SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

16 December 2016 / Issue 19

Legal and regulatory developments in pensions

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For more information, or if you have a query in relation to any of the above items, please contact the person with whom your normally deal at Slaughter and May or Bridget Murphy

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.	Severance payments and tapered annual allowance pitfall	From 6th April, 2016	Pensions Bulletin 16/06 2.1 Since 6th April, 2016, the £40,000 annual allowance for high income individuals is reduced by way of a taper to a minimum of £10,000 for those with income of £210,000 or more. 2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of: ♦ £110,000 "threshold" income, and ♦ £150,000 "adjusted" income. 2.3 Any taxable element of a termination package counts towards both threshold and adjusted income. A taxable termination payment could therefore catapult an individual over the £150,000 limit, resulting in a tax charge for the member on pension provision already made. 2.4 There may be scope for timing taxable termination payments to straddle tax years but care would be needed in view of anti-avoidance provisions. Termination procedures should be reviewed to build in a process to identify and manage this point.
2.	Members who intend to apply for Fixed Protection 2016 ("FP 2016") must have stopped accruing benefits **(note that fixed protection may be lost on joining a registered life cover arrangement)**	6th April, 2016	Pensions Bulletin 15/16
3.	Abolition of DB contracting-out: Rule amendments needed Note: Statutory power to amend, retrospective to 6th April, 2016, expires on 5th April, 2017	6th April, 2016	If your scheme was contracted-out on 6th April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5th April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6th April, 2016 to prevent the inadvertent addition of an additional underpin to the accrued GMPs of those active members. See further Pensions Bulletin 16/03.
4.	Put in place register of persons with significant control ("PSC") for trustee company where trustee is a corporate	6th April, 2016	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5th July, 2016 at the latest	Trustees must notify "service providers" if the scheme is being used as a "qualifying scheme" for auto-enrolment purposes and some or all of the benefits are money purchase. Pensions Bulletin 16/04.
6.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer's staging date	For example employers with a 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.
7.	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 Dawn Holmes.
8.	"Brexit"	Referendum held on 23rd June, 2016	Consider potential impact on pension schemes. Client publications available on Slaughter and May website.

No.	Topic	Deadline	Further information/action
9.	DC Code of Practice 13 on governance and administration takes effect	28th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code.
10.	GMP equalisation		
10.1	Lloyds Trade Union announces intention to bring GMP equalisation class action	August 2016	We will continue to monitor developments in this litigation, said to be worth £300 million.
10.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	Please see item I below.
11.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
11.1	CJEU decision in *Parris v. Trinity College, Dublin*	**Decided on 24th November, 2016**	**A 'death bed marriage' scheme rule did not indirectly discriminate on sexual orientation grounds.** Pensions Bulletin 16/18
11.2	Provisional date for Supreme Court to hear appeal in *Walker v. Innospec*	March, 2017	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force.
12.	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31st March, 2017	Pensions Bulletin 16/14
13.	HMRC's existing practice on VAT and pension schemes ends (please see our item on this in Pensions Bulletin 16/13)	31st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.
14.	Data protection: New Regulation	25th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15
15.	IORP II expected transposition deadline	October/ November, 2018	Pensions Bulletin 16/11

New Law

I. DWP consultation on GMP equalisation and contracting-out

The DWP is consulting[1] on:

- GMP equalisation;
- draft amendments to contracting out regulations ; and
- legislation subject to review.

The consultation runs until 15th January, 2017.

A. GMP equalisation

1. The consultation proposes a possible methodology for equalising GMPs involving a one-off calculation.

   Comment (1): This is in contrast to the proposal for annual calculations contained in the DWP's consultation published on 20th January, 2012.

   Comment (2): On 5th April, 2013, however, the DWP published an interim response confirming that the legislation proposed had been delayed. This was because the DWP needed time to consider providing statutory guidance on converting GMPs into conventional scheme benefits and the possibility of using the conversion process to equalise GMPs.

   Comment (3): Most schemes have not attempted GMP equalisation because of the cost and complexity involved. Many schemes have decided to wait and see what the Government's approach would be before committing to an equalisation exercise which could then prove to be out of kilter with the Government's views.

[1] A proposed methodology for equalising pensions for the effect of GMPs – 28th November, 2016

2. Schemes may choose to follow the DWP's method for equalisation or use their own method instead.

3. The suggested method compares the value of the future expected cash flows for the member in the period that needs to be adjusted for GMP inequalities (the period from 17 May 1990 to 5 April 1997) with that for an opposite sex comparator, allowing for contingent benefits.

4. If the opposite sex comparator has the greater discounted value of expected cash flow, then that greater value is adopted under the proposed method.

5. The consultation states that schemes will have to consider whether it is appropriate to use the cash equivalent transfer value method, or whether another method would be more appropriate.

