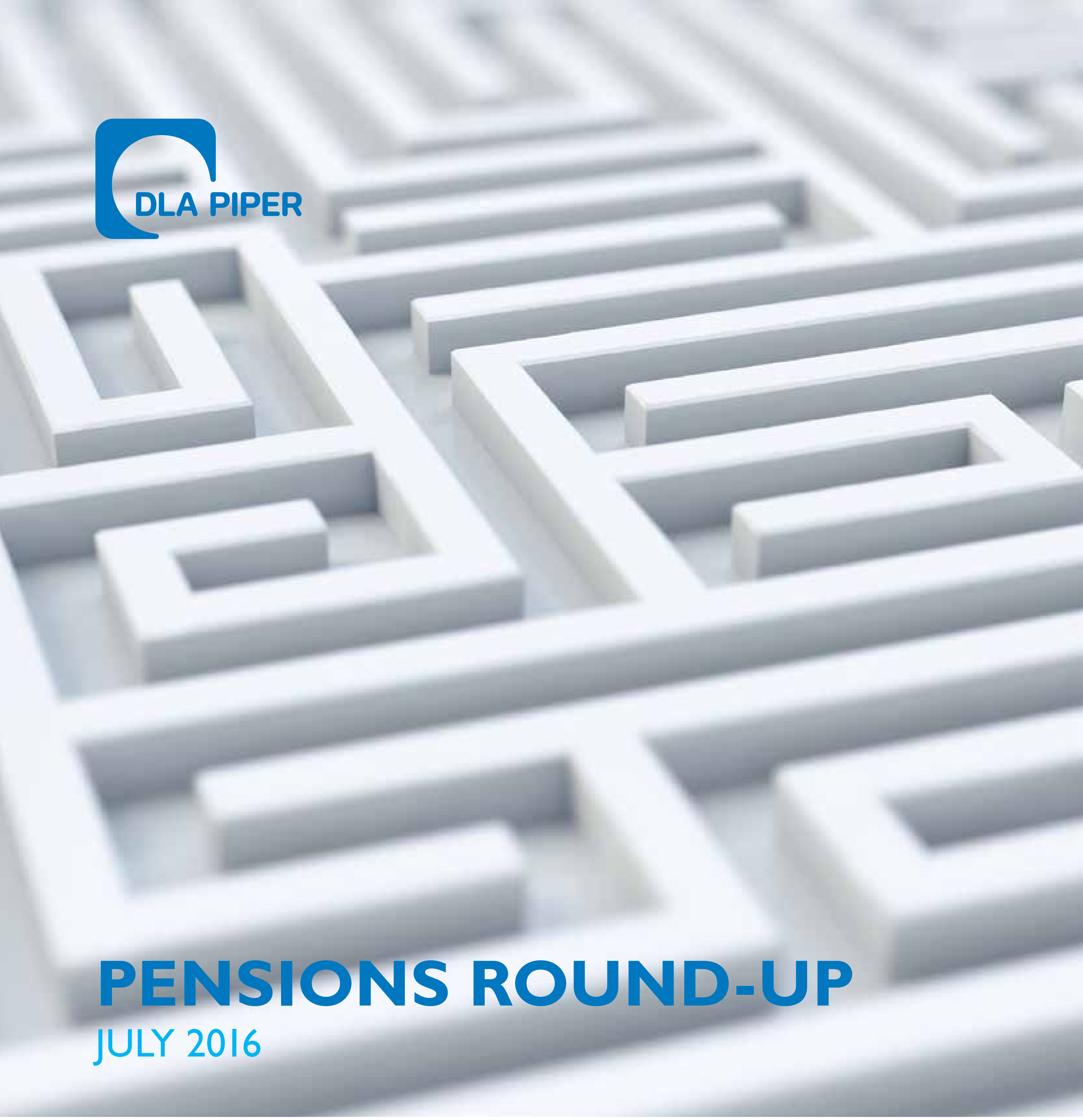


DLA PIPER

PENSIONS ROUND-UP

JULY 2016

IN THIS ISSUE

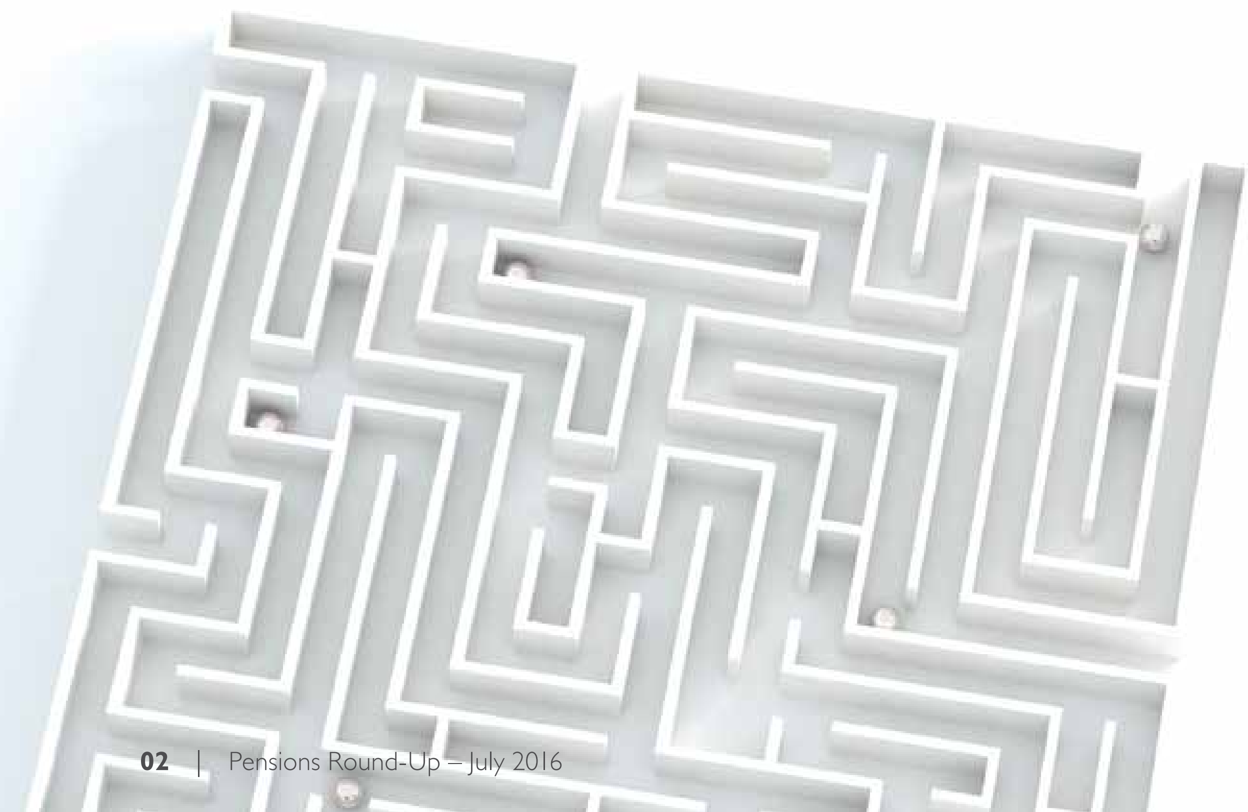
INTRODUCTION

Welcome to the latest edition of DLA Piper's monthly newsletter – Pensions Round-Up – in which we provide an overview of developments in pension legislation, case law and regulatory guidance.

In this edition we look at key developments from July 2016 including the following.

- **The Pensions Regulator:** a guidance statement for trustees about market volatility following the EU referendum; the coming into effect of the updated DC code of practice; the publication of research about DC governance; a Discussion Paper about 21st century trusteeship and governance; the Regulator's Annual Report and Accounts for 2015/16; and the latest annual commentary and analysis on automatic enrolment.
- **Department for Work and Pensions:** the publication of updated fact sheets about the new State Pension and the end of contracting-out; and the Government's response to the Work and Pensions Committee's May report about automatic enrolment.
- **Legislation:** regulations to extend the phasing period for the minimum DC contribution requirements for automatic enrolment; and completion of the Public Bill Committee stage of the Finance Bill.
- **Other news:** Annual Reports and Accounts for 2015/16 for the Pensions Ombudsman Service, the Pensions Advisory Service and the Pension Protection Fund; information from HMRC about its GMP Checker; and an update from the FCA on its work around pensions and retirement income.
- **On the Horizon:** a timeline of some of the key future developments in pensions to help employers and trustees plan ahead.

