

## Pensions and Employment: Pensions Bulletin

28th January 2016 / Issue 1

Legal and regulatory developments in pensions

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There is no Employment Update this week

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## Forthcoming Events

### I. Watch list

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/ action
1.	Abolition of refund of contributions for members of occupational schemes with at least 30 days' pensionable service who are just provided with money purchase benefits and who start pensionable service after 30th September, 2015	1st October, 2015	<a href="#">Pensions Bulletin 15/09</a>  <b>Action point:</b> Scheme rules should have been amended where necessary to remove right to refund of contributions where member has at least 30 days' qualifying service but less than 2 years' qualifying service
2.	Reduction in annual allowance for high income individuals <b>Note:</b> Up to £80,000 annual allowance for tax year ending 6th April, 2016	6th April, 2016	<a href="#">Summer Budget 2015 Supplement</a>
3.	Reduction in Lifetime Allowance from £1.25 million to £1 million	6th April, 2016	<a href="#">Pensions Bulletin 15/19</a>

No.	Topic	Deadline	Further information/ action
4.	Members who intend to apply for Fixed Protection 2016 ("FP 2016") must stop accruing benefits	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>  Think about communicating 6th April, 2016 reduction in LTA and possible protections highlighting necessity of ceasing accrual for FP 2016. Pensions Bulletin 15/20  As with FP 2012 and FP 2014, schemes may wish to add protective provisions to their trust deed and rules to prevent inadvertent loss of FP 2016. Please contact the person you usually deal with at Slaughter and May if you would like to add a protective provision to your scheme. The Deed of Amendment would need to be in place before 6th April, 2016
5.	Abolition of DB contracting-out: managing additional costs	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>  Checklist available to clients on request. Planning for this should be well developed by now

No.	Topic	Deadline	Further information/ action
6.	Abolition of DB contracting-out: practicalities	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>  Checklist available to clients on request. Planning for this should be well developed by now  Employers to notify affected employees of change in contracted-out status "at the earliest opportunity" and in any event by 6th May, 2016  Schemes to notify affected members before, or as soon as possible after, 6th April, 2016 and in any event by 6th July, 2016  Change template contracts of employment for new joiners to remove references to contracted-out employment

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No.	Topic	Deadline	Further information/ action
7.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer's staging date	For example employers with a March 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016  Publication available to clients on request from usual pensions contact
8.	First Chair's annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6th July, 2015)	For example, schemes with a 31st December year end must submit statement by 31st July, 2016  Client note dated June, 2015 available from <a href="#">Lynsey Richards</a>
9.	Data protection: New Regulation	2018	<a href="#">This Pensions Bulletin</a>

## New Law

### II. *Stop press: Consultation on further changes to auto-enrolment legislation*

On 26th January, 2016, the DWP published a consultation on technical changes to automatic enrolment.

The changes proposed are, in summary:

- introduction of a discretion for employers to exempt from automatic enrolment directors of “director-only” companies (i.e. where all the employees are directors - single director companies are already exempt),
- introduction of a discretion for employers to exempt from automatic enrolment “genuine partners” of limited liability partnerships,
- extension of the exemption that currently applies where an employer has reasonable grounds to believe that an employee has transitional tax protection to the new protections (Individual Protection 2016 and Fixed Protection 2016) that take effect on 6th April, 2016,
- introducing a single deadline for compliance for re-declarations (there are currently 2 deadlines, depending on whether or not the employer has any people to re-enrol). The proposed deadline will be 5 months after the third anniversary of the employer's staging date, and
- relaxation of the deadline for notifying the Pensions Regulator if bringing forward a

staging date, from one month to one day before the proposed new date.

The changes are expected to take effect on 6th April, 2016.

The Consultation Paper, on which responses are invited by 16th February, 2016 is on the [Gov.uk website](#).

