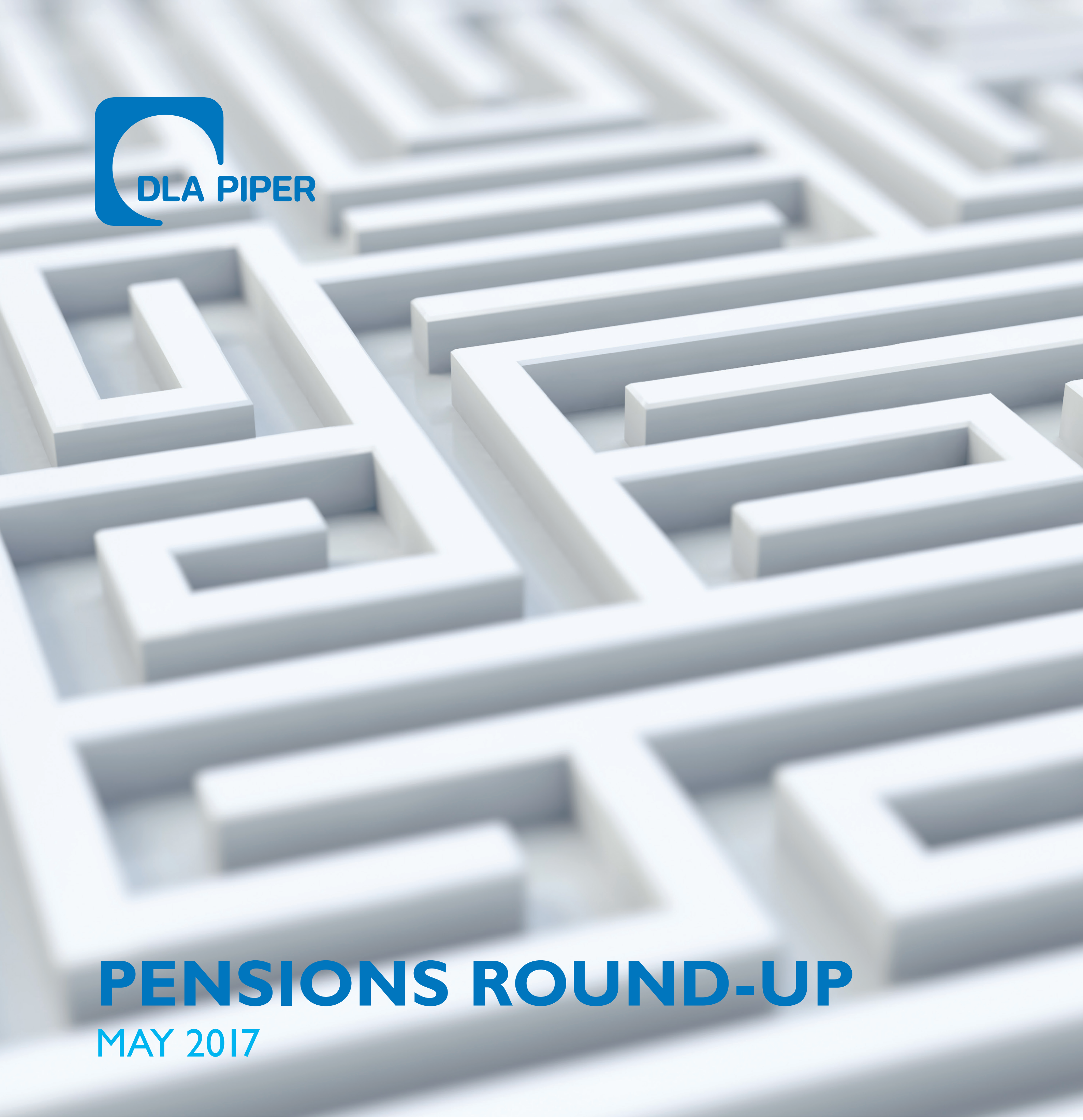


PENSIONS ROUND-UP

MAY 2017

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 May 2017 including the following.

