DLA PIPER

PENSIONS NEWS

APRIL 2015

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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 April 2015 including the following.

- **Budget 2014 reforms:** the final form of the Pensions Regulator's guidance on member communications, and on DB to DC transfers; information from HMRC about the practicalities of making flexible payments; and an update from the PPF.
- **The Pensions Regulator:** updates to the detailed guidance on automatic enrolment; and the latest quarterly report on compliance and enforcement activity in relation to automatic enrolment.
- **Case law:** the publication of three further Pensions Ombudsman determinations in relation to pension liberation – one where the transfer was blocked, and two where the member complained that the transferring schemes had not completed sufficient checks before the transfers were made.
- **Public service pension schemes:** the final form of the Pensions Regulator's code of practice on governance and administration of public service pension schemes.
- **Other News:** further FAQs from the PPF about the levy; the publication of an updated version of the DWP's guidance about the charge cap; and an update from HMRC about measures to help combat pension liberation.

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

The far-reaching DC reforms first announced in the March 2014 Budget came into effect on 6 April 2015. In the months leading up to this there were a large number of developments in relation to the introduction of these reforms including two Acts of Parliament, various sets of regulations, the launch of Pension Wise and the publication of official guidance.

However, the developments in relation to the reforms did not end in April, with final versions of guidance being issued by the Pensions Regulator and HMRC publishing information about some of the practical aspects of the reforms. In this section we provide an overview of the developments that took place in April.

COMMUNICATIONS GUIDANCE

Following the publication of a draft in March, in April the Regulator published the final version of its "*Essential guide to communicating with members about pension flexibilities*" (**"Essential Guide"**). The guide is for trustees, administrators and advisers of occupational pension schemes and covers two areas in relation to communications.

Guidance in relation to the Disclosure Regulations

With effect from 6 April, amendments were made to the Disclosure Regulations which introduce new requirements in relation to members with flexible benefits and change some of the existing requirements. A key aspect of the new requirements is ensuring that members are signposted to the Pension Wise guidance service. Our Pensions Alert dated 16 March 2015 provides further detail about the amendments to the Disclosure Regulations.

The Regulator's Essential Guide provides information on the key changes to the Disclosure Regulations with sections about making members aware of Pension Wise, other new requirements for retirement communications, and timing.

One of the changes made to the Disclosure Regulations is the addition of a list of information that has to be provided in certain circumstances to members who have "*an opportunity to transfer flexible benefits*". The list of information to be provided includes: a statement that the member has an opportunity to transfer the benefits; that different providers offer different options; a statement that different options have different features, rates of payment, charges and tax implications; and either:

- a copy of guidance that explains the characteristic features of those different options that has been prepared or approved by the Regulator; or
- a statement that gives materially the same information as that guidance.

In the Essential Guide the Regulator confirms that the relevant guidance is the Money Advice Service leaflet "*Your pension: it's time to choose*" and provides a link to that document.

Generic risk warnings

The Essential Guide also has a section about retirement options and generic risk warnings, with key points in this section including the following.

- The Regulator encourages 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 pot 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 declaration 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, as opposed to providing information; and where members ask further questions about their retirement options, trustees should be prepared to direct them toward Pension Wise for further guidance and/or an FCA-regulated financial adviser for advice specific to their personal circumstances and their selected retirement option.

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.

Trustees should ensure that their communications and processes are amended if necessary in order to comply with the updated Disclosure Regulations. Whilst the giving of generic risk warnings is not a statutory requirement, trustees should nevertheless consider whether to make any changes to their retirement processes in order to incorporate the Regulator's 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 advice to members.

DB TO DC TRANSFERS GUIDANCE

Background

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

Following a consultation published in February, on 2 April the Regulator published the response to consultation and the final form of its regulatory guidance "*DB to DC transfers and conversions*". The Regulator states that the guidance aims to:

- explain the new requirement for trustees to check that members have obtained appropriate independent advice before transferring or converting 'safeguarded benefits' (such as DB benefits) to DC benefits (save for cases where the cash equivalent transfer value of the safeguarded benefits in the scheme does not exceed £30,000);
- help trustees ensure they have appropriate processes in place to manage transfer requests;

- prompt trustees to consider the impact of transfer values as part of an integrated approach to risk management of their scheme; and
- require trustees to provide clear information for members so that they can get independent advice on the best option for them.

