able to deduct input tax if it receives the supply of services, and it will therefore need to be determined whether the services in question are supplied to the employer. It was noted that this is a "*highly fact sensitive question*" although a fundamental criterion to consider is "*economic reality*" and the most useful starting point is to examine the agreements between the parties.

The Latest Brief reports that some employers have expressed a concern that directly contracting for pension fund management services may sometimes be difficult owing to the regulatory context in which they operate, and have therefore asked whether HMRC will accept that tripartite contracts between the supplier, pension scheme trustees and employer meet the condition that the employer must contract for the services.

HMRC goes on to state that:

- it has considered the use of tripartite contracts specifically in the context of DB pension schemes where the regulatory regime requires the scheme to be established under a trust and it is the employer that ultimately bears the financial risks and benefits associated with the performance of the scheme;
- given the unique nature of these DB pension arrangements HMRC accepts that tripartite contracts can result in the employer being the recipient of a supply of DB pension fund management services; and
- an employer may therefore be able to deduct VAT incurred on these services in line with its usual recovery rate where, as a minimum, the contract with the service provider evidences specified matters set out in the Brief. For example, these matters include that the service provider makes its supplies to the employer, and the employer directly pays for the services that are supplied under the contract.

In addition to these points, the Latest Brief states that evidence that the pension scheme trustees agree that it is the employer who is entitled to deduct any VAT incurred on the services will reduce the potential for disputes.

Notwithstanding this Latest Brief uncertainties remain as to precisely what is necessary for the employer to be treated as receiving the services, and the Brief restricts itself to dealing only with management services in relation to DB schemes, and not other services, and other pension arrangements.

Paying and recharging of costs

The Previous Brief also stated that if the employer receives a taxable supply of administration and investment management services and recharges them to the pension scheme trustees, that recharge is consideration for an onward taxable supply, and VAT is due accordingly (although it is potentially deductible by the pension scheme trustees).

The Latest Brief provides some further information on this scenario, noting that pension scheme trustees and employers will normally regularly review the level of contributions required by the employer to ensure the fund is able to meet the forecast pension benefit commitments. HMRC states that it accepts that if adjustments are made to these contributions to take account of the fact that it is the employer rather than the fund that is paying for certain costs, and therefore the employer reduces its contributions that does not constitute consideration for a supply by the employer to the pension fund. This is provided that there is no specific reduction equal to the actual costs that were incurred in any given period.

Transitional period

HMRC states that the transitional period announced in the Previous Brief will continue until 31 December 2015, and that in the meantime, businesses may continue to use the VAT treatment outlined in VAT Notice 700/17 "Funded Pension Schemes" should they choose, provided that both employer and pension scheme trustees agree the same treatment.

Next steps

HMRC states that it has received enquiries in respect of the impact of the *PPG* decision on VAT recoverability relating to other types of services, other types of pension scheme, VAT grouping the corporate trustee and a sponsoring employer, and trustees that charge employers to run their pension schemes.

It goes on to report that it has been discussing these matters with interested parties and intends to provide further guidance in the summer.

Employers who can reclaim part or all of their VAT need to ensure that their contractual arrangements are as robust as possible to support reclaims following HMRC's announcements following the PPG case. If you would like assistance with this process, please get in touch with your usual DLA Piper pensions or tax contact.

PENSIONS TAX MANUAL

In March HMRC published a draft version of the Pensions Tax Manual (PTM) which will replace the current Registered Pension Schemes Manual (RPSM). The PTM is currently in draft form (although it does reflect HMRC's current view) and comments can be submitted in relation to it. HMRC states that it intends to update the guidance to incorporate comments received in June 2015 with a view to the guidance being updated in the summer of 2015.

An update published on 20 March in advance of the draft version of the PTM being issued explained that:

- when the Pensions Tax Manual has been updated following the consultation period, the RPSM will be removed from the gov.uk website but will remain available in its full form on the National Archive site; and
- unlike the RPSM (which has four different levels of guidance on the same subject covering technical, member, employer and scheme administrator), the PTM will provide just one level of guidance, with a focus on providing technical guidance on the pensions tax rules.

