DAC BEACHCROFT

Signpost: Pensions JANUARY – FEBRUARY 2019

FEBRUARY 2019

Government consultation response to DB White Paper: confirms proposals to strengthen Regulator's powers. The government's response confirmed two new criminal offences will be introduced: "willful and reckless behavior" in relation to a defined benefit (DB) scheme which will be punishable by seven years' imprisonment and/or an unlimited fine, and a failure to comply with a contribution notice, punishable by an unlimited fine. As a precursor, a requirement for a "Declaration of Intent" by a relevant transaction's corporate planners will need to be shared with the trustee board and the Regulator will also be introduced – this will be necessary where there is the sale of a controlling interest in the sponsoring employer, the sale of assets/business of a sponsoring employer, and the granting of security in priority to the scheme on a debt.

The government response also stated: (1) two new employer-related notifiable events would be introduced: (i) relating to the sale of a material proportion of the business/assets of a scheme employer which has a funding responsibility for at least 20% of the scheme's liabilities, and (ii) the granting of security on a debt which gives it priority over debts to a pension scheme; (2) a new civil penalty of £1million would be introduced for (i) failure to comply with the notifiable events framework, (ii) failure to comply with the declaration of intent requirements, and (iii) knowingly or recklessly providing false information to the Regulator or trustees; and (3) changes to the contribution notice regime would be introduced with the inclusion of two limbs to the material detriment test and amendments to the financial support direction (FSD) regime (including extending the scope of FSD targets to controlling shareholders of the sponsoring employer). FSDs are to become known as "financial support notices".

The Professional Trustee Standards Working Group: new standards for professional trustees. The Professional Trustee Standards Working Group published new standards which considered if schemes should be required to have professional trustees as well as assessing the case for greater regulation of administrators and systems. They view this as vital to ensure that schemes are well run and in turn are able to provide good outcomes for members. As a result new standards which all professional trustees will be expected to meet have been set and include fitness and propriety, governance skills, ongoing professional development and managing conflicts of interest, reflecting the fact that they are held to a higher degree of accountability. There are additional standards for professional trustees who chair or are the sole trustee on board. To hold accreditation, professional trustees will have to pass an initial application, and then on an ongoing basis that they remain fit and proper, completing the relevant professional development.

Pension Regulator: guidance on winding up DC schemes published. The Regulator's guidance is designed to help trustees and employers in winding up occupational defined contribution (DC) pension schemes, and sets out 4 key stages: (1) who has the power to trigger the winding-up and deciding when it may be appropriate, (2) preparing for and entering the formal wind-up of the scheme including the need for a project plan and communications, (3) making sure the scheme can secure members' benefits and considering the options available, and (4) completing the process after benefits are secured including consideration as to whether indemnities and insurance are needed, the documentation formalising the wind-up and notifications to HMRC and the Regulator, finalising scheme accounts, closing the trustees' bank account and a final member announcement.

Pension Regulator, PPF and PLSA: "superfund" consultation responses. The Regulator published its response to the government's superfund consultation (which closed 1 February) with the overall consensus that the consolidation of DB schemes could be beneficial, particularly with small schemes which tend to be less well-governed, although schemes that are able to buy out in the "foreseeable future" would be excluded. The early notification of events would be critical to the Regulator's supervision of superfunds, and it indicated it would seek the significant events regime to include a reporting requirement when a scheme is approaching a relevant trigger (e.g. a funding level trigger). The Regulator stated it wanted the flexibility to take swift and immediate action when required.

The PPF and the PLSA have also published their consultation responses. The PPF acknowledges that such consolidators/"superfunds" may provide more security for some schemes, but noted the possibility that "unconstrained" superfunds pose significant risks to the PPF, levy payers and members of PPF-accepted schemes and therefore a superfund would need to show "a high degree of confidence" that member benefits will be paid in full without reliance on the PPF. It supports the government's plans to set minimum governance standards including a fit and proper test for trustees. The PSLA mirrored the PPF's response including the need for a "robust regulatory regime", and deemed supervision by the Pension Regulator and a ring-fenced capital buffer as essential.