The advice requirement

Points of particular note in the guidance about the requirement for trustees to check that members have obtained appropriate independent advice include the following.

- The requirement applies to transfers under the scheme rules in the same way as it applies to statutory transfers, and applies to conversions or internal transfers to obtain DC benefits within a scheme in the same way as it applies to transfers between schemes.
- The guidance makes it clear that it is not the trustees' role to second guess the member's individual circumstances and choice to transfer, or to prevent a member from making decisions which the trustees might consider to be inappropriate. It also states that the advice is likely to be confidential to the member and therefore trustees should not request a copy or make enquiries about the substance of the advice.
- The role of trustees is to check that the appropriate advice has been obtained. The member gives the trustees a statement in writing from the adviser which confirms specified matters including that advice has been provided, that the adviser has the relevant regulatory permission, and the firm reference number of the relevant company or business in which the adviser works. The guidance explains how trustees should check that the adviser has the correct permission to carry on the regulated activity by verifying details on the Financial Services Register. It also contains guidance on keeping records of the checks, and on completing additional checks where trustees are suspicious that a fraudulent communication has been submitted to it. (The draft version had simply stated that it may be sensible for the scheme to conduct periodic additional checks.)
- The employer is required to pay for the advice where they, or the trustees or other third party on their behalf, writes to two or more members or survivors setting out the options available to them in terms that encourage, persuade or induce them to request a transfer. The Regulator sets out guidance about when communications might fall within this category.
  - It states that routine communications from trustees that simply explain to members their options, including the possibility of transferring or converting benefits should not trigger the requirement for the employer to pay for advice. Some examples are given which include where the routine information includes transfer values. It is also stated that trustees should avoid placing emphasis on one particular option or options.
  - However, the guidance also states that where the employer has requested that trustees should include the transfer value and/or information about transferring when communicating with members, trustees should consider the employer's reason for this request and, if appropriate, take advice as to whether they could be deemed to be encouraging, persuading or inducing members to transfer on behalf of the employer.

The guidance also includes a timeline setting out the main steps for a statutory transfer where the advice requirement applies, together with an accompanying table setting out further detail of the information that trustees have to provide to members.

The impact on transfer values

In relation to transfer values and considering the impact on the scheme, the guidance includes the following.

- The statutory basis and approach to be used in the calculation of cash equivalent transfer values is unchanged.

- As an integral part of scheme management, it will be important for trustees to monitor and understand demand from members for transfers and the subsequent impact those transfers could have on scheme funding, including the effect of a transfer of those members with a large transfer value relative to the scheme.
- It will also be important to monitor the potential impact on investments, particularly regarding the balance of asset classes held by the scheme and the liquidity required to pay large numbers of individual transfers or in respect of members with a large transfer value relative to the scheme.
- The guidance notes that in some situations, reducing transfer values for underfunding may be appropriate. It goes on to state that: in all cases trustees should balance their responsibilities to transferring members with those remaining in the scheme; achieving such balance will not be a precise science and trustees should obtain advice from their actuary; and the Regulator's transfer value guidance sets out the considerations needed to reach a balanced view.

Other issues

The guidance also has a section noting the Regulator's expectation that trustees check the receiving scheme to ensure that it is able and willing to accept the transfer and it is a legitimate arrangement, and sections about communications, and applying to the Regulator for more time to complete a transfer request.

Next steps

The response to consultation reports that a number of respondents pointed out that the Regulator's guidance on transfer-related issues and the new pension flexibilities will be spread across different documents. The Regulator states that it will review its guidance on transfers in 2016 in light of experience and agrees that, through this process, the consolidation of material will be beneficial to trustees and their administrators.

To the extent that they have not already done so, trustees of schemes with DB benefits should review their transfer processes to ensure that they can provide the relevant information to members and complete the necessary check before a transfer is made for the purposes of accessing flexible benefits. In addition, trustees should consider whether any changes are required in order to comply with the Regulator's guidance about transfer value bases and considering the impact on scheme funding and investment.