- **The Pensions Regulator:** the publication of the Regulator's 2017 annual funding statement together with a document setting out a summary of the key messages in the statement.
- **Automatic enrolment:** a reminder about the duties for new businesses which start up from October 2017; a regulatory intervention report about a case in which an employer incurred an escalating penalty of £40,000; and the Regulator's latest quarterly compliance and enforcement bulletin.
- **Case law:** an update on some upcoming cases; and a High Court judgment concerning a case in which a scheme employer challenged the trustees' 2011 decision to amend the scheme rules to introduce a power to grant discretionary increases and a 2013 decision to grant an increase.
- **Public service pension schemes:** the results of the Regulator's latest governance and administration survey in relation to public service pension schemes; and the publication by the LGPS Scheme Advisory Board of a Code of Transparency for LGPS asset managers.
- **Other news:** an announcement from the Association of British Insurers about an interim phase of the pensions dashboard project; the publication of an HMRC newsletter about the Scottish rate of Income Tax; an update from the FCA about the review of Independent Governance Committees; the findings of the FCA's review into the market for pensions and investment advice; and the publication of the FCA's final rules in relation to information prompts in the annuity market.
- **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

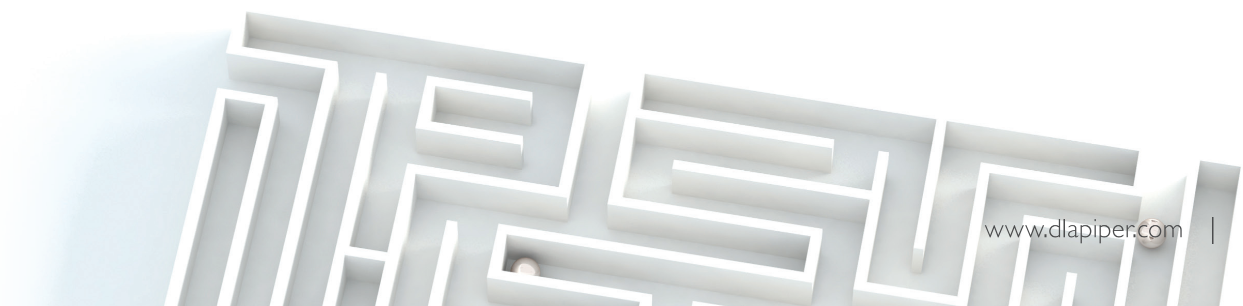
ANNUAL FUNDING STATEMENT

On 15 May the Regulator published its 2017 annual funding statement, together with a document setting out a summary of the key messages. The statement is primarily aimed at schemes undertaking valuations with effective dates in the period 22 September 2016 to 21 September 2017 (**"2017 valuations"**) and highlights some of the key issues the Regulator has identified facing schemes with 2017 valuations. The Regulator states that: (i) schemes will have been affected differently by market conditions and its analysis has identified groups of schemes which have been impacted in particular ways; and (ii) trustees and employers should use the statement to identify whether their scheme falls into those groups and take appropriate action. Points of note in the statement include the following.

- In relation to affordability and managing deficits, the statement includes a table dividing schemes into groups according to employer type and scheme characteristics and setting out what the Regulator expects of trustees for each group. For example, where a scheme has strong or tending to strong employers and a combination of weak technical provisions and a long recovery plan, the Regulator expects trustees to seek higher contributions now to mitigate against the risk of the employer covenant weakening and other scheme risks materialising in the future.
- Where trustees are looking to change the method used to set the discount rate, the Regulator expects them to have a sound rationale for the change and to document it clearly. Likewise, where trustees continue to use the same method, they should document why it remains prudent.
- Trustees should have a contingency plan in place detailing the actions they would need to take to correct the scheme's position in the event of a downside risk materialising. The plan needs to be agreed with the employer in advance and should be legally enforceable.
- The Regulator will be placing more focus on proactive casework and improving the way it identifies cases that present the biggest risks to members, intervening early before recovery plans are submitted.
- The Regulator is likely to intervene where it believes schemes are not being treated fairly, particularly where recovery plan end dates are being extended unnecessarily, and where the employer covenant is constrained and total payments to shareholders are being prioritised therefore restricting or reducing the level of contributions being paid to the scheme.
- As part of its drive to raise governance standards, the Regulator is "*taking a tougher approach*" where schemes fail to submit their valuations on time. The Regulator is more likely to take enforcement action when delays could have been predicted or where trustees do not engage with it regarding the breach.