In particular, it is worth noting that the PTM incorporates guidance on recent legislative changes including the new pensions flexibilities but the RPSM has **not** been updated to reflect changes made to taxation legislation in 2014 or changes in relation to the DC flexibilities.

PUBLIC SERVICE PENSION SCHEMES

INCREASES

On 12 March 2015 the Pensions Increase (Review) Order 2015 was made. This Order comes into force on 6 April 2015 and provides for an increase of 1.2% from that date for all official pensions, except those which have been in payment for less than a year which will receive a pro-rata increase. This percentage reflects the percentage rise in the Consumer Price Index in the twelve months to the preceding September.

REVALUATION

The Public Service Pensions Revaluation Order 2015 was made on 18 March 2015 and comes into force on 11 April 2015. The Explanatory Notes to the Order explain that for career average revalued earnings (CARE) schemes, pensions are determined by reference to pensionable earnings and those earnings are revalued each year until the member leaves pensionable service. This revaluation may be by reference to a change in prices or earnings (or both) in a given period.

The Public Service Pensions Act 2013 (**"Act"**) under which the new CARE public service schemes are established states that the change in prices or earnings to be applied will be specified in a Treasury Order. This Order is the first to be made under this provision of the Act and it applies to the first scheme established under the Act which is the new Local Government Pension Scheme for England and Wales. The Order sets an increase in prices of 1.2% (based on the CPI for September 2014) and relates to the period 1 April 2014 to 31 March 2015 inclusive (which is the first "scheme year" for the new LGPS).

Looking ahead, from April 2016 the Treasury will make an annual Order applying to all CARE schemes under the Act.

CODE OF PRACTICE

An Order was made on 3 March which appoints 1 April 2015 as the day for the coming into effect of the Pensions Regulator's new code of practice on the governance and administration of public service pension schemes.

The code had previously been the subject of a consultation and its proposed final form was laid before Parliament in January 2015. As at the end of March the final version of the code had not yet been placed on the Regulator's website.

PUBLIC SERVICE SCHEMES – REGULATIONS

In March regulations were made in relation to several public service schemes including: amendments to make a number of clarifications and improvements to the new LGPS which was established on 1 April 2014; amendments to the regulations governing the new Civil Service scheme in order to provide members of Partnership – the DC pension alternative to membership of the main scheme – with death and ill-health benefits under that scheme; amendments to the new NHS Pension Scheme in relation to eligibility; and amendments in relation to teachers' pensions to clarify the operation of certain ill-health benefits; allow access to AVC arrangements for members of the new scheme; and enable members of the AVC arrangements to utilise the new DC flexibilities.

OTHER NEWS

COMBATING PENSION SCAMS

Industry Code and updated materials from the Regulator

For some time now, the issue of transfer requests and pension scams (often referred to as pension liberation) has been a difficult one for trustees of occupational pension schemes. On the one hand, members may have rights to transfer but on the other hand trustees have regulatory and other general responsibilities to act in the members' interests and with due care, and whether trustees allow or block transfers there could be negative consequences.

In March there were two developments in relation to the issue of pension scams and transfer requests – an industry Code of Good Practice was published and the Pensions Regulator published updated versions of its 'scorpion' materials.

The Code sets out an industry standard for dealing with requests by members for transfers from a UK registered pension scheme to another registered pension scheme or a QROPS. Its main focus is on setting out industry standard due diligence to follow when considering a transfer request.

The Regulator's updated 'scorpion' materials consist of three documents.

- A transfer pack insert/short member leaflet which the Regulator asks trustees to include in their annual benefit statements and when issuing transfer packs to members.
- A more detailed booklet for members which includes information on warning signs and a case study. The Regulator states that it is calling on trustees to ensure that members receive regular and clear information about the risk of pension scams, and that the member booklet could be included in any member communications or linked to from the scheme or employer websites.
- An action pack for trustees and administrators which provides trustees with guidance on how to proactively educate members about pension scams and a checklist to help spot them. The action pack also signposts to the industry Code of Good Practice.