HMRC NEWSLETTER

On 2 April HMRC published Pension Schemes Services Newsletter 68 which includes two sections on the Budget reforms.

Tax on payments to scheme members

One of these sections looks at the tax position on payments to scheme members and states that it is very important that anyone considering making a withdrawal is aware of the tax implications before they make a decision, and contains a link to the Pension Wise website. This section also looks at how the tax is paid. Broadly speaking:

- where a current P45 is held for the member and the pension provider therefore knows the tax code to be applied for the year, the correct amount of tax can be deducted from payments as they are made; and
- where a current P45 is not held, tax will be deducted at a temporary rate (that is, emergency rate) and so a tax refund may be due, and the method for claiming that refund will depend on the person's circumstances, such as other income they have in the tax year and whether the person has emptied their pension fund.

The newsletter includes a series of example scenarios which include information about how refunds will be paid in different circumstances. This includes that where a person is intending to make a series of withdrawals at irregular times across the tax year, they should speak to their pension provider because, after applying the temporary tax rate to the first payment, in some cases the provider might be able to report a zero payment for the months where no withdrawal is made, and work with HMRC to tax subsequent withdrawals and correct the person's tax position.

Information for scheme administrators

Another section of the newsletter includes information on pension flexibility for scheme administrators including the following.

- Information on reporting flexi-access payments, the 25% tax-free element of an uncrystallised funds pension lump sum (UFPLS) and death benefit lump sums via Real Time Information. In relation to the 25% tax free on an UFPLS, HMRC notes that it previously said that this should not be reported at all under Real Time Information, however, it goes on to state that this is not the case and explains how it should be reported.
- Information about the possibility (described above) of reporting zero payments where a person is making a series of withdrawals at irregular times, which notes that this will have the effect of repaying a portion of the overpaid tax back to the member, meaning that by the end of the year their tax position will have been corrected. However, this option will depend on whether the payroll software allows zero payments to be made.
- It is noted that scheme members will need to consider the possible tax implications when making decisions about how and when to take payments under the pension flexibility tax rules and there is therefore an annex to the newsletter containing information for members. HMRC states that administrators may wish to signpost their members to this or include some of the text in messages to members.
- Information on three new forms available from 6 April 2015 for individuals to claim tax refunds where a temporary rate has been applied on flexible payments and the circumstances in which each should be used.

UPDATES TO HMRC'S IHT MANUAL

In April HMRC published some updates to its Inheritance Tax Manual to reflect the DC flexibility changes made by the Taxation of Pensions Act 2014. This includes updates to a page which looks at powers over death benefits and the impact on whether payments fall within the member's estate. This page states that where pension scheme providers have discretion over the payment of death benefits, the payment is not treated as part of the

estate, even where discretion is exercised in favour of the estate or the personal representative. A new paragraph has been added to this page which states the following.

- Some schemes may have a number of payment options available following the death of a member, for example, the options might be a lump sum death benefit or a nominee's flexi-access drawdown fund.
- A member may make a binding nomination in connection with who should receive any flexi-access drawdown fund, but if the scheme provider can choose which type of death benefit to pay and the member cannot also make a binding nomination of any lump sum death benefit, the death benefits will not be treated as part of the member's estate on death.
- However, if the member can create a situation where the scheme provider has no choice and has to pay any death benefits in accordance with the member's directions, the death benefits will be within the member's estate on death.
- HMRC ends this paragraph by stating that "*You should seek the advice of Technical before taking forward such an argument*".

EFFECT ON PPF AND FAS PAYMENTS

On 15 April the Pension Protection Fund added an update to its website about the effect of the new flexibilities on the PPF, noting that the flexibility changes do not apply to the PPF and therefore entitlement to PPF compensation does not change – members will still receive a regular payment from the PPF rather than a lump sum. Similarly, if a person's PPF compensation is not yet in payment, their options on retirement will be unaffected by the flexibility changes. The update adds that this also applies to the Financial Assistance Scheme and the assistance paid by FAS.