### III. **Abolition of DB contracting-out: Bulk transfers without consent**

[Pensions Bulletin 15/17](#) referred to draft regulations published by the DWP on 21st October, 2015 making “minor and technical” changes to contracting-out legislation ahead of 6th April, 2016.

These include amendments to the Transfer Regulations<sup>1</sup> so that transfers without consent can be made only to schemes that were formerly contracted-out on a salary related basis (“former COSR schemes”). This means that no pension scheme established after 6th April, 2016 can be used for “without consent transfers” which involve

<sup>1</sup> The Contracting-out (Transfer and Transfer Payment) Regulations 1996 (SI 1996/1462).

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contracted-out rights (as it will no longer be possible to establish a new COSR scheme).

**Comment:** This proposed restriction will have a significant impact on how UK businesses can manage the accrued contracted-out pension rights of their current and former employees, particularly where the transfer involves the accrued rights of deferred or pensioner members in respect of whom it would not be practicable to obtain consent. It is particularly material to a corporate demerger or equivalent where contracted-out rights are involved that is likely to cross the 5th April, 2016 deadline.

The Association of Pension Lawyers has suggested as an alternative that the DWP permits transfers of contracted-out rights to non-former COSR schemes that contain equivalent rules concerning contracted-out rights. But, to date, the DWP has stated that it does not propose to change the draft regulations. It will, though, give “serious consideration” to making further legislative changes post 6th April, 2016.

#### IV. Chancellor announces cap on early exit charges

On 19th January, 2016, the Chancellor of the Exchequer, speaking at Treasury Oral Questions in

the House of Commons, announced an end to early exit charges.

The FCA will be required to introduce a cap on excessive early exit charges as part of the Government’s response to its 30th July, 2015 consultation on pension transfers and early exit charges ([Pensions Bulletin 15/14](#)). The consultation response is to be published “shortly”.

The FCA will consult fully on the level of the cap in due course.

**Comment:** The FCA cap will apply only to contract-based pension schemes. But the Pensions Minister has apparently tweeted that a similar cap will apply to trust-based schemes.

#### V. Government response to consultation on creating secondary annuity market

On 15th December, 2015, HM Treasury and the DWP jointly published a response to the March 2015 Budget consultation on removing restrictions on buying and selling annuities.

The main points coming out of the responses to the consultation were:

- there was broad agreement with the Government’s view that the right decision for most people is to retain their annuity,
- most responses argued in favour of allowing providers to buy back their own annuities, but only indirectly or after a competitive price had been determined, for example through an intermediary bidding platform,
- most responses acknowledged the need for a wide range of purchasers to create an effective market, but also argued that they should be restricted to FCA-authorized entities,
- most responses agreed that the scope of annuities within the market should include any individual annuities held in an individual’s own name, although a “significant proportion” thought annuities held by occupational pension schemes should also be in scope, and
- most responses also agreed it was appropriate for the FCA to monitor fees charged by providers which cover the administrative costs they incur in allowing an assignment.

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The Government says it is “committed” to implementing the secondary market by April 2017.

The Government has decided:

- to permit “indirect” buy-back through brokers, financial advisers or other intermediaries. It plans to legislate to create a further regulated activity for buying back an annuity. Annuity providers will need to hold this permission in order to buy back their annuities through a regulated intermediary. The Government expects that the FCA will consult on its approach to authorise firms for this permission,
- that insurers should be able to buy back directly “low value” annuities from annuity holders. It will be consulting on the details of low value annuity buy-back, including how to determine the level and form of any threshold, when it consults ahead of introducing secondary legislation later this year,
- that UK firms operating in the secondary market for annuities should be regulated by the FCA: the Government will legislate to ensure that purchasing rights under an annuity on the secondary market is a regulated activity,
- that annuities offered on the secondary market are not suitable for retail investors and the Government will legislate to prevent this,
- it does not propose to restrict any entities from purchasing on the “tertiary” market (i.e. where annuities assigned on the secondary market are re-assigned to another investor) but will be considering with the FCA whether to prevent UK retail investors from purchasing rights under annuities that are re-assigned on the “tertiary” market,
- it intends to maintain the current “unauthorised payment” tax charge where a consumer seeks to partially assign or partially surrender an annuity,
- that annuities that are general scheme assets within an occupational pension scheme, and not held in the name of the individual, will be out of scope. But annuities purchased using “safeguarded benefits” that are held outside of an occupational scheme, in the name of the individual, will be in scope, as will other types of annuities that a scheme has assigned to individuals (for example, deferred annuities and annuities purchased by a scheme following a scheme wind-up), and
- the Government is considering whether a permitted statutory override that would permit the variation of annuity contracts and scheme rules where both parties agree is necessary. It intends to remove the general prohibition on annuities being assigned. It will also legislate to introduce an advice requirement for relevant annuity holders to take regulated advice.