If you would like further information about any of the issues raised in this edition of Pensions Round-Up, please get in touch with Cathryn Everest or your usual DLA Piper pensions contact. Contact details are at the end of this newsletter.



THE PENSIONS REGULATOR

EU REFERENDUM

On 14 July the Regulator issued a guidance statement for trustees entitled "*Market volatility following the EU referendum*" in which it emphasises that trustees should as a matter of course be regularly reviewing the circumstances of their scheme but they should remain focused on the longer term and not be overly influenced by short-term market fluctuations.

The section of the statement about DB schemes includes the following.

- Any impact will be scheme and employer specific, and it is important that trustees and sponsors discuss the issues in an open and collaborative way and review their position.
- In relation to covenant, trustees should consider how exposed their employer may be to the various risks and opportunities which may come from the transition of trading relationships and potential changes in economic fundamentals.
- In relation to investment, trustees should not be overly focused on short-term market movements but it is important to understand how this impacts on scheme funding plans and decision-making, including any issues with regard to liquidity and cash flow management. Where current conditions mean the scheme is exposed to an inappropriate level of risk, taking account of the employer covenant and other relevant factors, trustees should reconsider their investment strategy in that context.

The section about DC schemes states that when reviewing investment performance, it remains important to consider how fund performance impacts different members and notes that many schemes will already have strategies in place designed to minimise the impact of market movements on those close to pension age. The Regulator also states that as the future implications of any withdrawal from the EU become clearer, trustees may consider it appropriate to make changes to the investments included in the default arrangement and/or other investments offered to members.

The statement also has a section about communications in which the Regulator states that members may contact trustees for further information about the impact of the referendum result and states that trustees should be prepared to explain to members the approach that they plan to take.

The Regulator notes that it is too early to assess the full impact of the referendum result and states that it will continue to monitor the markets and other economic developments and will provide more guidance to trustees as necessary.

DC CODE OF PRACTICE

In the May edition of Pensions Round-Up we reported that a draft of the updated code of practice on governance and administration of occupational trust-based schemes providing money purchase benefits had been laid before Parliament. On 18 July an Order was made appointing 28 July as the date for the updated version of the code to come into effect. The purpose of the code is to set out the standards of conduct and practice that the Regulator expects trustee boards to meet in complying with their duties in legislation. The code has sections on: the trustee board; scheme management skills; administration; investment governance; value for members; and communicating and reporting. The code is supported by a series of 'how to' guides (with a separate guide for each section of the code). Following a consultation issued in April, the final versions of these guides and the response to consultation were published on 28 July.

Now that the code is in force trustees of schemes providing money purchase benefits should consider reviewing their governance and administration processes in light of the code and supporting guidance and, if necessary, making any changes. We will be publishing a separate Pensions Alert providing further information about the requirements of the final versions of the code and accompanying guides.

THE PENSIONS REGULATOR

DC GOVERNANCE SURVEY

On 20 July the Regulator published a report about research on DC governance, the main objective of which was to identify the type and prevalence of challenges which schemes offering DC benefits face in relation to the statutory governance standards introduced in April 2015 and the standards of conduct and practice in the new DC code. The research comprised quantitative interviews with 639 schemes and the findings included that: (i) larger schemes consistently out-perform smaller schemes on all aspects of governance and administration; (ii) 75% of members were in a scheme which had at least 75% of the statutory governance standards in place; (iii) schemes were most likely to report that their scheme met the governance standard in relation to investment obligations in default strategies; (iv) the governance standard in relation to prompt and accurate processing of core financial transactions was met by a comparatively low proportion of schemes; and (v) the requirement to assess the extent to which charges and transaction costs provide good value for members was the least likely of the new governance standards to be met.

21ST CENTURY TRUSTEESHIP AND GOVERNANCE

On 22 July the Regulator published a Discussion Paper in which it explains that in the context of the changing pensions landscape and challenging economic environment, it is keen to examine how trustee boards can meet the challenge of scheme governance in the 21st century and in the last year it has opened a debate with industry to consider what more can be done to support trustees. The Paper sets out what the Regulator is doing to educate and support trustees of DC and DB schemes and considers what more could be done by it and the wider industry in support of raising standards.