THE PENSIONS REGULATOR

AUTOMATIC ENROLMENT – UPDATED GUIDANCE

As reported in the March 2015 edition of Pensions News, with effect from 1 April 2015 a number of technical amendments were made to the automatic enrolment legislation and with effect from 6 April 2015 the qualifying earnings band was also amended. In April amendments were also made to the Pensions Regulator's technical guidance to reflect these changes.

In this article we provide a brief overview of the areas covered by the technical amendments and changes made to the guidance in respect of them.

Exceptions to the duties

Exceptions have been introduced so that the duty to automatically enrol or automatically re-enrol becomes a power to do so in the following circumstances.

- Notice of termination of employment is given before the end of six weeks beginning with the automatic enrolment date or automatic re-enrolment date.
- A person has chosen to cancel membership of a qualifying scheme (or a scheme that would have been a qualifying scheme if they had been a jobholder) or has opted out under the legislation in the 12 months before the automatic enrolment date or automatic re-enrolment date. In these circumstances, the employer's duty is carried over to the next cyclical re-enrolment date. The guidance explains that the exception means that the duty to automatically enrol does not apply in respect of any eligible jobholder who has previously opted out or ceased active membership more than 12 months beforehand.
- 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 guidance explains the Regulator's view of the meaning of "*having reasonable grounds to believe*" which includes that the employer must actually believe that the worker has the protection, and there must be evidence which would lead a reasonable person to believe this. For example, sight of a copy of the certificate issued by HMRC would be one way of giving the employer reasonable grounds to believe that the member has the benefit of tax protection.

The guidance explains the exceptions and in which cases the opt-in rights continue to apply.

An exception has also been introduced for cases where a worker has been paid a winding-up lump sum by an employer and since that payment was made the worker has ceased to be employed and been re-employed by that employer. In this case there are modifications to the automatic enrolment, re-enrolment, opt-in, joining and information duties, and the guidance explains the position for the different scenarios.

Whilst large employers will already have reached their staging date and therefore had to implement the reforms without the benefit of the exceptions, as they approach their three yearly automatic re-enrolment date they should consider what approach to take to the exceptions.

Information requirements

A number of changes have been made to the information requirements to achieve the following aims:

- reduce the employer's obligation to make an ongoing assessment of all categories of employment;
- 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 updated guidance reflects the following changes that have been made to the statutory information requirements.

- Amendments to the information provided to jobholders as part of the automatic enrolment, re-enrolment and enrolment process.

- The replacement of the four different options available for an employer to choose as their postponement notice with one notice.
- The combining into one notice of the information about the right to opt in to an automatic enrolment scheme for a jobholder and the right to join a scheme for an entitled worker. The guidance explains that the employer is only required to provide the information once, per worker, per employment.
- The removal of the requirement to provide information to jobholders who are already active members of a qualifying scheme.

The guidance explains that employers with staging dates prior to 1 April 2015 will have systems and processes in place supporting the administration of the previous information requirements. It goes on to state that the employer does not have to change its existing processes or template communications as a result of the amendments to the legislation. This is because the legislative requirements are a minimum and an employer could provide more information than this. In addition, some of the amended requirements allow an employer to choose to continue to give information about just one of the rights to opt in or join or to provide information about both of the rights.

Employers should consider whether they wish to make any amendments to their standard communications in light of these changes.

Alternative DB quality requirements

Two alternative scheme quality tests have been introduced for DB schemes. This is in light of the fact that, had this change not been made, when contracting-out ends in April 2016 DB schemes being used to fulfil duties under the automatic enrolment legislation would have to meet the complex statutory test scheme standard.

- One of the new alternative quality tests is based on the cost of the future accrual of active members' benefits. In summary, the test is 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.
- The other test allows a specific type of shared risk scheme to meet the minimum requirements for occupational DC schemes.

The Regulator states that the DWP will be issuing guidance on the alternative DB requirements in the near future.

Whilst we expect that it will be a relief for employers of DB schemes that they will not have to meet the complex test scheme standard, if their scheme is being used to comply with any automatic enrolment duties, they will still need to be satisfied that one of the new alternative quality tests is met when contracting-out ends in April 2016. Employers should therefore include consideration of this issue in their plans for the end of contracting-out.