The consultation response is on the [Gov.uk website](#).

#### VI. Review of automatic enrolment earnings trigger and qualifying earnings band for 2016/17

On 15th December, 2015, the DWP announced the outcome of its annual review of the automatic enrolment earnings trigger and qualifying earnings band.

The **earnings trigger** is the level of earnings from which people are automatically enrolled. The **qualifying earnings band** sets the minimum contributions level for money purchase schemes. The Pensions Act 2008 requires these thresholds to be reviewed each year, and revised if appropriate, taking into account the prevailing rates of NICs, the PAYE personal tax allowance, basic state

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pension, inflation and any other factors that the Secretary of State considers appropriate.

So far as the **earnings trigger** is concerned, the Secretary of State has reconsidered all the review factors and decided that the current threshold of £10,000 per annum<sup>2</sup> remains the right level and so will not be changed for 2016/17.

So far as the **qualifying earnings band** is concerned, the lower limit will retain its link with the NICs lower earnings limit for 2016/17 of £5,824 per annum<sup>3</sup>. Similarly, the upper limit will retain its link to the NICs upper earnings limit for 2016/17 of £43,000 per annum<sup>4</sup>.

The changes take effect on 6th April, 2016.

## VII. Provisional agreement reached on the EU data protection reform

On 15th December, 2015, the European Parliament and the Council of the EU reached informal agreement on the long awaited General Data Protection Regulation (the “**Regulation**”). With competition-style fines and a generally stricter

<sup>2</sup> Equating to £192 per week or £833 per month.

<sup>3</sup> Equating to £112 per week or £485 per month.

<sup>4</sup> Equating to £827 per week or £3,583 per month.

regime for businesses to contend with, we believe that the Regulation is the most important development in the last few decades of EU data protection history.

The Regulation will take effect 2 years after it is formally approved, giving those affected until 2018 to comply with the new requirements.

A short briefing on the Regulation is available on our [website](#).

## Tax

### VIII. Pensions provisions in the Finance Bill 2016

The draft legislation for the Finance Bill 2016 was published on 9th December, 2015, reflecting announcements in the March and July, 2015 Budgets and the December, 2015 Autumn Statement.

Comments on the legislation are invited by 3rd February, 2016. The final details will be confirmed in the 2016 Budget on 16th March, 2016 and introduced in the Finance Bill, 2016, expected to receive Royal Assent in July, 2016, with most provisions backdated to 6th April, 2016.

### Reduction of Lifetime Allowance:

- the Lifetime Allowance is reduced from £1.25 million to £1 million from the 2016/2017 tax year onwards, and
- from 6th April, 2018, the Lifetime Allowance will be indexed, rising each year in line with the annual increase in the CPI.

A 16-page Schedule to the Bill introduces 2 new transitional protection regimes, “Fixed Protection 2016” (“**FP16**”) and “Individual Protection 2016” (“**IP16**”).

FP16 and IP16 work in a similar way to the 2 previous transitional protection regimes, FP14 and IP16, including that certain “protection cessation events” cause an individual to lose the benefit of protection. These include where there is further benefit accrual, where there is a transfer of sums or assets that is not permitted, or where a new pension arrangement relating to the individual is made otherwise than in permitted circumstances.