MASTER TRUSTS

Whilst the provisions of the Pension Schemes Act 2017 introducing an authorisation and supervision regime for master trusts are expected to be commenced in full in October 2018, some of the provisions are already in force in relation to existing master trusts with retrospective effect from 20 October 2016. These include: (i) provisions requiring the Regulator to be notified when certain "triggering events" (such as a decision to wind up the scheme) take place and when the triggering event has been resolved; and (ii) restrictions on increasing or imposing administration charges while the scheme is in a triggering event period. The Regulator has published forms that can be used to notify it of a triggering event and a resolved triggering event, and guidance can also be found about these duties on the Regulator's website. The guidance also states that the Regulator expects those involved with running master trusts to understand how the Pension Schemes Act 2017 affects their scheme now and to start making preparations for the future.



AUTOMATIC ENROLMENT

A REMINDER FOR NEW EMPLOYERS

The automatic enrolment duties are being introduced over a staging period which began on 1 October 2012. The legislation provides for a series of staging dates by size of employer working from largest to smallest with size measured by the size of the PAYE scheme as at 1 April 2012. These dates ran from 1 October 2012 to 1 April 2017 and therefore businesses which existed before April 2012 have now passed their staging date. The legislation also provides for staging dates from 1 May 2017 to 1 February 2018 for employers who first pay PAYE income between 1 April 2012 and 30 September 2017.

For employers who first pay PAYE income on or after 1 October 2017 the duties apply from the day on which the first worker begins to be employed by that employer. On 10 May the Regulator issued a press release alerting new businesses which start up from October 2017 to the fact that they will need to put pension plans in place alongside all the usual tasks associated with setting up a business. The press release also reports that the Regulator will write to employers to tell them what they need to do and by when and has launched a new online suite of information and tools for new businesses.

REGULATORY INTERVENTION REPORT

On 8 May the Regulator issued a warning to employers not to ignore their automatic enrolment duties and published a regulatory intervention report about a case in which an employer incurred a penalty of £40,000 for failures in relation to automatic enrolment.

The employer's staging date was 1 May 2014 which meant that it was due to complete its declaration of compliance by 30 September 2014 but did not do so. The Regulator issued a Compliance Notice and, following the employer's failure to comply with the Notice, issued a fixed penalty of £400. The employer requested a review of the penalty and stated that its failure to comply was due to pressures of work. However, the Regulator did not consider this to be a reasonable excuse because it had sent the employer several reminders of its duties in the 12 months before its staging date. The £400 penalty was paid in September 2015 but the employer still failed to comply with the Compliance Notice. This resulted in the Regulator issuing an Escalating Penalty Notice whereby the employer would be fined £2,500 per day if it did not meet the requirements by 7 December 2015. The accrual under the Escalating Penalty Notice started on 8 December 2015 and stopped on 23 December 2015 once the employer had completed a declaration of compliance and provided evidence of compliance. By this time, the Escalating Penalty amounted to £40,000. The employer failed to pay the penalty and the Regulator lodged a claim with the courts to recover the debt. Ultimately the employer paid the penalty in full and the Regulator's claim was withdrawn.

COMPLIANCE AND ENFORCEMENT BULLETIN

On 11 May the Regulator published its latest quarterly compliance and enforcement bulletin in relation to automatic enrolment which covers the period 1 January to 31 March 2017. The bulletin reports that the Regulator's use of Fixed Penalty Notices and Escalating Penalty Notices has increased in line with the expansion in the number of employers with automatic enrolment responsibilities. During the relevant period the Regulator issued 8,955 Compliance Notices (taking the total to 40,206), 487 Unpaid Contributions Notices (total 1,592), 4,673 Fixed Penalty Notices (total 14,502) and 1,043 Escalating Penalty Notices (total 2,517).

The Regulator has also published the following two lists on its website: (i) employers who have paid their Escalating Penalty Notice but remain non-compliant; and (ii) employers who failed to pay their Escalating Penalty Notice and as a result have been made subject to a court order. The lists will be updated each quarter alongside the publication of the compliance and enforcement bulletin and the Regulator intends that the publication of the lists will highlight the importance of employers meeting their automatic enrolment requirements.