Further detail on both of these developments is provided in our Pensions Alert.

ScamSmart – information from the FCA

On 23 March the Financial Conduct Authority issued a press release noting the launch of the next wave of its ScamSmart campaign that highlights the warning signs consumers need to be aware of in relation to investment scams. The FCA goes on to state that the new pension flexibilities mean thousands of people will be making vital decisions about their retirement, and this can be the very moment that unscrupulous fraudsters will offer investments with high returns, and the FCA wants would-be investors to reject cold calls, check the FCA Warning List and get impartial advice.

The press release also provides a link to the FCA's ScamSmart website which sets out what people can do to spot investment fraud. It is also worth noting that the Pensions Regulator's press release which announced the publication of its new 'scorpion' materials, states that in addition to using Pension Wise, pension savers are advised that if they are approached, they should check that their adviser is registered with the FCA, and that the FCA's Scamsmart list also names the investment schemes that are known scams.

DEPARTMENT FOR WORK AND PENSIONS

New Deputy Pensions Ombudsman

On 25 March the DWP announced that Karen Johnston has been appointed as Deputy Pensions Ombudsman and Deputy PPF Ombudsman from 1 July 2015 for a three year term. The current Deputy Ombudsman will stand down from 31 May 2015.

Employer Debt – Call for Evidence

On 12 March the DWP published a call for evidence in relation to section 75 employer debt in non-associated multi-employer DB schemes. This has been published as a result of a number of stakeholders having approached the DWP to express concerns about the workings of the employer debt provisions. In particular, the Call for Evidence notes concerns from employers that their pension liabilities are becoming increasingly unaffordable in the current economic climate, but they cannot move their staff to a more suitable option without triggering an even more unaffordable debt, and that some small employers can accidentally trigger the debt as a result of an employment-cessation event.

The Call for Evidence looks at and asks questions about the current arrangements and then goes on to look at suggested approaches raised by stakeholders. It is important to note that the suggested approaches are **not** Government proposals and at present the Government is simply seeking to better understand the landscape and whether any changes may be helpful, but is not committing to any future changes.

The suggested approaches considered are as follows, with the Call for Evidence setting out a description and the benefits and risks of each:

- giving trustees greater flexibility to arrange a debt repayment plan with a departing employer;
- amendments so that an employment-cessation event where the employer remains in existence does not trigger an employer debt; and
- changing the way that the liability is calculated following an employment-cessation event.

The Call for Evidence also asks whether there are any other approaches not listed that the DWP should consider that might improve the employer debt regime for employers, schemes and members. The closing date for comments is 22 May 2015.

PENSION PROTECTION FUND

The PPF issued an update in relation to some minor changes made on 12 March 2015 to the 2015/16 Determination. The PPF states that:

- the changes have been made to remove any ambiguity and make clear the unchanged policy position; and
- Experian has been calculating monthly scores as intended, so in all cases the amendments will have no impact on scores and no action is needed.

The amendments relate to: the use of consolidated accounts in the PPF-specific model; the way in which Experian uses Companies House indicators to categorise entities' accounts; the correction of cross-references; and the correction of a typographical error to make it clear that the confirmation of Appropriate Legal Advice in relation to last man standing status should be sent to the PPF (not the Regulator).

FINANCIAL CONDUCT AUTHORITY

Retirement income market study – final report

Background

In February 2014 the FCA issued the results of a thematic review which had found that the annuities market was not working well for most consumers. The FCA therefore launched a market study to look at the entire retirement income market, although following the reforms announced in the March 2014 Budget the terms of reference for the study were amended to shift the emphasis away from current market dynamics towards how market conditions might evolve after April 2015.