Pensions Regulator: bulletin confirms progress on recent enforcement and supervision actions. In addition to confirming the Regulator's recent enforcement actions, the bulletin highlighted a few interesting examples of what the Regulator had been involved in, including intervening on scheme funding discussions which led to several employers agreeing to a shorter recovery plan (its scheme funding statistics show the average recovery plan length for strong employers to be 5.9 years) and where an agreement was reached to introduce a "dividend-matching" mechanism with an employer which guarantees additional payments into a DB scheme when dividends grow in excess of a threshold.

Pensions Regulator: trustee prosecution on grounds of fraud by abuse of position and making employer-related investments. In a first of its kind, the Regulator has prosecuted a trustee for fraud by abuse of position under the Fraud Act 2006 and making employer-related investments by way of prohibited loans under the Pensions Act 1995. The individual was an accountant who was both a director of the scheme's employer and a director of the professional pension trustee firm that acted as the scheme's trustee, and transferred more than £280,000 of scheme funds to support his own businesses and investments. The sentence will be given in March 2019.

DWP consultation: increasing DC scheme investment in "illiquid" and infrastructure opportunities and exploration of "smaller" scheme consolidation. On 5 February the DWP published its consultation on the above as part of the government's wider review of patient capital (announced in November 2016), which also falls within the context of the Law Commission's 2017 review of pension funds and social investment. This document sets out proposals for significant changes to the occupational DC pension scheme regime, including a new requirement that larger DC pension schemes should set out in their illiquid investments policy and current practices (and supporting them to invest more in infrastructure), encouraging "smaller" DC schemes to actively consider consolidating into a bigger scheme and changes to accommodate performance fees within the charges cap.

FCA consultation: disclosing costs and charges to workplace pension scheme members and amendments to COBS. The FCA has published a consultation paper on (i) publishing and disclosing administration costs and transaction charges to workplace pension scheme members and (ii) amendments to its Conduct of Business Sourcebook (COBS 19.8), as they relate to FCA-regulated relevant schemes within the DC workplace market (including prescribing a methodology which is similar to the packaged retail and insurance-based investment products regulation (PRIIPs)). The consultation closes on 28 May 2019 and the FCA, after considering the feedback received, will publish final rules in a policy statement later in 2019, with the intention that the final rules come into force from April 2020.

Competition and Markets Authority: draft Investment Consultancy and Fiduciary Management Market Investigation Order 2019 and FCA response to CMA report on investment consultancy market investigation. The Order was published for consultation on 11 February. Helpful for trustees, the measures include more information on fees and the performance of fiduciary managers and investment consultants, as well as mandatory competitive tendering of fiduciary management services (FMS) and a requirement that integrated firms clearly separate marketing materials from advice.

The FCA's response to the Competition and Markets Authority (CMA) final report on its market investigation into the supply and acquisition of investment consultancy services (ICS) and FMS to and by institutional investors and employers in the UK, includes recommendations that: (i) once certain CMA remedies are in place, the FCA will consult on relevant new rules for firms offering FMS (including integrated FMS's and ICS's firms separating marketing material from advice, and FMS firms needing to provide more information about their fees (e.g. transition and exit costs, asset management and custodian fees) to prospective customers), (ii) certain parts of the CMA's remedies will sit beside and be additional to existing obligations under the MiFID II Directive impacting firms already subject to this legislation, (iii) the FCA will work with Treasury and the CMA to take forward the extension of its regulatory perimeter to capture the full scope of ICS, including asset allocation advice which would allow it to incorporate the CMA's remedies into its regulation, and (iv) the FCA will maintain its oversight of transparency of asset management fee reporting and will reconsider disclosure to institutional investors if it considers the market is not operating effectively.