Unlike the previous protections, there is no cut-off date for applying: the wording currently refers to an application being made “on or after 6th April, 2016”.

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**Dependants' Scheme Pensions:** The 2015 Autumn Statement announced simplification of the anti-avoidance measure limiting the amount set aside to pay dependants' scheme pensions from a registered pension scheme so that it is not excessive in comparison with the amount used to provide the member's scheme pension. The measure requires a test to be carried out during the first year that any dependant is entitled to receive a scheme pension, and every year thereafter.

Under the proposed simplification, if the total value of a member's benefits under a pension scheme is not more than 25% of the standard lifetime allowance at the earlier of the member's death (if the member did not have an actual right to a scheme pension at death) or the date the member became entitled to the pension (rounded up to the nearest £100), the scheme administrator is authorised to pay the dependants' scheme pensions without carrying out the test.

If the total value exceeds the threshold, then the calculations will need to be carried out as currently to determine how much of the payment to the dependant is an authorised payment.

**Bridging pensions:** One of the conditions for a pension being a "scheme pension" is that the pension must not decrease except in prescribed circumstances. These include when State Pension

Age is reached, at which point the pension may reduce by an amount that does not exceed the relevant State Pension rates. This allows schemes to pay a bridging pension.

New regulations are to be introduced for 2016/17 and subsequent tax years to align the bridging pension easement with the single-tier State Pension taking effect on 6th April, 2016.

HMRC says it will consult with industry representatives on the drafting of these new regulations and clarify the exact implications of the single-tier State Pension on bridging pensions.

**Inheritance tax (1): Drawdown funds:** Currently an IHT charge arises if a person reduces the value of their estate by failing to exercise a right they have over property. It has been suggested that, if a member dies leaving funds designated for drawdown or flexi-access drawdown that have not been withdrawn, the unused drawdown funds may be subject to IHT under this provision.

The Finance Bill 2016 amends the IHT legislation to prevent such a charge arising.

The new exemption will be backdated to apply to deaths on or after 6th April, 2011 for dependants' drawdown and to 6th April, 2015 for flexi-access drawdown.

**Inheritance tax (2): Reforms to the taxation of non-domiciles:** As announced in the July 2015 Budget, and following a consultation published on 30th September, 2015, the deemed domicile test for IHT is amended to catch individuals who have been UK resident for at least 15 out of the last 20 tax years or who were born in the UK with a UK domicile of origin and have been UK resident for at least one of the last 2 tax years.

The change is expected to take effect on 6th April, 2017.

## IX. Pension Schemes Newsletter 74

This was published on 11th December, 2015.

Points to note are:

- **Reduction in the Lifetime Allowance ("LTA") - Messages to members:** The sample communications to scheme members, scheme administrators and independent financial advisers relating to the 6th April, 2016 reduction in the LTA referred to in [Pensions Bulletin 15/20](#) are appended to the Newsletter,
- **Applying for Individual Protection ("IP") 2016 or Fixed Protection ("FP") 2016:** As previously announced, HMRC is introducing



an interim process enabling affected individuals to make a temporary application for IP 2016 or FP 2016 prior to the new online self-service application system going live in July 2016. HMRC confirms that, once the new online system goes live, such members will need to make a full online application to ensure continued protection.

The Newsletter sets out details of the interim process. The temporary reference number that HMRC will supply will be valid only to 31st July, 2016. Scheme administrators will not be able to use this temporary reference number in any reporting to HMRC and must wait until a permanent reference number is provided by the scheme member. If the member fails to make a full online application, the application made under the interim process will not be valid and the member will be liable to an LTA tax charge on pension savings above the LTA. HMRC is to provide further guidance on the interim process in due course, including details of the format of the temporary and permanent reference numbers.