LEGISLATION AND CASE LAW

DATA PROTECTION – ONE YEAR TO GO

Significant changes to data protection law are due to come into force on 25 May 2018 in the form of a new EU General Data Protection Regulation (GDPR) which will impact on the way that pension schemes can lawfully collect, use, retain and share information about members. With new duties to report breaches and the potential for significant financial penalties, it is important for trustees to ensure that they are ready to comply with the GDPR. Our recent Pensions Alert provides an overview of some of the differences between the GDPR and current data protection legislation in the UK, and sets out some action points for trustees.

STATE PENSION AGE REVIEW

The Pensions Act 2014 makes provision for the periodic review of State Pension age (SPA). It also states that a report must be published on the outcome of each review and that the first report must be published before 7 May 2017. In March 2017 two reports were published – a report of the Independent Review of SPA and a report by the Government Actuary's Department – which will help inform the Government's review of SPA. A House of Commons Library Briefing Paper dated 2 May 2017 about the review of SPA reports that on 28 April a DWP spokesperson said that a decision on the SPA review would be made after the General Election.

CHANGING FROM RPI TO CPI

In previous editions of Pensions Round-Up we have reported on the High Court's July 2015 judgment and the Court of Appeal's November 2016 judgment looking at whether the rules of a particular scheme permit the trustees to substitute RPI with CPI for the purposes of pension increases and revaluation. The key issue was the construction of the words "*or any replacement adopted by the Trustees without prejudicing Approval*". The High Court and the Court of Appeal both concluded that this wording means the RPI or any index that replaces the RPI and is adopted by the trustees. This is a two stage process in which RPI is replaced by something else which the trustees then adopt and means that, as RPI has not been replaced, the trustees cannot adopt a different index. In May the Supreme Court reported that on 6 April 2017 the employer in this case was granted permission to appeal against the Court of Appeal's judgment. A date for the hearing has not yet been published.

GMP EQUALISATION

In the March 2017 edition of Pensions Round-Up we reported on the Government's response to its November 2016 consultation about equalisation for the effect of Guaranteed Minimum Pensions (GMPs). One of the points made in that response was that, notwithstanding the Government's opinion that equalisation is required, it will consider its position in light of any legal decision resulting from a case likely to come before the courts on this issue. In May it was reported that proceedings have been lodged with the High Court in which a trustee is seeking directions in relation to two broad questions: (i) whether the trustee is required to equalise its schemes for the effect of GMPs; and (ii) if so, how such equalisation should be achieved.

OBJECTIVE JUSTIFICATION

As reported in previous editions of Pensions Round-Up, earlier this year the Employment Tribunal issued judgments in relation to separate claims that transitional provisions in two public service pension schemes constitute unlawful discrimination. The claim in relation to the judicial pension scheme was upheld but the claim in relation to the firefighters' pension scheme was dismissed. Both judgments are being appealed. In May the Fire Brigades Union added an update to its website reporting that its appeal against the judgment on the firefighters' pension scheme has "*passed the sifting process and will be progressed*". The update also reports that the Employment Appeal Tribunal has made an order consolidating these two appeals, and that whilst the judges may raise an objection to the consolidated appeal, "*at the moment it is being progressed as one*".

CASE LAW

CHALLENGES TO TRUSTEE DECISIONS

On 19 May the High Court issued its judgment in a case in which a scheme employer challenged decisions of the scheme trustees. The judgment is lengthy (around 160 pages) and covers a number of issues. In this article we provide a brief overview of some of the key issues considered.

Background

The scheme's rules provided for pensions to be increased in accordance with annual Pension Increase Review Orders made by the Treasury. In 2010 it was announced that in future these Orders would provide for increases by reference to CPI rather than RPI. The Orders used CPI from 2011. The drafting of the scheme's rules meant that the basis for pension increases under the scheme automatically switched to CPI. There were 12 trustees of the scheme, six of whom were appointed by the employer and six of whom were elected by the members (MNTs). The power of amendment rested with the trustees although a two thirds majority was required. In 2011 the trustees introduced a power for them to grant discretionary increases, with the exercise of the power requiring a two thirds majority. In 2013 the trustees voted by a majority to grant a discretionary increase of 0.2% which was 50% of the gap between RPI and CPI. The employer argued that these decisions – to amend the scheme and then to exercise the new power – were invalid.