6. Under the proposals, the GMP is also converted into a conventional scheme benefit. The Government thinks that all the GMP is likely to be converted, not just the portion accrued between 1990 and 1997.

7. The proposals envisage schemes following a 10-step process involving:

    - liaising with the employer (steps 1, 2 and 3),
    - liaising with the actuary (steps 5 and 9),
    - member communications (steps 4 and 8),
    - implementing the conversion (steps 6 and 7), and
    - resolving to amend the scheme to provide the converted benefit (step 10).

8. The consultation also suggests possible amendments to the conversion legislation, such as changing the definition of "GMP conversion" so that survivors entitled to GMP benefits are covered.

9. The DWP acknowledges that there are a number of issues still to be addressed regarding GMP conversions, however, and discussions are still ongoing.

Comment (1): There are reasonable arguments for the view that there is no requirement in law to equalise GMPs.

Comment (2): Even if there is a requirement to equalise, there is no guarantee that the proposed method put forward by the DWP will comply with the equalisation laws.

Comment (3): In view of the uncertainty surrounding both issues mentioned above, employers and trustees may well wish to wait and see before trying to equalise GMPs. This is especially the case given that any equalisation exercise is likely to result in considerable costs being incurred in additional benefit provision and implementation.

Comment (4): As a consequence, employers and trustees may wish to make representations to the DWP in response to this consultation that the DWP should not be doing anything until the legal position is clearly resolved.

Note: The closing date for responding to the consultation is 15th January, 2017.

B. Draft amendments to contracting out regulations

1. The consultation includes commentary on draft regulations[2] coming into force on 6th April, 2017.

2. One proposed change strengthens the protections given to earners and their surviving spouse/civil partner when

[2] : draft Occupational Pension Schemes and Social Security (Schemes that were Contracted-out and Graduated Retirement Benefit) (Miscellaneous Amendments) Regulations 2017

their Section 9(2B) rights are to be altered so that:

2.1 the benefits post-alteration are at least equal to the person's benefits before the alteration (currently, the benefits must be at least equal to those that would have been provided by a reference scheme); and

2.2 the benefits post-alteration are at least as generous **both** as regards the amount **and** as regards the circumstances in which it will be paid, as was the case before the alteration (currently, the words 'both' and 'and' are expressed as 'either' and 'or', respectively).

C. Legislation subject to review

1. The Government is giving further consideration to:

   1.1 issues raised by the pensions industry where a rule amendment is proposed and the scheme actuary must certify that members' rights accrued while the scheme was contracted-out are not affected; and

   1.2 the fact that bulk transfers without consent cannot be made to schemes that have never been contracted-out.

2. The Government says that any changes to legislation on these points will not be introduced before Autumn 2017.

II. Work and Pensions Select Committee evidence given by Richard Harrington

1. Under Secretary of State for Pensions, Richard Harrington MP, gave evidence to the Work and Pensions Select Committee on 23rd November, 2016.

2. Discussing the pensions Green Paper, originally expected in Winter, 2016, Mr Harrington identified the key issues as follows:

   - consolidation of smaller schemes "*I think the Government have to nudge consolidation*";
   - whether the Regulator needs more powers, such as mandatory clearance - "*From my point of view, anything is on the table*".;
   - governance – is the trust model the right one?
   - scheme valuation timings - "*I cannot see why it should not be shorter*"; and
   - indexation – Mr. Harrington had no objection in principle "*to giving trustees, the people running the pension funds, the right to change the indexation, as long as … pensioners are protected … against rises in prices*".

3. Regarding the timing of the Green Paper, Mr Harrington stated that he hoped it would now be out before April 2017.

   Comment: Mr Harrington has since reportedly announced, at a pensions conference held on 1st December, 2016, that the Green Paper would be issued "in the first few weeks of next year".

III. Pension scams consultation - includes blocking transfers

1. The DWP and HM Treasury are consulting[3] on restricting the statutory right to transfer in order to combat pension scams. The consultation also covers a number of other proposals designed to address the problem of pensions liberation fraud.

2. The consultation closes on 13th February, 2017.

[3] Pension scams: consultation – 5th December, 2016

3. The consultation paper identifies 3 areas on which the Government intends to legislate:

    3.1 enabling trustees to refuse a statutory transfer in certain circumstances;

    3.2 introducing a ban on cold calling; and

    3.3 introducing a requirement that pension schemes may be registered only by active companies.

Comment: There is no statement in the consultation about a proposed implementation date, which would have been particularly helpful in relation to the proposal to allow trustees to block a statutory transfer.

A. Blocking statutory transfers

1. The proposal to allow trustees to refuse a statutory transfer in certain situations follows the case of *Hughes v The Royal London Mutual Insurance Society Limited*.