In December 2014 the FCA published a report setting out the provisional findings of the study as well as its proposed remedies. The objective of the proposed remedies is to increase the effectiveness of the information that is provided to consumers to help address consumer inertia and encourage shopping around and, if appropriate, switching. The proposed remedies, recommendations and actions were then the subject of further consultation which closed on 30 January 2015.

On 26 March the FCA published the final report of the study which confirms that it will proceed with the proposals. A summary of the remedies and the next steps is set out below. It is also worth noting that the FCA states that it is coordinating with the Pensions Regulator and in discussions with the DWP on its remedies, to consider the interaction between the trust-based and FCA-regulated sectors of the market in respect of the remedies.

Annuity comparison and wake-up packs

The remedies include:

- requiring firms to provide an annuity quotation comparison so that consumers can easily identify if they could be getting a better deal by shopping around; and
- redesigning and behaviourally trialling the information that consumers receive from their providers, such as wake-up packs, in the run up to their retirement.

In terms of next steps on these remedies, the FCA states that:

- it has already started to design the behavioural trials that it will carry out with consumers, and is now contacting firms to work with it on these; and
- it will consult on proposed rule changes as part of its wider review of rules in the pensions and retirement area in summer 2015, and subject to that consultation, the FCA estimates that firms will be required to implement these remedies in 2016.

Pensions dashboard

Another remedy is, in the longer term, the creation of a pensions dashboard which will allow consumers to see all their pension pots in one place. In terms of next steps, the FCA states that it is in discussions with the Government to explore the most effective and efficient way to develop a dashboard solution for its recommendation, with a view to implementation in the next few years.

Framing

The FCA states that:

- it is making recommendations to firms and Pension Wise to consider the role of framing effects; and
- it wants to see firms framing options to consumers in a way that helps consumers make good decisions, rather than to drive sales of higher margin products.

It also notes work that it has been completing on framing with the Treasury and Pension Wise, and issues it will consider going forward.

Monitoring

The FCA will also be monitoring the market to track market developments, consumer behaviour and outcomes, as well as the take-up of Pension Wise.

ON THE HORIZON

- **Equalisation for GMPs.** It had previously been expected that guidance on conversion of GMPs would be published in spring 2014 but, as at the end of March, this had not been published. An HMRC Bulletin on the end of contracting-out issued in July 2014 reported that the DWP understands that schemes are waiting for GMP conversion guidance but it thinks it is important to develop fully considered proposals, and guidance will be published when this critical work is completed.
- **DB to DC transfers.** The Regulator's consultation on guidance on DB to DC transfers closed on 17 March and following this it intends to prepare a response with a view to publishing the final documents as soon as possible. As at the end of March, this had not been published. Looking ahead, the Regulator intends to review the guidance in 2016 in light of experience.
- **DC reform guidance.** The Regulator intends to publish guides on DC reform (the Budget changes, governance standards and charges) in 2015. In March 2015 the Regulator published a draft essential guide to communicating with members about pension flexibilities which provides information about changes to the Disclosure Regulations and giving generic risk warnings. The Regulator will publish the final version of the communications guidance once the updated regulations come into force.
- **Public service schemes.** The Regulator's Code of Practice for public service pension schemes takes effect on 1 April 2015.
- **Solvency.** Following its consultation on further work on solvency of IORPs (which closed on 13 January 2015), EIOPA will consider the feedback received and expects to publish draft technical specifications by early 2015 for a quantitative impact assessment. Following this assessment, EIOPA will develop technical advice to the European Commission on EU solvency rules.
- **Automatic enrolment technical amendments.** Technical amendments to the automatic enrolment legislation, including the introduction of exceptions, come into force on 1 April 2015.
- **DC regulation.** The Regulator expects trustees of occupational pension schemes to assess the extent to which their scheme complies with the DC quality features and publish a governance statement in relation to this assessment at the end of the 2014/15 scheme year.
- **DC scheme quality and charges.** Statutory quality standards for DC schemes and a cap on charges for default funds in qualifying schemes will come into effect on 6 April 2015.
- **DC reform.** The far-reaching DC reforms announced in the 2014 Budget will come into force on 6 April 2015.
- **Automatic enrolment thresholds.** New automatic enrolment earnings thresholds for 2015/16 come into force on 6 April 2015.
- **SMPIs.** Updated guidance in relation to Statutory Money Purchase Illustrations that was issued in December 2014 will apply to illustrations issued on or after 6 April 2015.
- **The end of contracting-out.** The response to consultation on the regulations about how to administer accrued contracted-out rights will be published in summer 2015.
- **Pension liberation.** The Pensions Ombudsman Service has reported that they are currently considering a case in which a member is arguing that their scheme should have blocked a transfer request. The determination is expected to be issued in the first half of 2015.
- **Pensions Tax Manual.** In March HMRC published a draft version of the Pensions Tax Manual (PTM) which will replace the current Registered Pension Schemes Manual. The PTM is currently in draft form and HMRC intends to incorporate comments on it with a view to the guidance being updated in summer 2015.
- **Review of survivor benefits.** The review of different treatment of survivor benefits under occupational pension schemes required to be completed under