The key themes that the Paper considers include: board effectiveness; the role of the chair; meeting trustee knowledge and understanding (TKU) standards; managing conflicts of interest; and engagement with key governance activities and working with third parties. The questions raised in the Paper cover issues including: (i) whether there should be any barriers to becoming a professional trustee such as requiring all professional trustees to be qualified or registered by a professional body; (ii) whether DB schemes should be required to appoint a chair and report on compliance with governance standards; (iii) how the Regulator can help trustees to be aware of, understand and apply the TKU framework; (iv) how trustees can demonstrate they have the level of competence required to fulfil their role; and (v) whether a Continuous Professional Development (CPD) framework would assist trustees to meet the challenges of scheme governance.

In terms of next steps, the Regulator states that over the next year it plans to increase its focus on educating and supporting trustees. The Regulator notes that it is not looking to impose new standards of governance or add to the burden on trustees but rather its focus is to make sure that its education and communications are sufficiently clear to help trustees understand the expected standards and act accordingly. The Regulator intends to be more targeted in terms of the audiences it talks to and the content and format of its products and the channels it uses. The Regulator notes that its research and engagement with schemes provides it with the information it needs to segment the trustee universe so that it can establish different approaches according to the size, type and risk profile of schemes as well as other relevant factors. In particular, the Regulator aims to focus its engagement on poorly performing schemes and disengaged trustees. The Paper also states that in the future the Regulator aims to produce key overarching pieces of guidance to cover the principles or issues common to all schemes, with separate guidance covering issues specific to particular types of scheme. As well as its focus on education, the Regulator will work closely with government partners and industry to consider what other solutions may be required, including changes to the legislative framework, particularly if some schemes are not improving.

The closing date for comments on the Discussion Paper is 9 September and the Regulator states that it will continue the dialogue during the autumn as it develops its 21st century trustee strategy.

It will be interesting to see what the Regulator's 21st century trustee strategy looks like once it is finalised and in the meantime trustee boards may find it useful to consider if any improvements are needed to their TKU and governance standards.

THE PENSIONS REGULATOR

ANNUAL REPORT AND ACCOUNTS

On 7 July the Regulator published its Annual Report and Accounts 2015-2016 which it states shows that it is performing well in its key areas of responsibility despite the pace of change in the pensions sector. The Report includes a performance summary outlining the Regulator's key activities and achievements, and a performance analysis which reports on key performance indicators (KPIs) and key outcome indicators. In relation to KPIs, the Regulator states that, in the main, it has hit its targets or narrowly missed them, which was primarily due to it having created deliberately stretching targets. The Regulator achieved 10 out of its 17 KPIs, missed five by a small margin and missed two significantly. The two KPIs which were missed significantly relate to the proportion of members in public service schemes that have assessed themselves against the legal requirements and code of practice, and questions in the perceptions tracker survey about delivery against the Regulator's objective to minimise any adverse impact on the sustainable growth of an employer.

The Report also provides information about the work of the Determinations Panel including that, during the year, the Panel made 10 determinations and exercised 12 powers. The powers exercised included two appointments of independent trustees, one contribution notice, and five cases concerning requests for an extension of the statutory time limit to make a transfer.

AUTOMATIC ENROLMENT

On 27 July the Regulator published its fourth annual commentary and analysis report about automatic enrolment. The report relates to the period from April 2015 to March 2016 during which the Regulator's key challenge has been to engage hundreds of thousands of small and micro employers and help them prepare for automatic enrolment.

Points in the report of potential note for larger employers include that: (i) the Regulator is working with the larger employers who are due to re-enrol; (ii) its approach on re-enrolment remains to raise awareness and direct employers to the appropriate information online in order to complete their duties and re-declare their compliance on time; and (iii) of the 612 employers who re-declared compliance in 2015-2016, 375 did not have anyone to re-enrol but did have a workplace pension scheme with active members in it.

Actions for the Regulator looking ahead include that it will: (i) communicate the changes to the phasing of contributions to employers and help them to make sure they are planning to incorporate this into their processes; (ii) put in place an approach to support employers who have used DB transitional arrangements; and (iii) work with the DWP to find simplification or transformational opportunities through the 2017 review.

TRANSFERS

On 5 July the Regulator issued a press release stating that it has warned all pension savers to be vigilant when considering transferring out from their existing pension, after publishing details of governance failings in the London Quantum Retirement Benefit Scheme. The Regulator also published a final notice confirming its appointment of an independent trustee to this scheme. The Regulator states that the case highlights how members should be cautious when considering pension transfers or investment returns that sound too good to be true and demonstrates that it will use its powers when necessary to protect savers.