2. The High Court in that case decided that schemes in receipt of a statutory transfer request could not block a transfer purely because the member's earnings did not come from an employer participating in the receiving scheme.

3. The consultation proposes that the statutory right to transfer should exist only where:

    3.1 the receiving scheme is a personal pension scheme operated by an FCA authorised firm or entity; or

    3.2 a genuine employment link to the receiving occupational pension scheme could be demonstrated, with evidence of regular earnings from that employment and confirmation that the employer has agreed to participate in the receiving scheme; or

    Comment: The *Royal London* decision was unfortunate in that it removed one layer of protection against pensions liberation fraud. Prior to that case, a transfer could be refused where the member was unable to demonstrate earnings from an employer participating in the receiving scheme.

    3.3 the receiving occupational pension scheme is an authorised master trust.

4. As an alternative to blocking a transfer, the Government suggests obtaining a discharge letter limiting the member's recourse to the ceding scheme in the event of a scam. The letter could be accompanied by a statutory cooling off period of, for example, 14 days.

    Comment: Obtaining a discharge letter from the member in addition to a new power to block a statutory transfer would provide a greater level of certainty from a trustee perspective.

5. As regards non-statutory transfers, the Government says that it would expect trustees to make all reasonable efforts to agree a transfer request if the receiving scheme does not appear to be part of a scam.

    Comment (1): Scheme rules typically require trustees making non-statutory transfers to obtain the consent of the employer beforehand.

    Comment (2): It is the employer who, in general, ends up paying the price if the trustee does not get a good discharge in respect of the transfer.

    Comment (3): So the trustee, in reality, will usually not be in a position to proceed with a non-statutory transfer without employer consent. The employer may, acting in its proper business interest, decide that it will only allow non-statutory transfers to, for example, the "plain vanilla" types of receiving schemes where there is little or no risk of the scheme not receiving a good discharge.

B. Cold calling ban

1. Currently, the Financial Conduct Authority (FCA), the Information Commissioner's Office and Ofcom have powers to regulate cold calls, to an extent. For example, the FCA bans some types of cold calls, and applies restrictions to others. The restrictions only apply to FCA authorised firms, however.

2. The consultation paper sets out a broad range of phone interactions that would fall within the scope of the proposed pensions cold calling ban (for example, offering a free pensions review).

3. Transgressing the proposed cold calling ban would, it is proposed, result in a fine of up to £500,000 imposed by the Information Commissioner's Office.

4. The proposed ban would not apply to "legitimate interactions", however, such as situations where consumers have expressly requested information from a firm, or where an existing client relationship exists.

C. Schemes to be registered by active, not dormant, companies

1. The proposal to require that only active companies can apply to for a pension scheme to be registered with HMRC is intended to make it harder for schemes to be registered for fraudulent purposes.

2. The consultation also seeks views on what steps could be taken to minimise the chances of small self administered pension schemes being used as a vehicle for a pension scam.

   Comment (1): In certain situations, such as a demerger, a new scheme is set up using a newly incorporated company to be the trustee of that scheme.

   Comment (2): The "scheme administrator" for tax purposes who would apply for registration of the new scheme in this case would, in our experience, invariably be that newly incorporated company.

   Comment 3: The proposed change shows a lack of understanding as to what a typical trustee of an occupational pension scheme looks like. For example, this type of single purpose trustee company is generally treated as a dormant company for Companies Act 2006 purposes (although the trustee company will be active in its role as trustee of the scheme).

IV. Pension Schemes Bill progress

1. The Pension Schemes Bill 2016/17 has received its 2nd sitting in the House of Lords.

2. The revised version of the Bill makes some tidying up changes regarding pause orders in relation to master trusts. Pause orders may be made by the Pensions Regulator once a 'triggering event' has taken place (Pensions Bulletin 16/17).

3. Changes were also made regarding the procedure for authorisation applications made by master trusts.

4. As regards the automatic transfer of small pots, Lord Freud stated that the Government intends to deal with this issue through the forthcoming Pensions Dashboard (Pensions Bulletin 16/9), the full introduction of which is intended to take place "by 2019".

V. General levy consultation

1. The DWP is consulting[4] on the general levy (see **3.** below) on occupational and personal pension schemes for 2017/18.

2. The consultation closes on 18th January, 2017. The new legislation would take effect on 1st April, 2017.

3. The general levy funds the administration costs of:

   - the Pensions Regulator;
   - the Pensions Advisory Service; and
   - the Pensions Ombudsman.

4. The rates were reduced by 13% for 2012/13 and have been held at the same level since then.

5. The Government estimates that a levy surplus of approximately £13 million will exist at the end of 2016/17.

6. The Government is attracted to reducing the levy rates for very large schemes (meaning schemes with 500,000 members or more) so that their levy would be 25% less than the rates for schemes with 10,000-499,999 members.