the Marriage (Same Sex Couples) Act 2013 has been published, although no date has been given for when the Secretary of State will announce whether or not any amendments will be made to the legislation. The Employment Appeal Tribunal's judgment in the *Walker v Innospec* case concerning the restrictions placed on benefits payable to civil partners is the subject of an appeal to the Court of Appeal, with a hearing due to take place in summer 2015.

- **Review of consumer price statistics.** Following the report of an independent review, a public consultation on the consumer price statistics is expected to be published in summer 2015 with the response to follow later in the year.
- **Transparency of DC charges.** The April 2015 measures on charges include some reporting requirements in relation to charges and transaction costs. The DWP intends to build on this and on 2 March published a joint Call for Evidence with the FCA which closes for comments on 4 May 2015.
- **Short service refunds.** Short service refunds will be withdrawn from money purchase schemes from 1 October 2015.
- **Investment regulations.** A consultation in relation to some amendments to the investment regulations following recommendations made by the Law Commission in July 2014 closes in April 2015. It is expected that any changes to the legislation arising from the consultation would be made in 2016.
- **DC charges.** From April 2016, it is proposed that member-borne commission payments and Active Member Discounts will be banned from DC qualifying schemes.
- **End of contracting-out.** The reform of state pension which will result in the end of contracting-out is due to take effect in April 2016.
- **Defined ambition.** It is expected that the provisions of the Pension Schemes Act 2015 on Defined Ambition and collective schemes will be available in time for the end of contracting-out in April 2016.
- **Lifetime Allowance.** In the 2015 Budget it was announced that the Lifetime Allowance will be reduced from £1.25 million to £1 million from 6 April 2016 and transitional protection will be introduced.
- **Flexibility for existing annuity holders.** In the 2015 Budget it was announced that from April 2016 the Government will change the tax rules to allow people who are already receiving income from an annuity to sell that income to a third party, subject to the agreement of the annuity provider. A consultation published in relation to these proposals closes on 18 June 2015.
- **Automatic transfers.** The system of automatic transfers is intended to be launched in October 2016. Following the publication of a framework document in February, further detail and a consultation are expected to be published later in 2015.
- **IORP II.** The draft updated IORP Directive published in March 2014 proposed that Member States would have to transpose the new IORP Directive into national law by 31 December 2016. An updated draft published in September 2014 deleted this date and did not replace it with a new date. A further draft published in December 2014 stated that Member States would have two years after the entry into force of the Directive to transpose it into national law.
- **DC charges.** In 2017 it is proposed that the measures on DC charges and governance standards will be reviewed, in particular, the level of the charge cap and the question of whether any transaction costs should be included in the cap.
- **Lifetime Allowance.** In the 2015 Budget it was announced that the Lifetime Allowance will be indexed annually in line with inflation from 6 April 2018.

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