The High Court's conclusions

The power of amendment was subject to a number of provisos including that amendments could not be made which would have the effect of changing the purposes of the scheme. Clause 2 of the deed about the scheme's main object included that the scheme "*is not in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom*". The court thought that the exercise of the new discretionary power would not always and inevitably involve a benevolent or compassionate payment or a payment otherwise than for the purposes of the scheme and rejected the employer's argument that the amendment was outside the scope and purpose of the power of amendment. The employer also submitted that the fundamental characteristic of a defined benefit pension scheme is that it exists to provide deferred pay from an employer to an employee, that the purpose of the scheme is to deliver the benefits defined by the scheme and the benefits can only change if it is in accordance with the employer's wishes. The court disagreed and concluded that it is not appropriate to use a general concept such as the purposes of a pension scheme to write a requirement for employer consent into the unilateral power of amendment. It was concluded that the March 2011 decision was a valid exercise of the amendment power.

In relation to the 2013 decision to grant a discretionary increase of 0.2%, the court concluded that this was not outside the scope of the power to grant such increases. The court thought that this power was subject to clause 2 but that the increase was not a compassionate payment as it was available to all pensioners whatever their circumstances. Neither did the court think that it was a benevolent payment. It also concluded that the decision to grant the increase was for the purposes of the scheme and not for a collateral or ulterior purpose. The court concluded that the existence of a deficit and the absence of employer consent were relevant considerations but did not mean that the exercise of the power must be for an impermissible purpose. In relation to the decision-making process, the employer argued that the MNTs who voted for the increase had not given proper consideration to the matters relevant to the decision but had "pre-determined" their decision. The court considered the evidence in relation to each MNT and concluded that none of them had failed to give active and genuine consideration to the exercise of the power or fettered their discretion. The employer also argued that there were nine respects in which the MNTs failed to take account of all relevant and no irrelevant considerations, for example, they failed to take account of the employer's wishes or the potential cost of granting increases year on year. The court considered each of the nine challenges in turn against the evidence in relation to the trustees' decision-making and rejected all of the challenges.

The case provides a useful demonstration of the court's approach to analysing the unilateral amendment power and its detailed consideration of the trustees' decision-making process. It should be noted that the employer has been granted permission to appeal this decision.

PUBLIC SERVICE PENSION SCHEMES

GOVERNANCE AND ADMINISTRATION SURVEY

In May the Pensions Regulator published the results of its latest governance and administration survey in relation to public service pension schemes which it states supports its existing assessment that the top risks in this landscape are around scheme governance, record-keeping, internal controls and member communications. The Regulator published a "*Summary of results and commentary*" which sets out how it has interpreted the findings, its expectations of those involved in running the schemes and what it will be doing over the next year to address these issues. The Regulator also published the full research report which sets out the responses to all survey questions. Actions for the next year highlighted in the summary document include the following.

- As part of the Regulator's 21st century trusteeship and governance work, it will provide clarity on the roles and responsibilities of those involved in running public service pension schemes. The Regulator will clearly set out the standards it expects of all parties and provide tools they can use to meet the standards.
- The Regulator notes that all schemes should conduct an annual data review and put a plan in place to put things right if required. To ensure record-keeping failures are identified and tackled effectively, the Regulator will provide additional education in 2017 and will also set out more clearly its expectations of scheme managers regarding data security. The summary also notes that from 2018 scheme managers will be required to report on their record-keeping standards in the scheme return.

It is also worth noting the following points in the summary document.

- The Regulator notes that only 43% of respondents reported that all their members received their annual benefit statements on time. The Regulator recognises that public service schemes initially faced challenges meeting this new duty but states that it expects schemes to have made significant progress by now. The Regulator states that it expects member outcomes, in particular the proportion of members who receive their statements on time, to improve dramatically, and that its "*tolerance for schemes' shortcomings, particularly in the areas identified in this report, is reducing*".
- In a section entitled "*Taking action*" the Regulator states that scheme managers should be aware that it is "*more likely to move to use of [its] enforcement powers this year*". The Regulator states that it has and will "*take enforcement action where scheme managers have not taken sufficient action to address issues or meet their duties*".

LOCAL GOVERNMENT PENSION SCHEME

In May the LGPS Scheme Advisory Board published a Code of Transparency for LGPS asset managers to assist LGPS funds in obtaining the data they require in order to report costs on a transparent basis. The Code is voluntary and covers the provision of transparent and consistent investment cost and fee information between Investment Managers and Administering Authorities.