AUTOMATIC ENROLMENT – COMPLIANCE AND ENFORCEMENT

The Regulator publishes quarterly bulletins about automatic enrolment compliance and enforcement designed to help employers, their advisers and the pensions industry as a whole understand the type of compliance and enforcement interventions that follow the Regulator's educative and enabling communications and support.

In April the Regulator published its latest bulletin which covers the period 1 January to 31 March 2015. It reports that, in that period, the Regulator:

- issued 15 information notices (whereby the Regulator can demand documents or any other information relevant to the exercise of its functions), bringing the total up to 31;
- made one use of its power to inspect premises, bringing the total up to 8;
- issued 213 compliance notices, bringing the total up to 1,529;
- issued 9 unpaid contributions notices, bringing the total up to 17;
- issued 198 fixed penalty notices (whereby the Regulator can issue a penalty of £400 for failure to comply with a statutory notice or some specific employer duties), bringing the total up to 367; and
- used its powers to issue escalating penalty notices (whereby the Regulator can issue a penalty of between £50 and £10,000 per day, depending on size, for failure to comply with a statutory notice) for the first time, issuing 4 such notices.

The bulletin also has a section on lessons learned from the Regulator's casework which refers to the following lessons for employers.

- Employers should ensure they know what they will need to do to comply with their duties. On this point, the Regulator reports on a recent investigation it conducted in respect of a medium-sized employer which had been broadly aware of the reforms but assumed that as most of their staff were 'low paid', they did not have any duties.
- Check what services the pension scheme provides, with the Regulator reporting on a case of a medium-sized employer which completed the declaration of compliance confirming that a high proportion of the workforce had been automatically enrolled into a master trust, but subsequently contacted the Regulator to advise that no contributions had been paid to the scheme. This is because the employer had misunderstood the role of the scheme and assumed it was responsible for calculating contributions and making the correct deductions from staff.

LEGISLATION

SHARED PARENTAL LEAVE

Background

In December 2014 regulations came into force which radically overhaul the UK's existing parental leave regime. The regulations apply to employees who are expecting a child on or after 5 April 2015.

The default regime will continue to be 52 weeks' maternity leave and 2 weeks' paternity leave. However, provided certain eligibility conditions are met, the introduction of shared parental leave offers employees a new option to end the mother's maternity leave after a minimum of 2 weeks with the remaining leave then available to share between the mother and her partner/father of the child. Shared parental leave can be taken in up to three separate blocks, although the employer can agree to more. Given that leave can now be shared in this way, there is no longer any need for the separate regime of additional paternity leave and therefore that has been abolished.

Pension provision during shared parental leave

The legislative requirements in relation to pension provision while an employee is on shared parental leave mirror those that already apply in relation to paternity leave and adoption leave. Essentially this means that:

- pension rights will continue to accrue in a DB scheme during periods of paid shared parental leave but the employee only needs to pay contributions in respect of actual pay; and
- in the case of a DC scheme, during periods of paid shared parental leave, the employee only needs to pay contributions in respect of actual pay but the employer should contribute based on what the person would have been paid had they not been on leave.

Employers will need to ensure that they understand the pension contribution payments that they need to make for any employees who take shared parental leave. Trustees will also need to ensure that the scheme is able to comply with the requirements for shared parental leave which will involve considering whether the drafting of the scheme rules means that rule amendments are required and ensuring that administrative processes are updated. In addition, scheme amendments will need to reflect the fact that additional paternity leave has been abolished.

CASE LAW

PENSION LIBERATION – FURTHER OMBUDSMAN DETERMINATIONS

The issue of transfer requests and pension liberation is a difficult one for trustees and scheme providers, and the approach taken by the Pensions Ombudsman (**"PO"**) is therefore watched with interest by the pensions industry. Three determinations were issued on this subject in April – one where a transfer was blocked and two where transfers were made. Whilst all three cases relate to personal pension providers, in our view, the key points arising from the cases are also relevant for trustees of occupational pension schemes. In this article we provide a brief overview of these determinations and their implications for trustees.