DEPARTMENT FOR WORK AND PENSIONS

APPOINTMENTS

Following Theresa May's appointment as Prime Minister, in July it was announced that Damian Green has been appointed as the new Secretary of State for Work and Pensions and Richard Harrington has been appointed Parliamentary Under-Secretary for Pensions.

NEW STATE PENSION AND THE END OF CONTRACTING-OUT

On 19 July the DWP published updated versions of some of its literature about the new State Pension and the end of contracting-out to take account of the fact that the changes have come into force. There are three sets of factsheets which have been updated and each set is aimed at a different audience – employers, employees and trustees. These documents provide an overview of the impact of the changes to National Insurance and relevant action points.

> Employers and trustees who have been using these factsheets – in particular if they are in the process of sending the employee factsheets to employees or if they signpost to these factsheets in scheme literature – should note that they have been updated.

AUTOMATIC ENROLMENT – GOVERNMENT RESPONSE TO COMMITTEE

In the May edition of Pensions Round-Up we reported that the Work and Pensions Committee had published a report about its inquiry on automatic enrolment. On 22 July the Committee published the Government's response to the recommendations in the report.

Lifetime ISA ("LISA")

The Committee's recommendations included that the Government: (i) develop a communication campaign that highlights the differences between the LISA and workplace pensions; and (ii) should conduct urgent research on any effect of the LISA on pension saving through automatic enrolment. Points made in the Government's response include the following.

- The DWP plans to continue supporting automatic enrolment during implementation through a national communications campaign – this campaign focuses on automatic enrolment and there is no intention to broaden this. However, it goes on to state that the Government will ensure that factual sources of information on the LISA will be available on the gov.uk website prior to its launch and will engage with stakeholders regarding factual content for external websites.
- The Government will undertake an Impact Assessment as part of the due process in legislating for the new LISA in the autumn. Beyond this, the Government does not currently intend to commission new research to predict the impact of the LISA on individual behaviour in advance of implementation, but will continue to monitor the success of automatic enrolment including in terms of opt out rates.

2017 review of automatic enrolment

The Committee recommended some areas for consideration as part of the 2017 review of automatic enrolment including: (i) removing the lower qualifying earnings band for contributions and lowering the earnings trigger threshold; and (ii) approaches to increasing contributions beyond the statutory minimum of 8% of qualifying earnings. The Government's response includes that it is keen to treat the review as an opportunity to look back on successes and think about future challenges and is in the early stages of scoping the review. It states that recommendations from the Committee's Report will be considered within this scoping work as the DWP recognises that these are important issues.

LEGISLATION

AUTOMATIC ENROLMENT – CONTRIBUTIONS

The Employers' Duties (Implementation) (Amendment) Regulations 2016 were laid before Parliament on 11 July 2016 and will come into force on 1 October 2016. These regulations give effect to the announcement made in the Autumn Statement 2015 that for employers using DC schemes to comply with their automatic enrolment duties, the phasing period for contribution rates will be extended as follows.

- The second phase – when the minimum employer contribution will increase from 1% to 2% of qualifying earnings and the total minimum contribution rate will rise from 2% to 5% – will now commence on 6 April 2018 (rather than 1 October 2017).
- The final phase – when the minimum employer contribution will rise to 3% of qualifying earnings and the total minimum will rise to 8% – will now commence on 6 April 2019 (rather than 1 October 2018).

It is also worth noting that if an employer is using a measure of pensionable pay other than qualifying earnings under the certification provisions of the legislation, different contribution rates may apply but the phasing periods are the same.

HYBRID SCHEMES

An amended version of the Hybrid Schemes Quality Requirements Rules 2016 took effect on 4 July 2016. These rules set out the detailed quality requirements that a hybrid pension scheme must satisfy in order to be used to meet an employer's automatic enrolment duties. A previous 2016 version of the Rules which took effect on 6 April 2016 had been amended since the 2015 version to remove references to DB schemes being contracted-out. This latest version of the Rules has been further amended in order to correct a minor and technical error in the rule about "combination hybrid schemes", that is, schemes under which members accrue both defined benefits and money purchase benefits in respect of the same period of service.