The Code provides that Investment Managers who sign up to the Code will, within a period of 12 months, put in place the systems necessary to allow the completion and automatic submission of a template to each Administering Authority that it is appointed by. The template lists a series of broad headings for reporting costs and expenses. The Code states that "automatic" submission means that this takes place without the client having to make a request. The Code also provides that the template must be submitted automatically each year to each Administering Authority if required. In terms of the templates: (i) there are separate templates for segregated portfolio management and for pooled funds; (ii) the current templates only apply in relation to listed asset classes; and (iii) templates for unlisted asset classes such as private equity will be developed in due course.

OTHER NEWS

PPF LEVY

In March 2017 the Pension Protection Fund (PPF) published a consultation on levy rules for the third PPF levy triennium starting in 2018/19. On 10 May the PPF added an update to its website reporting that, in support of the consultation, PPF and Experian representatives have participated in a number of live webinar broadcasts and that recordings of the webinars are now available. The update provides links to three webinars: (1) overview of the consultation – insolvency risk measurement; (2) risk reduction – guarantees, certifying deficit reductions, good governance; and (3) small schemes.

DB TRANSFERS

On 22 May the Regulator published a response to a Freedom of Information request about transfers out of DB schemes. The response reports that for the period 1 April 2016 to 31 March 2017 DB schemes reported a total of 67,700 transfers out, but that not all schemes have reported the number of transfers and therefore the Regulator's estimate is that around 80,000 transfers were made.

PENSIONS DASHBOARD

On 17 May the Association of British Insurers (ABI) announced that it will establish and lead an interim phase of the pensions dashboard project to maintain momentum with the development of the service. The ABI notes that the project to develop a prototype closes at the end of May and the General Election means that there will be a pause before the Government can resume its role in developing the service.

The ABI states that whilst there has been good progress on the technology for dashboards, there is still a lot to do, such as understanding consumer needs in detail, the costs and benefits for all parts of the industry, and to further develop data standards. The ABI reports that all of the firms currently contributing to the project have agreed to start fresh work on these issues.

The four main aims of the interim phase of the project are therefore to: (i) establish a cost benefit analysis for the wider industry; (ii) research customer needs and establish what features people are likely to find most useful in a dashboard; (iii) establish the requirements and costs for a secure end-to-end service between data providers and data consumers; and (iv) further develop the technical data standards for all firms and work with the Pensions Administration Standards Association on agreeing a code of conduct in line with requirements from the Pensions Regulator.

HMRC NEWSLETTER

On 12 May HMRC published "*Pension schemes Scottish rate of Income Tax newsletter*". HMRC explains that: (i) the introduction of the Scottish rate of Income Tax means that pension scheme members receive tax relief on their contributions based on their residency tax status; and (ii) for administrators operating relief at source pension schemes, if the Scottish rate of Income Tax differs from the rest of UK rate, this affects the amount of tax relief given to each member. The newsletter notes that administrators operating a relief at source pension scheme must submit an annual return of individual information by 5 July each year and states that HMRC will use the data submitted on the previous year's return to tell administrators the correct relief at source rates to apply to their scheme members in the following tax year. HMRC will provide the relief at source rates electronically and will do this in January each year from 2018 onwards.

HMRC also explains that it is introducing a new electronic service (the Secure Data Exchange Service) for the submission of the annual return of individual information and from April 2018 this service will run alongside existing submission methods. However, from 2019 administrators will only be able to submit the annual return of individual information electronically and will do this using the Secure Data Exchange Service. The newsletter provides information for administrators about submitting the annual return to HMRC from 2018 onwards.

OTHER NEWS

FINANCIAL CONDUCT AUTHORITY

In May the Financial Conduct Authority (FCA) issued an update and some publications relevant to workplace pensions.