**Comment:** Where a member is proposing to take benefits after 5th April, 2016 but before permanent reference numbers are available (likely to be July 2016), it will

be safer for trustees to assume, when calculating whether any LTA charge arises, that the member **does not** have IP2016 or FP2016, even where the member has a temporary reference number. If a member wishes to rely on either protection, he may want to postpone taking benefits until he has a permanent reference number,

- **Certificate of residence requests:** HMRC has introduced a new digital service for requests for certificates of residence.

**Note:** UK occupational schemes that are reclaiming overseas withholding tax may be asked by tax authorities in other jurisdictions to provide evidence that they are (i) UK resident for tax purposes, and (ii) that they are IORPs.

So far as the former is concerned, HMRC provides a “certificate of residence”. For the latter, the Pensions Regulator has provided a sample letter that schemes can send to the relevant authorities (see **item XV** below).

- **Pension flexibility and trustees in bankruptcy:** The Newsletter sets out how pension flexibility payments made to trustees in bankruptcy are to be taxed and reported.

**Comment:** There are conflicting authorities on whether pensions that are not in payment can be accessed by a trustee in bankruptcy. The Court of Appeal is expected to decide the issue in **Horton v Henry** to be heard later this month.

- **Publication of the PTM on Gov.UK:** HMRC published the final version of its pensions tax manual (“PTM”) on Gov.uk (rather than on the HMRC website) on 8th December, 2015. The final version reflects comments on the draft version ([Pensions Bulletin 15/06](#)). It does not yet include guidance on the tapered annual allowance and the consequential alignment of pension input periods that take effect on 6th April, 2016.

The Registered Pension Scheme Manual (“RPSM”) will shortly be archived and available only on the National Archives website.

Newsletter 74 is on the [Gov.uk website](#).



## Cases

### X. Meaning of “ordinarily working in Great Britain” for the purposes of auto-enrolment: R on the application of Fleet Maritime Services (Bermuda) Limited v. The Pensions Regulator

On 21st December, 2015, the High Court held that a seafarer living in Great Britain, who spent most of his time sailing in foreign waters, was “ordinarily working in Great Britain” for the purposes of the auto-enrolment definition of “jobholder”, as he habitually joined and left his ship in Great Britain. But a seafarer living in Great Britain, who spends most of his time in foreign waters, will not “be ordinarily working in Great Britain” if the port where he joins and leaves the ship is outside Great Britain.

The employer, a Bermudan company which employs seafarers who work on ships owned by Carnival plc, brought an action for judicial review of the Pensions Regulator’s approach to, and guidance on, the duty to auto-enrol peripatetic workers who travel from place to place, such as seafarers and airline pilots.

In establishing where an employee ordinarily works, the Regulator relies on where the employee is **based**, rather than what his contract

of employment provides. This follows the test set out in the unfair dismissal case of **Lawson v Serco** [2006] IRLR 289, where the House of Lords held that a peripatetic employee’s base should be treated as their place of employment.

The High Court found that, although the Pensions Regulator had been applying the correct test, it had been wrong to treat seafarers who spent all of their tours of duty outside Great Britain as ordinarily working in Great Britain; the auto-enrolment duty applied only to those who were **based** in Great Britain.

### XI. Incorrectly executed rule amendment upheld: Trustees of the Scottish Solicitors’ Staff Pension Fund v Pattison and Sim

On 30th December, 2015, the Scottish Court of Session (equivalent to the Court of Appeal in England and Wales) dismissed an appeal by the partners of a firm of solicitors (the “**partners**”) in relation to a claim for arrears of pension contributions to the Scottish Solicitor’s Staff Pension Fund (the “**Fund**”).

The partners had argued that the trustees were not entitled to claim the arrears on the basis that amendments made to the Fund’s trust deed were invalid. Until 1991, amendments had to be

approved under a mechanism requiring two-thirds majority approval of each constituency involved in the Fund at 3 general meetings. The trustees were unable to produce evidence showing full compliance with this requirement on each and every occasion.