FINANCE BILL

The Finance Bill continued to progress through Parliament in July and completed the Public Bill Committee stage on 7 July. In relation to pensions, during July, the Committee considered and agreed to a clause which will make provision to ensure that a charge to inheritance tax will not arise when a pension scheme member has unused funds in a pension drawdown fund when they die. This change will be backdated to apply to deaths on or after 6 April 2011.

The House of Commons is expected to consider the remaining stages of the Finance Bill on 5 and 6 September 2016.

DATA PROTECTION

In the February edition of Pensions Round-Up we reported that, following the 2015 decision of the Court of Justice of the European Union declaring the Safe Harbor scheme to be invalid, the European Commission had announced that it and the United States had agreed on a new framework for transatlantic data flows – the EU-US Privacy Shield. This issue is potentially relevant for those schemes which transfer personal data of pension scheme members to the US, for example, because a parent company of an employer is based in the US or the administrator is part of a US group.

On 12 July 2016 the European Commission voted to adopt the final version of the EU-US Privacy Shield. You can read more about this development in DLA Piper's Be Aware alert.

OTHER NEWS

PENSIONS OMBUDSMAN SERVICE

On 7 July the Pensions Ombudsman Service (POS) published its Annual Report and Accounts 2015/16. We set out below some points of note from the Report.

POS' caseload

POS took on 1,363 new investigations in 2015/16 (including around 200 complaints about pension liberation) which is 6% more than in 2014/15. It completed a record number of investigations in the year (1,308) which represents an increase of 35% on performance in 2014/15.

The Report sets out the top ten subject matters of new investigations taken on during the year – the top three were: pension liberation (15.6%); failure to provide information/act on instructions (14.2%); and misquote/misinformation (12.5%). It also sets out the top ten subject matters of closed investigations – the top three subjects were the same as those for new investigations although the percentages were different at 20.6%, 12.4% and 10.5%. It is also worth noting that personal pension complaints accounted for 46% of completed investigations compared to 25% in 2014/15.

23% of cases formally decided by an Ombudsman were upheld; 14% were partly upheld; and 63% were not upheld.

Looking ahead

POS is monitoring developments in the pensions industry that might increase its workload further and thinks that, for example, GMP reconciliation, the DC flexibilities and automatic enrolment are areas that are likely to be sources of complaints in the coming year and beyond.

POS has increased the number of cases resolved informally – for 2015/16, 63% of cases were resolved informally and 37% formally (compared to 2014/15 when 44% were resolved informally and 56% formally). The Annual Report states that this trend will continue with the use of more informal opinions and a reduction in the number of Ombudsman determinations. The traditional route of a provisional decision followed by a determination will only be used in certain circumstances, for example, where the subject of the complaint is complex, there is a novel legal point, there are a number of complainants with the same issue or the case is almost certainly going to be appealed.

Appeals

The Annual Report includes a section about appeals to the court within which POS reports on a case decided by the High Court in February 2016 (and reported in our Pensions Alert dated 26 February 2016) which is relevant to the issue of pension liberation. In that case the High Court allowed an appeal against the PO's decision to reject a complaint about a refusal to pay a transfer. The High Court disagreed with the PO's interpretation that the requirement in the statutory transfer legislation to be an "earner" means that the person has to be an earner in relation to a scheme employer. The Annual Report notes that the respondent pension provider did not wish to make representations on this point but did so because it was instructed by the court in order that the judge could hear both sides of the argument. The Report goes on to state that the PO has decided that, going forward, he will be more robust in participating in appeals (whether or not the respondent participates) if he considers that to do so would be beneficial to the pensions industry at large.

On 27 July an update was added to the POS website about this new approach to appeals. The update states that examples of increased participation may include where the decision could have a wider impact on the pensions industry, such as pension liberation or automatic enrolment, or where there is a significant concern over access to justice and participation is necessary to properly present and argue the points.

TPAS ANNUAL REPORT AND ACCOUNTS

On 7 July the Annual Report and Accounts for 2015/16 for the Pensions Advisory Service (TPAS) were published. TPAS reports that it achieved its strategic aim to service more customers, increasing from 103,136 direct customers to nearly 178,000. The Report also provides statistics on TPAS' work which include that the number of dispute cases received increased by 5% in 2015/16.