Blocked transfer case

Background

In January 2015 the PO determined three complaints in respect of blocked transfers. He found in the providers' favour in all three cases on the grounds that the members did not have a statutory right to transfer (although he noted that the providers had not subjected the applications to analysis to establish this), but in one case the complaint was upheld to the extent that the provider had not properly considered the exercise of a discretion under the scheme rules. A further determination was issued in April 2015 in respect of a provider that had blocked a transfer, but this time the complaint was upheld and the provider was directed to make the transfer.

Facts

The Applicant requested that his benefits in a personal pension scheme (**"Transferring Scheme"**) be transferred to a small self-administered scheme (**"Receiving SSAS"**). The provider refused to make the transfer because it believed that it was for pension liberation purposes, informing the Applicant that it was concerned because he was under age 55, the Receiving SSAS had only recently been registered with HMRC, and its scheme administrator (for Finance Act purposes) had only recently registered as a company. During the PO's investigation the provider expressed some more specific concerns including whether the scheme had been validly registered with HMRC because of a lack of evidence that the entity which submitted the registration had been appointed as scheme administrator.

PO's conclusions

As for the cases determined in January 2015, the PO completed detailed analysis as to whether the member had a statutory right to transfer. Whilst the PO was satisfied that the Receiving SSAS was an occupational pension scheme, he did not think that the transfer met the statutory requirement of being for the purposes of acquiring "*transfer credits*". This was on the basis of the PO's view that in order to meet the definition of "*transfer credits*" the person has to be an "*earner*" in relation to an employer participating in the receiving scheme, which the Applicant was not.

However, this was not the end of the matter because the rules of the Transferring Scheme stated that members could direct a transfer to be made to another registered pension scheme. The Receiving SSAS was in fact a registered pension scheme and therefore the Applicant had a contractual right, rather than a statutory one, to a transfer. The PO also decided that the transfer would not have constituted an unauthorised payment and therefore concluded that the provider should have acceded to the transfer request once it completed its review of the Receiving SSAS documentation.

In his conclusions, the PO was critical of the provider's failure to give the Applicant an opportunity to argue his case, to give specific reasons for its concerns about pension liberation or to ask questions about the specific matters

which it later said had caused it concern. In particular the PO noted that had questions been asked, the concerns about the scheme administrator's appointment would have been shown to be unwarranted.

The PO considered that if the provider had taken the correct approach, it should, by 31 July 2013, have reached the conclusion that the Applicant was entitled to exercise his contractual right to transfer. The provider was directed (if the Applicant still wishes to transfer) to pay the transfer value at the higher of its value at the date of payment and the value as at 31 July 2013 plus simple interest.

Implications for trustees

The existence of the contractual right to transfer was fundamental to the outcome of this case and the criticism of the provider's failure to ask questions and give specific reasons is also notable. The case therefore provides two key lessons for trustees when dealing with transfer requests.

- Understand what rights the member has to transfer their benefits, whether under statute or the scheme rules. The existence of the contractual right was crucial here with the PO stating that it "*immediately places [the provider] on the back foot in this case*".
- When considering whether pension liberation is a potential issue, be clear about what the specific warning signs are and ask questions and conduct due diligence to establish whether there is a cause for concern. As we reported in our Pensions Alert of 26 March 2015, a voluntary industry Code of Good Practice on Combating Pension Scams (**"Code"**) has recently been published which focuses on setting out industry standard due diligence to follow when considering a transfer request. The Code sets out steps including asking the member questions to try to identify whether there are warning signs, and undertaking detailed due diligence on the receiving scheme.

It is also notable that this case demonstrates the same approach that the PO took in the January determinations which is that where members have a right to a transfer, they cannot be deprived of this.

Cases where transfers were made

Background

The receiving scheme in these cases was the Capita Oak Pension Scheme which was the subject of a previous PO determination issued in December 2014. That case involved Mr X, who had transferred his benefits from a public service pension scheme to the Capita Oak Pension Scheme, but subsequently became concerned about his decision and requested a transfer out. The PO upheld Mr X's complaint that the trustee of the Capita Oak Pension Scheme had failed to comply with this request and directed the trustee to make the transfer, noting that if it does not comply Mr X may attempt to enforce the direction through the courts.