The Scottish Court noted that the latin maxim *omnia praesumuntur rite esse acta* (all things are presumed to have been done in due form) was relevant when considering transactions that had taken place a significant time in the past. In this case, the maxim applied and the onus was on the partners to prove that the proper process had **not** been followed. They were unable to do so, so that the various amendments had been properly effected.

**Comment:** Although this is a Scottish case, and the Scottish courts have been more inclined to focus on the substance of what is done rather than the technicalities of how it is achieved,<sup>5</sup> it will be interesting to see whether it is taken into account in the forthcoming appeal against the High Court decision in *Briggs v Gleeds* ([Pensions Bulletin 14/07](#)) (due to be heard in July, 2016). The Court

<sup>5</sup> See for example the Scottish Court of Session’s decision in *Low and Bonar plc v. Mercer* [2010] CSOH 47 (Pensions Bulletin 10/06).

there held that deeds of amendment were ineffective because the formalities for execution by partners had not been complied with, resulting in the scheme's deficit being increased by £45 million.

## **XII. Employer's duty to inform about pensions tax consequences: Recent Ombudsman determinations**

### **A. Overview**

1. Two recent Ombudsman's determinations (PO - 7096 (**Cherry**) and PO - 7511 (**Lennon**)) concern the extent to which employers have a duty to advise members about their pension options.
2. In both cases the Ombudsman decided, following the 1992 decision in **Scally v Southern Health Board**, that the employer had an implied contractual obligation to inform members of options open to them and the impact their actions may have.

### **B. Cherry**

1. On 22nd December, 2015, the Pensions Ombudsman determined that the

Police and Crime Commissioner of South Wales (the "**Commissioner**") had a duty of care as employer to provide a police officer with relevant information about the tax penalties on his retirement benefits if he were re-employed within a month of becoming entitled to his police pension.

2. Mr Cherry ("**C**") had left police service and had taken his scheme benefits in June 2011 but was re-employed in materially the same role less than a month later. This resulted in him losing his protected pension age under the Police Pension Scheme so that his past and future pension payments up to his reaching age 55 were unauthorised payments.
3. A Home Office circular explaining the April 2006 pensions tax changes was published on 6th April, 2006. Among other things, it provided links to the relevant pages in the RPSM setting out the circumstances in which members of the Police Pension Scheme could lose their protected pension age status.
4. Although the Ombudsman agreed that the Commissioner was under no legal

obligation to advise individual officers and employees about their tax and pension liabilities, as a "responsible employer" following **Scally** it had a duty of care to provide C with salient information about the tax implications of re-employment, as contained in the Home Office circular. The provision of this information did not amount to the giving of advice. The Commissioner's failure to provide it led to C incurring tax charges which it was reasonable for the Commissioner to meet.

5. The Ombudsman directed the Commissioner to pay C the amount due to HMRC in respect of the loss of protected pension age.

### **C. Lennon**

1. On 25th November, 2015, the Pensions Ombudsman determined that a member could not bring an action against her employer for failure to inform her about valuable pension transfer options but only because she was outside the 3 year time limit for bringing complaints.

2. The Ombudsman held, again following **Scally**, that the employer had an implied contractual obligation to take reasonable steps to inform a member that she had a right in 1992 to transfer her previous scheme benefits from the Teachers' Pension Scheme to the Local Government Pension Scheme on a "transfer club" basis within 12 months of becoming a member, and that the scheme had a discretion to allow transfers outside this period.
3. The Ombudsman held that the information the employer had sent to the member in 1992 did not satisfy this obligation, with the result that she missed the 12-month transfer window. But further information sent in 2005 did satisfy the obligation. The usual 3-year limitation period for bringing complaints to the Ombudsman ran from that date so that the member's complaint was now out of time.

**Comment:** These determinations highlight the importance of ensuring that appropriate steps are taken to inform members about legal and regulatory changes relating to pensions that may be relevant to them.