Public sector: Treasury pausing employer cost control cap in public service pensions. Treasury has issued directions that the government is pausing the employer cost cap mechanism in valuations of public service pensions with effect from 15 February, following the significance of the Court of Appeal's ruling in the judges and firefighters pension schemes age discrimination cases (which the government is seeking permission to appeal). The Treasury has stated that it is not possible to assess the value of the current public service pension arrangements with any certainty (previous provisional estimate of £4 billion p.a.). It had earlier consulted the Government Actuary about the proposed directions who agreed it was reasonable to pause the cost control process in the circumstances as the public service schemes' liabilities remain presently uncertain.

Public sector: updated GAD actuarial assumptions for broad comparability assessments. The Government Actuary's Department (GAD) has published revised actuarial assumptions that it will use when issuing passport certificates to contractors involved in public sector outsourcing exercises. The passport means that a contractor's DB scheme provides benefits which are "broadly comparable" to those offered in the relevant public sector scheme. The main changes are revisions to financial assumptions relating to the earnings-measure revaluation of career-average revalued earnings, the discount rate and the rate of public sector earnings growth. GAD will use these updated assumptions for broad comparability assessments under both the Fair Deal 2004 and Fair Deal 2013and they will apply to all new applications received by GAD on or after 1 March 2019. For applications prior 1 March 2019, GAD will continue to use the previous 1 July 2014 assumptions until the 1 September 2019 (or later if in exceptional circumstances). Existing passport certificates are not affected.

Legislation: no-deal Brexit regulations for Pensions. These assist in addressing how pensions in the UK will be dealt on a no deal Brexit, especially where there isn't a withdrawal agreement and therefore no transition period. The regulations are to come into force on exit day and essentially make technical changes to six items of primary legislation and amend 29 sets of regulations. The Occupational Pension Schemes (Cross-border Activities) Regulations 2005 will also be revoked.

HM Treasury: PEPP Regulation. On 12 February 2019, Treasury released a letter which sets out the proposed regulation on a pan-European personal pension product (PEPP). However, the government anticipates that there will not be a great demand for the PEPP in the UK and that there will be little applicability given any implementation is likely to enter force following the UK's exit from the EU.

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Pensions Regulator: Brexit statement. The Pensions Regulator's short statement about Brexit for trustees of DB schemes notes that it does not expect the UK's withdrawal from the EU to have a substantial impact on the legislative framework applying to schemes or on trustees administering their schemes effectively. In the event of a "no-deal" it recommends trustees ensure they have a contingency plan, consult the guidance given in its 2018 annual funding statement and notes its 2019 annual funding statement (to be published in March 2019) will contain further guidance about Brexit risk management. DWP guidance about the payment of benefits for EU citizens in the UK and UK nationals in the EU in a no-deal scenario should also be considered. Authorised and approved cross-border schemes will also need to consider the implications of the UK's withdrawal from the EU and how either a negotiated settlement or no deal scenario may affect them and members.

HMRC: GMP equalisation and master trusts operating without authorisation may be de-registered warning. HMRC is considering the pension tax issues arising from the High Court's ruling in the *Lloyds Banking* case on GMP equalisation, and will be issuing advice on this in due course. In relation to Master trusts who want to continue must apply to the Pensions Regulator before the closure of the application window on 31 March 2019. Operating without authorisation is grounds for HMRC to de-register it. HMRC notes that it would consider the impact of de-registration on employers and scheme members in each particular case when deciding to use its discretionary powers.

Pensions Regulator: measuring scheme data guide. The Regulator expects trustees and managers to review their data at least once a year, warning that additional reviews may be needed on the occurrence of specific events such as triggering a winding-up or a change in scheme administrator. Trustees and managers are advised to focus on data that is key to running their scheme and meeting their legal obligations. The guide provides advice on how to measure data and how to calculate their data score (i.e. the percentage of members with fully accurate data), together with how to improve this.

PPF issues: new and updated insolvency practitioner guidance. The PPF guidance on its position on key issues which can arise in insolvency proceedings has been published. There are seven guidance notes including ones explaining the PPF's approach where a pre-pack is proposed or has occurred, or with company voluntary arrangements, and how the PPF approaches potential legal actions (and defences to legal proceedings), together with the appointment of independent trustees and how insolvency practitioners can help with an appointment. More detail is expected before May 2019.

