PENSIONS BULLETIN

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Welcome to the November 2020 Pensions Bulletin from Slaughter and May. In this month's edition, we analyse the Pensions Regulator's guidance for defined benefit trustees on protecting schemes from sponsoring employer distress. There are also updates on pension scams and the Pension Schemes Bill as it nears Royal Assent. We report on the Government's decision on the date that the Retail Prices Index methodology will change and its statement on guidance for members using the pensions freedoms. We cover the latest developments in international data transfers and conclude with a look at the recent extension to the Coronavirus Job Retention Scheme.

We have prepared a separate client briefing Lloyds 3: historic transfers and GMP equalisation about the recent *Lloyds* judgment on the unequal effects of guaranteed minimum pensions, which looked at transfers out from formerly contracted-out defined benefit schemes. The High Court decided that statutory cash equivalent transfers back to 1990 should have reflected equalised benefits and members have a right to seek a top-up transfer payment. Whilst the judgment gives some helpful clarifications, a number of questions remain, particularly as to what schemes should now do in practice in relation to re-investigating and addressing past transfers, issues which are explored further in our briefing.

GUIDANCE ON PROTECTING SCHEMES FROM SPONSOR DISTRESS

Trustees and sponsors should take into account new Pensions Regulator (TPR) guidance for trustees on protecting defined benefit (DB) schemes from employer distress. The clear message is that trustees should take action before a sponsor shows signs of distress. This necessitates regular assessment of the scheme's integrated risk management, including ensuring trustees have access to full and up-to-date information about the employer.

The main element of TPR's approach in its guidance is a fully documented and regularly reviewed integrated risk management (IRM) plan, with workable (and preferably legally enforceable) contingency plans and suitable triggers in place. There is more detail here than in the existing IRM guidance, in particular the need for all DB trustees, on a regular basis, to:

- Assess the employer's legal obligations to the scheme and the possible results of an insolvency.

- Review scheme governance procedures (on trustee skill and experience, conflicts and record keeping). Trustees should ensure they have full and up-to-date information about the sponsoring employer and that information sharing protocols have been agreed.
- Monitor the covenant to identify and mitigate sponsor risk - this should include challenging the employer's financial forecasts.
- Seek appropriate advice, before a sponsor shows signs of distress (when the trustees' options are likely to be limited by other stakeholders competing for value alongside the scheme).

Moving to scenarios where there is evidence of sponsor distress, TPR cross-refers to its COVID-19 guidance on issues such as increasing the frequency of covenant monitoring, considering requests for scheme easements and understanding the role of other stakeholders. The guidance contains some helpful examples of steps trustees might take to address a material detriment resulting from corporate activity, in particular lenders seeking or enforcing security ahead of the scheme. The guidance notes that the new procedures for distressed companies introduced by the Corporate Insolvency and Governance Act 2020 may present risks for DB schemes; schemes should not delay in putting protections in place.

THE PENSIONS REGULATOR'S PLEDGE CAMPAIGN TO COMBAT PENSION SCAMS

Trustees may want to consider taking part in a new campaign introduced by the Pensions Regulator (TPR) under which trustees can self-certify that they have taken the necessary steps to reduce the risk of pension scams. As well as being a helpful checklist, the campaign is a reminder that all staff who interact with members should receive training and keep up to date with developments on pension scams.

TPR has launched a new campaign to urge the pensions industry to commit to combating pension scams. Trustees can self-certify on TPR's website that they meet the pledge and can then publicise their self-certification to members and the pensions industry.

By submitting a declaration, the trustees certify that they will:

- Warn members regularly about the risk of scams, through annual benefit statements, responses to transfer requests and website messaging.
- Encourage members asking for cash drawdown to contact The Pensions Advisory Service for guidance.
- Make sure that trustees (and other staff who interact with members) complete the new Trustee Toolkit scams module and study other resources from TPR and the Financial Conduct Authority (FCA).
- Carry out due diligence, through checks on transfers and documenting transfer procedures.
- Warn members who insist on high risk transfers, by writing and calling.
- Report concerns about scams and tell the member.