OTHER NEWS

PPF ANNUAL REPORT AND ACCOUNTS

On 21 July the Pension Protection Fund published its Annual Report and Accounts for 2015/16 together with its annual Funding Strategy Update. The Report shows that as at 31 March 2016 the PPF's funding level calculated on an actuarial basis was 116.3% (compared to 115.1% as at 31 March 2015). It also shows that the likelihood of the PPF meeting its target of being financially self-sufficient by 2030 has increased from 88% as at 31 March 2015 to 93% as at 31 March 2016, although the PPF reports that the main drivers of this increase were technical rather than driven by market conditions.

HMRC – GMP CHECKER

In April 2016 HMRC introduced its GMP Checker which scheme administrators can use to obtain GMP calculations in respect of scheme members. On 18 July HMRC published information about how to access the Checker and how to request multiple GMP calculations.

FINANCIAL CONDUCT AUTHORITY

On 14 July the FCA provided an update and published some further documents on its work around pensions and retirement income including the following.

- The FCA published the Terms of Reference for its Retirement Outcomes Review which is the follow up to its 2015 Retirement Income Market Study. The Review will explore whether competition is working effectively in the retirement income market following the introduction of the DC pension reforms, focusing on four key areas – shopping around and switching, non-advised customer journeys, firm business models and barriers to entry, and the impact of regulation on retirement outcomes. The Terms of Reference include some questions on each of these areas and the closing date for responses is 31 August 2016. The FCA intends to conclude the Review and publish its final report in the summer of 2017.
- In light of a proposal in the Retirement Income Market Study, the FCA is behaviourally testing the effectiveness of variations to firms' wake-up packs. The FCA anticipates that it will publish the results of these trials and consult on any proposed rule changes in early 2017.
- The Retirement Income Market Study also proposed the creation of an annuity comparator to improve competition and help consumers get a better deal. The FCA published the results of research to test what difference this remedy could make. This demonstrates that the proposed remedy is effective at encouraging consumers to shop around and, where appropriate, switch provider. The FCA will therefore consult on rule changes later this year.
- The FCA has recently completed a review looking at how firms are complying with the relevant rules around signposting the availability of pensions guidance. The FCA also sought to understand how firms are highlighting the risk of pension fraud and scams to their customers. The results of this research were published alongside the update. The findings include that: the majority of firms in the sample were, on the whole, meeting the FCA's signposting requirements; and the FCA was encouraged to see some firms taking a particularly proactive approach to identifying potential scams and raising awareness of these amongst their customers.

ON THE HORIZON

DATE	DEVELOPMENT
Unknown	A consultation on revised regulations about **equalising GMPs** is expected in this Parliament.
	The reforms in relation to **Defined Ambition, Collective Benefits** and **automatic transfers of small DC pots** will be revisited once the market has had time and space to adjust to the other reforms underway.
2016	A final response is expected from the Board of the UK Statistics Authority in relation to the 2015 consultation on **consumer price statistics**.
	The Regulator intends to review its **guidance on transfers**.
	The Regulator intends to publish **guidance on DB scheme investment strategy**.
	A consultation is expected on extending the ban on **member-borne commission payments** in certain DC qualifying schemes to existing arrangements. The ban already applies to new arrangements entered into on or after 6 April 2016 and existing arrangements that are varied or renewed on or after 6 April 2016.
	The **Finance Bill** is expected to receive Royal Assent. The Bill is currently before Parliament and includes provisions on: the reduction of the lifetime allowance to £1 million, fixed protection 2016 and individual protection 2016; and some changes announced in the Budget 2016 to ensure the DC flexibilities work as intended.
	A **Pensions Bill** is expected containing provisions in relation to the regulation of master trusts, the cap on early exit charges and restructuring financial guidance.
Summer 2016	A new requirement will be introduced for trust-based schemes to **report regularly on their performance in processing transfers**.
End of 2016	The transitional period in which employers and schemes may continue to use the VAT treatment in **VAT** Notice 700/17 ends on 31 December 2016.
End of March 2017	The Government will place a duty on the FCA to **cap excessive early exit charges**. The FCA intends to implement its duty by the end of March 2017 and published a consultation on its proposals in May 2016. In parallel, the DWP is consulting on implementing a comparable cap for occupational trust-based schemes.
April 2017	Legislation to enable the development of a **secondary annuity market** is expected to be introduced.
2017	The measures on **DC charges and governance standards** will be reviewed.
6 April 2018	The **lifetime allowance** is due to be indexed annually in line with CPI.
May 2018	The new EU General **Data Protection** Regulation will apply.
2018	The **IORP II Directive** is awaiting formal approval by the European Parliament and, after that, it will be published in the Official Journal and will officially enter into force. Member States will have 24 months to transpose the Directive into their national legislation.
2019	The Government will ensure the industry designs, funds and launches a **pensions dashboard** by 2019.