Facts

The April 2015 cases where transfers were made relate to complaints brought by the same member (Mr Winning) against two different personal pension providers. In 2012 Mr Winning requested that transfers be made from both schemes to the Capita Oak Pension Scheme. The transfers were made in late 2012 and Mr Winning signed forms discharging each of the providers from any liability.

Mr Winning subsequently had difficulties contacting the Capita Oak Pension Scheme and became concerned about his benefits. He claims that the providers did not make the necessary checks before making the transfers and as redress wants the providers to pay him the transfer value.

PO's conclusions

Whilst the PO expressed sympathy for Mr Winning's position, he did not uphold the complaints. He noted that both transfer applications appeared to comply with the requirements for a statutory right to transfer and that the Pensions Regulator did not issue guidance to providers about pension liberation until February 2013 (after the transfers had already been made). This meant that there was no reason to withhold the transfers and the PO therefore concluded that there had been no administrative failure by the providers.

Implications for trustees

These cases provide some comfort for trustees who make transfers, in that the PO once again stated that if members have a statutory transfer right, they cannot be deprived of this. However, in so far as the conclusion that there were no administrative failures relates to the level of due diligence and the failure to flag the risk of pension liberation, it is of limited application.

This is because these transfers pre-date the Regulator's guidance on pension liberation and the publication of the Code. The PO noted that the publication of the Regulator's guidance might be seen as a point of change in what might be regarded as good industry practice and that he could not apply current levels of knowledge and understanding or present standards of practice to a past situation.

If a scheme proceeded with a transfer now without flagging the risk of pension liberation to the member, having regard to the Regulator's guidance or following the steps in the Code, the outcome may well be different. In any event, taking these actions are useful steps for trustees to try to prevent complaints from arising in the first place.

These cases demonstrate that pension liberation continues to be a complex issue for trustees with no easy answer. If you would like advice in relation to a particular case or more generally on your scheme's processes for dealing with transfer requests, please get in touch with your usual DLA Piper pensions contact.

PUBLIC SERVICE PENSION SCHEMES

CODE OF PRACTICE

Background

Reform of public service pension schemes under the Public Service Pensions Act 2013 took effect on 1 April 2015. As part of this reform, the Pensions Regulator has responsibility for setting standards of practice in order to help the schemes meet governance and administration requirements.

In December 2013 the Regulator issued a consultation about a draft Code of Practice providing a single source of reference for public service schemes. The response to consultation was published in January 2015 along with an updated version of the Code, which was laid before Parliament.

In March 2015 an Order was made setting 1 April 2015 as the day for the coming into effect of the Code. The final form of the Code "*Governance and administration of public service pension schemes*" was added to the Regulator's website in April 2015.

The code of practice

The code of practice sets out the legal requirements for public service pension schemes in certain areas, contains practical guidance and sets out standards of conduct and practice expected of those who exercise functions in relation to those legal requirements. We set out below a brief overview of the areas which the code covers.

Governing your scheme

- Knowledge and understanding requirements for pension board members. This looks at the areas and degree of knowledge and understanding required, and acquiring, reviewing, updating and demonstrating knowledge and understanding.
- Conflicts of interest and representation. This includes practical guidance to help scheme managers in meeting the legal requirement to be satisfied that pension board members do not have any conflicts of interest.
- Publishing information about schemes. This relates to a legal requirement for scheme managers to publish information about the pension board and keep that information up to date.

Managing risks

- This addresses the requirement for scheme managers to establish and operate adequate internal controls.

Administration

- Practical guidance on the statutory requirements for record-keeping in the Public Service Pensions (Record Keeping and Miscellaneous Amendments) Regulations 2014.
- Maintaining contributions which addresses the need to monitor the payment of contributions, manage overdue contributions and report materially significant payment failures to the Regulator.
- Information to be provided to members including requirements in the Public Service Pensions Act 2013 in relation to benefit statements for DB members and requirements in the Disclosure Regulations.

Resolving issues

- This covers internal dispute resolution and reporting breaches of the law including guidance on judging whether a breach must be reported to the Regulator.