## Points in Practice

### XIII. Financial Services Compensation Scheme: Proposed changes

#### A. Overview

1. On 30th November, 2015, the FCA published CP15/40, proposing changes to the Financial Services Compensation Scheme ("FSCS") Sourcebook that would have an impact on trustees of occupational DC schemes.
2. The FSCS is the compensation scheme that works within the financial services regulatory regime. It provides compensation for "eligible claimants" in relation to "protected claims".
3. The FSCS is of relevance to occupational pension schemes in 2 respects:
  - 3.1 in relation to investment in insurance policies (in particular bulk buy-ins and investments in unit-linked life policies) and on buy-outs where benefits are secured by insurance policies, when the insurance company providing the policy is in default. In these circumstances, assuming the pension trustee is an eligible claimant,

it is, in general, entitled to claim compensation of 100% of the sum insured, and

- 3.2 in relation to non-insurance investments, in which case compensation is restricted as set out below.
4. The changes affect only compensation in relation to non-insurance investments.

#### C. Current position for non-insurance investments

1. Currently, pension scheme trustees can only claim on the FSCS in relation to non-insurance investments if the sponsoring employer of the scheme is not "large", as defined in the FCA rules. Compensation for such claims is in any event capped at £50,000 per claim.
3. A "large" employer is one that meets 2 of the following criteria:
  - 3.1 turnover of more than £6.5 million,
  - 3.2 balance sheet total of more than £3.26 million, and

3.3 more than 50 employees.

4. Where the pension scheme provides **money purchase benefits**, the FSCS is required to look through the trustees and treat each scheme member as having a separate claim (up to the £50,000 limit for each member in the case of investment claims).

5. Where a scheme provides **defined benefits**, the FSCS is not required to look through the trustees, but can only make a single payment of compensation to the trustees (up to the £50,000 limit).

#### **D. Proposed change**

1. The FCA is now proposing to amend its rules so that trustees of schemes with “large” employers will be eligible to claim on the FSCS where the benefits are money purchase benefits; the FCA says it is not clear that the size of the employer is relevant in the case of money purchase benefits since the employer is not providing any guarantee. The change means that members have the same protection for money purchase benefits irrespective of the size of the employer.

2. It also has the advantage of including master trusts within the ambit of the FSCS.

3. CP15/40, on which comments are invited by 29th February, 2016, is on the [FCA website](#).

#### **XIV. Pensions Regulator’s draft prosecution policy published for consultation**

On 11th January, 2016, the Pensions Regulator published a consultation on its draft prosecution policy. The annex to the policy sets out the specific criminal offences created by workplace pensions legislation which the Pensions Regulator has the power to prosecute. The policy sets out how it will use these prosecution powers.

The draft policy, on which comments are invited by 19th February, 2016, is on the Regulator’s [website](#).

#### **XV. Withholding tax reclaims by UK schemes: Pensions Regulator’s letter**

On 4th January, 2016, the Pensions Regulator published on its website a sample letter to assist UK schemes that wish to reclaim overseas withholding tax.

In order to repay the tax, overseas jurisdictions require confirmation that the UK scheme:

- is required to comply with the EU IORP Directive (the “**Directive**”) , and
- is subject to regulation in the UK in accordance with the Directive.

Although the Regulator is unable to provide individual certifications, its letter provides a link to the EIOPA public register of IORPs, noting that UK-based IORPs appearing on this register are also included on the Pensions Regulator’s register of occupational pension schemes operating in the UK and are therefore subject to regulation by the Pensions Regulator and are required to comply with UK pensions legislation implementing the IORP Directive.

The Regulator’s letter is on its [website](#).

**Comment:** This, and the certificates of residence provided by HMRC (see **item IX** above) show a helpful, joined-up, approach by Government to assisting schemes to reclaim overseas tax.

#### **XVI. DC flexibility: FCA retirement income market data**

On 7th January, 2016, the FCA published its Retirement Income Market Data for the period from July to September, 2015.