We can advise on aspects of the self-certification process.

There is ongoing tension between compliance with the CETV requirements, giving the member the statutory right to transfer their benefits (provided the relevant statutory requirements are met), and the need to minimise scam risks. This is an issue which the Government says it will address in regulations under the Pension Schemes Bill currently going through Parliament (discussed below). The regulations will clarify that trustees can refuse to make transfers if certain "red flags" are present. Examples of these red flags are:

- The receiving scheme or parties in the transfer not having the required permissions from the FCA.
- The member was contacted via social media, email or by cold calling, or was offered "free pension reviews" or "early access" to cash.
- The member was pressured to transfer quickly.

PENSION SCHEMES BILL NEARS ROYAL ASSENT

The Pension Schemes Bill has nearly completed its journey through Parliament. Although we are awaiting regulations and detailed guidance, employers and trustees should consider the effect of the Bill now, not least because some aspects of the new Pensions Regulator (TPR) powers may be retrospective and TPR expectations are already influenced by the powers it will have under the Bill.

Recent debates in the House of Commons give some indication of the Government's likely approach in regulation and TPR guidance, once the Bill becomes law later this year, on two key issues:

- **New powers for TPR:** The Bill includes two new criminal offences in relation to corporate activity where there is a DB scheme - avoidance of employer debt and conduct risking accrued benefits. These offences could apply to any person regardless of any connection to the scheme or sponsoring employer, potentially exposing to TPR action a very wide range of parties, including trustees, banks that lend to employers, the purchasers of business assets, insurers and investment counterparties. The Government reiterated earlier assurances that its objective is not to interfere with routine business activity and confirmed that an offence would be committed only if the person did not have a reasonable excuse and that it would be for TPR to prove that the action was not reasonable.
- **Funding requirements for open DB schemes:** An amendment to the Bill mandating different funding rules for DB schemes open to new members was removed during Committee stage. However, the Pensions Minister stated that the Parliamentary debate will influence TPR's approach and ensure that not all schemes will be treated the same under the draft Funding Code. The Government says it will use secondary legislation to ensure that the requirement for all schemes to have a funding and investment strategy works appropriately for open schemes. Schemes that are (and are expected to remain) immature, and have a strong employer covenant, will continue to be able to take appropriate investment risks (such as investing in a substantial proportion of return-seeking assets) where that is supportable.

Meanwhile, the **Pensions Dashboards** Programme (PDP) has published an indicative plan, confirming that Phase one (programme set-up and planning) is under way. The PDP expects to publish an initial version of its proposed data standards for dashboard providers in December 2020. Dashboards are expected to be available from 2023.

NEW RPI METHODOLOGY FROM 2030

The Government has announced that the reform to the Retail Prices Index (RPI) measure of inflation will take effect no earlier than February 2030 – the latest date it could have chosen. The proposed reform could have a significant impact on a defined benefit scheme's funding position.

Earlier this year, the Treasury and UK Statistics Authority published a consultation seeking views on the Government's intention to reform RPI by aligning it with the Consumer Prices Index, including owner-occupiers' housing costs (CPIH), with the change to take place no earlier than 2025 and no later than 2030. The Government issued a response to the consultation on 25 November 2020 confirming that, from 2030, RPI will be calculated using the same methods and data sources as CPIH. Given the limited availability of CPI-linked instruments, many DB pension schemes use RPI-linked gilts and RPI derivative markets to hedge the inflation risk attached to their CPI-linked liabilities by reference to assumptions as to the extent to which RPI will exceed CPI. Those schemes in particular will see a negative impact on their funding position. The choice of the later date for implementation is in part a recognition of the potential impact on DB schemes.

DWP POLICY ON GUIDANCE FOR MEMBERS USING THE PENSIONS FREEDOMS

Trustees will need to update their administrative processes following the DWP's statement of policy intent on plans to introduce a "stronger nudge" for DC members to obtain Money and Pensions Service Pension Wise guidance before accessing their flexible benefits.