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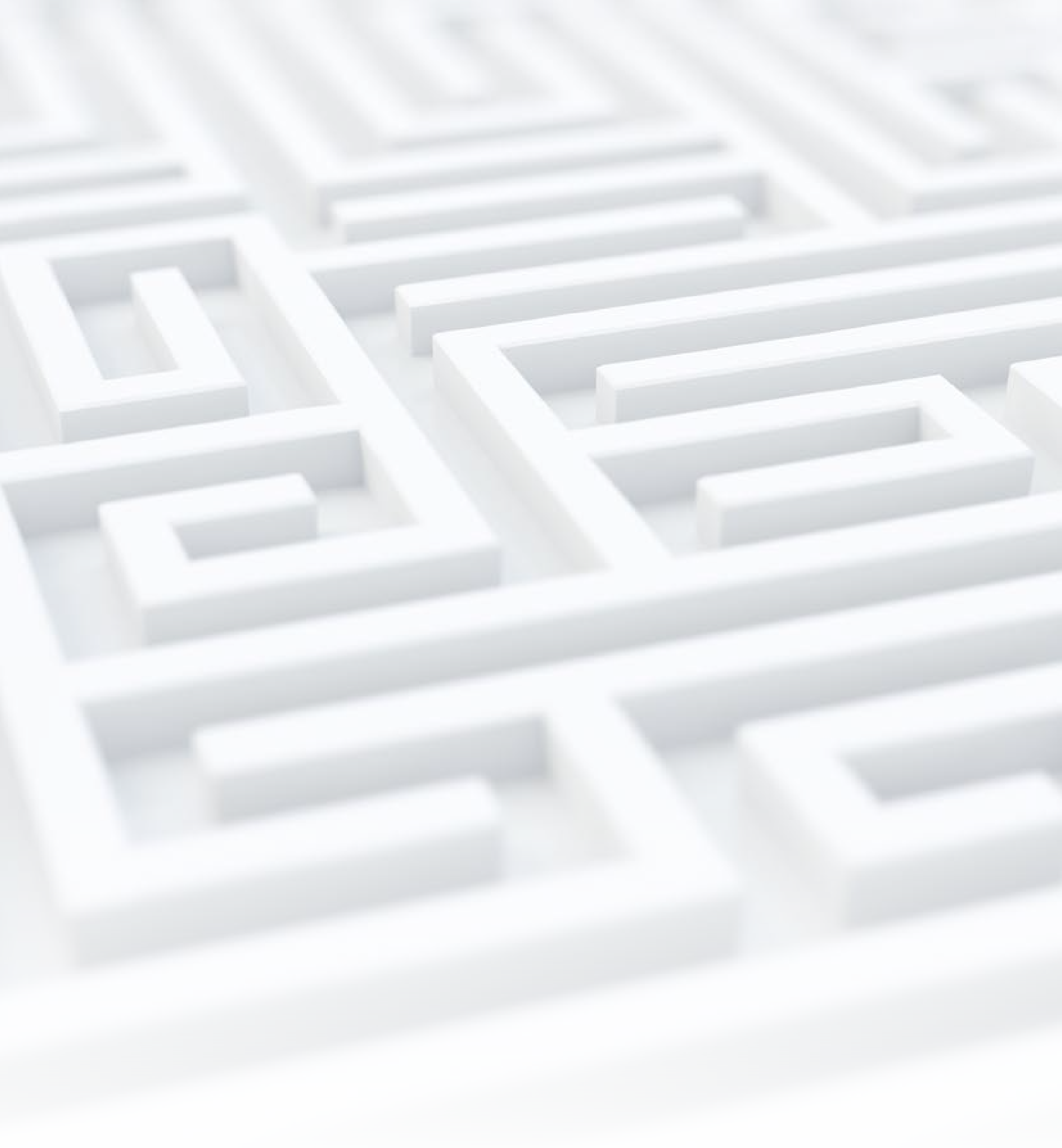

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