7. The levy rates freeze would be maintained for schemes with fewer than 500,000 members.

VI. FCA Asset Management Market Study - interim report

1. The FCA has published (November, 2016) an interim report as part of its Asset Management Market Study.

2. The consultation ends on 20th February, 2017. A Policy Statement is planned for Spring, 2017.

3. Recommendations in the interim report include:

   3.1 greater pooling of assets for small pension schemes;

   3.2 a strengthened duty on asset managers to act in the best interests of investors;

   3.3 greater transparency and standardisation of costs and charges for institutional investors;

   3.4 an ‘all-in fee’ approach to charge quotes;

   3.5 requiring asset managers to be clear about the objectives of a fund and providing tools for investors to identify persistent underperformance;

   3.6 clearer disclosure of fiduciary management fees and performance; and

   3.7 a suggestion that the Treasury consider bringing within the FCA’s regulatory range the provision of institutional investment advice.

Comment (1): The FCA has been focusing on greater transparency for investors in recent months. One example of this focus is its consultation paper of 5th October, 2016 on transaction cost disclosure in money purchase workplace pensions (Pensions Bulletin 16/15).

Comment (2): Costs and charges are relevant to the size of a member’s pot, but the most important variable is the investment performance.

Comment (3): It may be that certain recommendations in the interim report (such as greater asset pooling, acting in the best interests of investors and providing tools to identify underperformance) could play a role in better investment performance.

[4] The Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2017 - 24th November, 2016

VII. FCA consultation on shopping around for an annuity

1. The FCA is consulting (CP16/37) on proposed changes to its rules concerning the purchase of annuities, to be introduced from 1st September, 2017.
2. The consultation ends on 24th February 2017.
3. The consultation proposes that consumers should be told about the potential gains they could achieve if they were to shop around and possibly change provider before buying an annuity.
4. The FCA proposes requiring firms to include certain information (in a prescribed format) when they provide an annuity quotation to a consumer as part of pre-sale disclosure.
5. This would show the difference between the provider's own quote, and the highest guaranteed quote available to the consumer on the open market (using comparison tools that include every provider on the market).

Tax

VIII. Overseas schemes requirements - consultation

1. HMRC is consulting[5] on changes to the conditions which must be met for a scheme be:
   - an 'overseas pension scheme' ("**OPS**") or
   - a 'recognised overseas pension scheme'("**ROPS**").
2. The consultation period runs from 5th December, 2016 to 1st February, 2017.
3. The regulations[6] would come into force on 6th April, 2017.
4. The proposed changes would:

   4.1 remove the requirement for schemes to designate 70% of funds that have received UK tax relief to provide the member with an income for life in order to be a OPS or a ROPS;

   4.2 require that, if the scheme itself is not regulated, a provider of a non-occupational pension scheme would need to be regulated in the country in which the scheme is established;

   4.3 enable benefits to be paid before age 55 if the payment would be an authorised payment if paid by a registered pension scheme; and

   4.4 expand the type of agreement that satisfies one of the conditions to be a ROPS to include tax information exchange agreements.
5. HMRC also published on 5th December, 2016 several new guidance documents regarding overseas pensions.

Points in practice

IX. Regulator focuses on record-keeping

1. The Pensions Regulator has announced via a press release, on 30th November, 2016, that it will ask trustees to report on record-keeping in their scheme return.
2. The press release includes a link to a survey, dated June 2016, carried out by the Regulator, demonstrating that record-keeping has improved only to a limited extent. For example, 30% of members are in schemes where

[5] Draft legislation: The Pension Schemes (Categories of country and requirements for overseas pension schemes and recognised overseas pension schemes) (Amendments) Regulations 2017 - 5th December, 2016

[6] The draft Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) (Amendments) Regulations 2017

conditional data, used to calculate benefits, is not measured.

3. There is also a link in the press release to the Regulator's quick guide to record-keeping, with further material promised in 2017.

4. The guide is very basic, although it does contain links to further information, such as the relevant Codes of Practice and the Regulator's guidance on record-keeping.

X. IORP II - final draft passed

1. A press release issued by the European Parliament, dated 24th November, 2016, states that the final draft of the new Institutions for Occupational Retirement Provision (IORP) Directive has been passed by the European Parliament.

2. Please see Pensions Bulletin 16/11 concerning points to note about the final IORP II wording.

3. The next steps are approval by the Council of Ministers followed by publication in the Official Journal. The Directive comes into force 20 days after publication.

4. Member States then have 2 years within which to implement a Directive following its 'in force' date.

5. The impact of Brexit will be relevant but, at this stage, can only be conjectured.

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 or your usual Slaughter and May adviser.