Independent Governance Committees

In April 2015 new rules came into force requiring providers that operate workplace personal pension schemes to establish and maintain Independent Governance Committees (IGCs). IGCs have a duty to scrutinise the value for money of the provider's workplace personal pension schemes, raising concerns and making recommendations to the provider's board as appropriate. In its 2016/17 Business Plan the FCA stated that it would be conducting a review of the effectiveness of IGCs. On 4 May the FCA published an update which reports that during 2016 it conducted, jointly with the DWP, a review of industry progress against the Independent Project Board's recommendations on workplace pensions, and that it published its findings report in December 2016 which was broadly supportive of the effectiveness of IGCs in implementing the Independent Project Board's recommendations. Given this, the FCA has decided to defer the full IGC review to allow it to focus on other priorities as set out in its 2017/18 Business Plan. (Information on the 2017/18 Business Plan can be found in the April 2017 edition of Pensions Round-Up.)

Pensions and investment advice

On 18 May the FCA published the findings from its review into the market for pensions and investment advice. The review assessed 1,142 individual pieces of advice given by 656 firms against the suitability and disclosure rules in the Conduct of Business sourcebook. The findings included that: in 93.1% of cases the sector provides suitable advice and in 52.9% of cases the sector provides acceptable disclosure. The main area in which there was a high level of unacceptable disclosure was with firms' initial disclosure which includes their costs and services.

In terms of next steps, the FCA will commence a communication programme over the course of 2017 and into 2018 which will look at the key areas where there is scope for improvement, and will provide more detail on its findings including communicating examples of good and poor practice. The FCA also intends to repeat the review in 2019.

Information prompts in the annuity market

Following a consultation issued in November 2016, on 26 May 2017 the FCA published a Policy Statement setting out its final rules which will require firms to inform consumers, by providing an information prompt, how much they could gain from shopping around and switching provider before they buy an annuity. The Policy Statement also provides the FCA's response to the feedback received to the consultation. The FCA reports that in general respondents were supportive of the principle of the information prompt but, based on feedback, it has made some changes to its final rules compared to those in the November 2016 consultation including a requirement to include a clear and prominent warning about enhanced annuities. The consultation had proposed that the requirement would apply to firms from 1 September 2017 but, in light of feedback that this implementation date was too challenging, the final rules require firms to implement the information prompt by 1 March 2018.

ON THE HORIZON

DATE	DEVELOPMENT
Unknown	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 other reforms.
	In March 2017 the Government published a response to its consultation on **equalisation for the effect of GMPs** noting that a number of issues will be considered with the industry working group. The date that any final form documents will be published is not known.
	The closing date for comments on the DWP's **Green Paper on DB schemes** was 14 May 2017 but a date has not been given for publication of the DWP's response.
Spring 2017	The response to the December 2016 consultation about measures to tackle **pension scams** is expected to be published.
	Following its Discussion Paper on **21st century trusteeship and governance**, an education campaign by the Regulator is expected to start.
Second quarter of 2017	Following a consultation published in October 2016, the FCA is expected to publish rules aimed at standardising the disclosure of **transaction costs** incurred by pension investments.
Autumn 2017	A **factsheet** is expected to be published by the FCA and the Pensions Regulator in September 2017 about what help employers and trustees can provide on financial matters without being subject to regulation.
	In the Autumn the PPF is expected to publish a consultation setting out its conclusions in relation to the **levy for the third triennium** alongside a draft set of rules for 2018/19.
	The **cap on early exit charges** for occupational pension schemes and the extension of the **ban on member-borne commission** is expected to come into force on 1 October 2017.
	Following a consultation issued in April 2017 amendments to the **employer debt legislation** are expected to come into force on 1 October 2017.
2017	In April 2017 when measures were removed from the **Finance Bill** (including a tax exemption for **employer-arranged pensions advice** and the reduction in the **money purchase annual allowance** to £4,000) the Treasury stated that the Government would legislate for these provisions at the earliest opportunity at the start of the new Parliament.
	A review of **automatic enrolment** will take place in 2017. A report setting out policy recommendations is expected towards the end of 2017.
	Following a December 2016 call for evidence, a consultation is expected on **bulk transfers of DC pensions without member consent**.
	The transitional period in which employers and schemes may continue to use the **VAT** treatment in VAT Notice 700/17 ends on 31 December 2017.
	The DWP is expected to consider further measures in relation to **transfers of contracted-out rights** to schemes that have never been contracted-out.
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.
2019	Member States must transpose the **IORP II Directive** into national law by 13 January 2019.
	The Government will ensure the industry designs, funds and launches a **pensions dashboard** by 2019.

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