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The report is part of the FCA's commitment to monitor and assess the impact of the April, 2015 pension reforms which it made in its Retirement Income Market Study published in March, 2015.

The report relates to contract-based pension schemes. Key points are:

- 178,990 pensions were accessed by consumers to take an income or fully withdraw their money as cash, of which 68% were fully cashed out. Of these cashed-out pensions, 88% were "small pots" (up to £30,000),
- of the 178,990 pensions that were accessed, 34% used UFPLS (both partial and full withdrawals), 30% used income drawdown (both partial and full withdrawals), 13% were used to purchase an annuity and 23% were full withdrawals using small pot lump sums,
- 17% of consumers told their provider they had used Pension Wise, and
- the majority of consumers accessing their pensions stayed with their existing pension provider (58% going into drawdown and 64% purchasing annuities).

The report is on the [FCA website](#)

**Action point:** For noting.

### **XVII. Abolition of DB contracting-out (1) New DWP Q&As on new state pension**

The DWP has (16th December, 2015) published a leaflet with the top 10 questions that people are asking about the new state pension, including questions on contracting-out and transitional arrangements.

The leaflet includes links to more detailed information. Schemes may find it useful when explaining the changes to members.

Note that the DWP factsheet on the contracted-out pension equivalent ("COPE") has been temporarily withdrawn from the gov.uk website.

The Q and As are on the [Gov.uk website](#)

**Comment:** With fewer than 3 months to go before the new state pension, and consequent abolition of DB contracting-out, takes effect, schemes should be thinking about communicating the change to members. As well as these Q&As, the DWP has (November 2014) published a [factsheet](#) for members of open DB contracted-out schemes

which it suggests that trustees may wish to send out.

**Action point (1): Employers** are required to notify affected employees of the change in their contracted-out status "at the earliest opportunity" and, in any event, by 6th May, 2016.

**Action Point (2): Schemes** are required to notify affected members before, or as soon as possible, after 6th April, 2016 (and in any event by 6th July, 2016).

### **XVIII. Abolition of DB contracting-out (2): HMRC's Countdown Bulletin 12**

This was published on 22nd December, 2015.

It sets out the benefits for schemes of using HMRC's Scheme Reconciliation Service. It notes that the GMP Service cannot and should not be used to reconcile scheme memberships; the GMP Service is planned to go live in April, 2016 with the purpose of providing administrators with accurate GMP calculations, contracted out contributions and earnings information on a self-service basis.

In order to gain the maximum benefit from the GMP Service, HMRC recommends that administrators first request and reconcile their scheme data using the Scheme Reconciliation

Service. When that is done, both the scheme and HMRC will hold the correct information regarding an individual's contracted out liability.

The Bulletin also:

- sets out key information about the Contracted Out Pension Equivalent (“COPE”) and why it is being included in State Pension information, noting that customers may not receive the full COPE amount, and why,
- deals with late payment of contributions equivalent premiums (“CEPs”). Although the legislation<sup>6</sup> specifies that CEPs should be paid on or before 6 months after the date of

<sup>6</sup> Regulation 52 of the Contracting-out Regulations 1996.

termination of contracted out employment, where a scheme discovers that a CEP should have been paid after that date, HMRC says the scheme should not do anything for the time being. The DWP and HMRC are aware that CEP non-payments are being discovered as part of scheme reconciliation exercises and are considering how to deal with them: an announcement will be made in due course,

- the DWP has produced an employer resource pack containing information to help employers explain the changes to State Pension taking effect on 6th April, 2016, and
- HMRC asks schemes to make available to their members information about its State Pension online service, including contact

details. The newsletter also contains details of where customers should be directed if they have queries about the new State Pension, noting that they should not be given any direct email addresses.

Countdown Bulletin 12 is on the [Gov.uk website](#).

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If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn [jonathan.fenn@slaughterandmay.com](mailto:jonathan.fenn@slaughterandmay.com) or your usual Slaughter and May adviser.

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