OTHER NEWS

PPF LEVY FAQs

Background

In its Levy Determination for 2015/16 published in December 2014 the PPF stated that for the 2015/16 levy year, last man standing schemes would be required to confirm that they have legal advice confirming their structure. The PPF therefore stated that after 31 March 2015 all schemes that have been classified as last man standing on their scheme returns will receive an email from the Pensions Regulator requiring them to confirm that they have received "appropriate legal advice" from an "appropriate solicitor" confirming that the current scheme rules do not contain any requirement or discretion for the trustees to segregate assets on cessation of participation of an employer.

In February the PPF published some Frequently Asked Questions in relation to the levy which included questions looking at what legal advice is required and the process for providing confirmation that the trustees have received the necessary legal advice. The process involves the Pensions Regulator requesting confirmation by email which contains a link to an online form hosted on the PPF's website, with the trustees having to submit the form by 29 May 2015.

April FAQs

During April the PPF added the form of the last man standing certificate to the document library on its website and published two further FAQs which cover the following issues.

Previous advice

The PPF states that schemes can rely on legal advice which they have obtained previously regarding their structure provided that:

- the scheme's structure has not changed since the advice was given; and
- the advice is clear and unambiguous regarding the scheme's structure.

Exclusion from last man standing status

The question asks why the PPF excludes from last man standing status schemes where discretion to segregate is at the option of a third party, noting that this is different from the legislative definition.

In short, the PPF confirms that the reason for this is that, unlike other last man standing schemes, it does not consider that these schemes in practice represent a lower risk to the PPF.

The PPF goes on to explain that in a situation where the employer has the power or discretion to decide, it could in practice be said that there is a de facto requirement for the trustees to segregate where the employer decides to direct them to do so. It goes on to state that where the employer has the power to decide, it is not possible for the PPF to say with certainty that the scheme would not come into assessment on the insolvency of an employer and, in consequence, the scheme should not qualify for a levy discount.

DC CHARGE CAP – DWP GUIDANCE

On 6 April the charge cap which applies to default arrangements of relevant DC qualifying schemes came into effect. The final form of the regulations, as well as guidance from the DWP, was published in March (as reported in the March 2015 edition of Pensions News).

The guidance from the DWP is for trustees and managers of occupational schemes, and looks at 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.

In April the DWP published an updated version of this guidance to reflect some amending regulations which were consulted on and made in March and came into force on 6 April 2015. These regulations amend the regulations containing the charge cap to make it clear that an arrangement is **not** a default arrangement if the only benefits it provides are attributable to AVCs. This clarification was needed because a scenario had come to light whereby, without amendment, in certain circumstances an arrangement which only received AVCs could have been caught by the charge cap.

HMRC NEWSLETTER – PENSION LIBERATION

On 2 April HMRC published Pension Schemes Services Newsletter 68. As well as including sections on DC flexibilities (reported in the Budget 2014 reforms section of this newsletter), the newsletter also includes a section on pension liberation.

This provides a reminder that from April 2015 scheme administrators will be required to provide additional information and declarations to HMRC. In addition, HMRC reports that it has:

- amended the information that must be provided to HMRC when a scheme changes its structure;
- amended the member ranges to be recorded on registration of a new scheme – HMRC also states that all schemes already registered will automatically be converted to one of the new ranges so when next using HMRC's online system after April 2015, scheme administrators should check that the member range for their scheme is correct and, if not, amend it through the event report; and
- removed the ability to amend a scheme administrator name online.

HMRC states that updated guidance will be provided in the new tax year.

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 April, 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.
- **DC reform guidance.** The Regulator intends to publish guides on DC reform (the Budget changes, governance standards and charges) in 2015. Guidance on communicating the flexibility reforms and on DB to DC transfers was finalised in 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.
- **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.
- **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.
- **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.
- **Transfers guidance.** In the response to consultation on the DB to DC transfers guidance, the Regulator stated that it will review its guidance on transfers in 2016 in light of experience and agrees that, through this process, the consolidation of material will be beneficial to trustees and their administrators.
- **Investment regulations.** A consultation in relation to some amendments to the investment regulations following recommendations made by the Law Commission in July 2014 closed 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 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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