The Government has confirmed that it is to implement Section 19 of the Financial Guidance and Claims Act 2018 through regulations requiring trustees to ensure that those with flexible benefits and who have applied to transfer out or to start receiving benefits:

- are referred to "appropriate pensions guidance" and provided with an explanation of the nature and purpose of that guidance; and
- receive that guidance, unless the individual has opted out of receiving it.

The DWP will consult on draft regulations to implement the policy and the Pensions Regulator is expected to provide guidance for trustees. The Pensions Minister has said that the draft Regulations will come into force "at the earliest opportunity". There will be a separate process involving the Financial Conduct Authority for contract-based schemes.

INTERNATIONAL DATA TRANSFERS – FURTHER DEVELOPMENTS

Trustees and sponsors who rely on EU standard contractual clauses (SCCs) or the EU-US Privacy Shield for international transfers of personal data will need to monitor the progress of EU initiatives and check how their processors are assessing compliance in the light of new guidance.

In *Schrems II,* the European Court invalidated the EU-US Privacy Shield framework for personal data transfers to the US (see our Pensions Bulletin July 2020). In addition, while confirming that SCCs can provide a lawful framework for international transfers of personal data, the Court commented that transfers pursuant to the SCCs should be suspended or stopped if the protection required by EU law cannot be ensured in the recipient country. This creates potential problems for transfers of data outside the EEA where trustees are relying on SCCs. SCCs are issued by the European Commission in order to provide sufficient safeguards for data transferred outside the EU or EEA.

The European Commission has now published revised SCCs. The new SCCs are open for public consultation until 10 December 2020 and are expected to be adopted in early 2021. In addition, the European Data Protection Board (EDPB) has made recommendations on international transfers of personal data. These recommendations follows previous EDPB guidance that organisations must conduct a risk assessment as to whether a transfer tool, such as SCCs, provides enough protection within the legal framework of the destination country. If not, organisations must put extra measures in place to mitigate the risks, such as encryption and anonymisation.

The UK's Information Commissioner's Office (ICO) issued a statement on 13 November in response to these two developments. It is reviewing the SCCs and the EDPB guidance and repeats previous advice that organisations should take stock of the international transfers they make, and update their practices as guidance and advice become available. The ICO will consider whether they need to publish their own guidance.

Meanwhile, in an updated announcement on Brexit transition: *Using personal data in your business or other organisation after the transition period* (24 November 2020), the Government explains that negotiations are being held on an "adequacy" decision on UK data privacy laws, to permit personal data to flow freely from the EEA to the UK, as the UK will itself become a third country at the end of the transition period on 31 December 2020. The European Commission recently reiterated that it would use its best endeavours to conclude the assessment of the UK regime by the end of 2020 with a view to adopting an adequacy decision if the UK meets the applicable conditions.

REINTRODUCTION OF THE CORONAVIRUS JOB RETENTION SCHEME

The Government has reintroduced the CJRS from November 2020. As before, those looking to take advantage of the CJRS will need to consider how contributions and benefits under pension schemes are affected.

Under the CJRS extension until the end of March 2021, employers can claim 80% of an employee's usual salary for hours not worked, up to a maximum of £2,500 per month. Employers can top up salary further if desired, and will need to pay employer National Insurance Contributions (NICs) and pension contributions on all amounts paid to the employee (whether those payments to the employee are reimbursable under the CJRS or not). The level of Government support will be reviewed in January to decide whether employers will be required to make a greater contribution thereafter. Introduction of the Job Support Scheme has been postponed.

Neither the employer nor the employee need to have used the scheme before in order to claim and, as under the second stage CJRS that applied until the end of October, flexible furloughing will be allowed in addition to full-time furloughing.

The Pensions Regulator has updated its COVID-19 DC contributions and auto-enrolment guidance to reflect the reintroduction of the CJRS.

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