PPF: ECJ Hampshire updated ruling. On 21 December 2018, the PPF had confirmed that it was initially assessing the position of pensioners subject to the long-service cap, after which it would deal with pensioners subject to the standard compensation cap before considering other cases. However, subsequent to that on 14 February 2019, the PPF published an update disclosing court proceedings which subsequently issued. These seek to challenge the intended approach for calculating increases due to members as a result of the Hampshire ruling. The PPF intends to undertake a one-off calculation for affected members involving the assessment of the total actuarial value of the member's scheme benefits payable from their employer's insolvency date (and using their original scheme benefit structure) and comparing that against the total actuarial value of their PPF benefits payable from the same date. If the latter is less than 50% of the former, the PF will increase the member's PPF benefits until the 500% threshold is met. No further adjustments will be made to reflect subsequent events and interest will be payable on arrears at Bank of England base rates.

Pensions cold calling: ban now in force but guidance for trustees still to come. This long awaited ban came into force on 9 January 2019 under the applicable regulations which include new protections for savers. However, the issue of guidance for pension scheme trustees dealing with transfer requests where they have real concerns but the member wishes to proceed, remains outstanding and a timetable for the draft guidance is yet to be provided.

Legislation updates: standard lifetime allowance (LTA) increase / VAT / qualifying earnings band. Effective from 2019/20 tax year the standard LTA will increase from £1,030,000 to £1,055,000.

The Value Added Tax (Finance) (EU Exit) Order 2019 made on 15 January is intended to remove inconsistencies between UK and EU law in relation to the VAT treatment of the management of (1) pension funds, by inserting in the list of VAT exemptions the management of a "recognised pension fund" (i.e. a pension fund solely funded by or on behalf of members and which contains the pooled contributions of more than one member and the members bear the investment risk) and (2) closed-ended collective investment undertakings, by removing the requirement that the capital investments forming the undertaking's sole object must mainly be in securities.

Under an Auto-enrolment Order, from 6 April 2019 the lower end of the qualifying earnings band will rise from £6,032 to £6,136 for a 12-month pay reference period and the upper end of the band will rise from £46,350 to £50,000. The draft Order also sets out revised and rounded figures for qualifying earnings received by jobholders in shorter pay reference periods ranging from one week to six months.

Public sector pensions: consultation on extending Fair Deal to LGPS. The Ministry of Housing, Communities and Local Government's consultation on proposals for extending Fair Deal guidance to the LGPS will run until 4 April 2019. These proposals include amending regulations requiring (1) service providers to offer LGPS membership to individuals who have been compulsorily transferred from an LGPS employer (and removing the option of a broadly comparable scheme) and (2) providing for the automatic transfer of LGPS assets and liabilities when employers are involved in mergers/takeovers.

Pensions Ombudsman: administrator not obliged to forewarn transferred employee about future option to aggregate two periods of service under New Fair Deal. The Pension Ombudsman has rejected a complaint by a member of the Principal Civil Service Pension Scheme (PCSPS) arising from the revised Fair Deal policy put in place in 2013 and held that the administrator had no responsibility to inform the complainant of the changes to the Fair Deal policy or to advise him of the course of action he should take prior to his starting his PCSPS pension.

Pension Ombudsman: GP locum practitioner did not die in service when not "engaged" to work on day of death. The Pension Ombudsman has rejected a complaint by a deceased member's husband regarding his entitlement to death in service benefits. Here, the member had worked at several surgeries over different times. She died on a day on which she was not scheduled to work and her husband was awarded a death benefit lump sum under death in deferment rules. He had argued that he should have been awarded death in service benefits (which would have been higher.) The determination by the Ombudsman considered the wording of the scheme regulations which provided that locum practitioners would only be entitled to death in service benefits if they were "engaged" under a contract for services at the time of death and because she was not in pensionable employment at the time she died, she was unable to be awarded the full sum.

HMRC: online money purchase annual allowance calculator launched. HMRC have published an online calculator for individuals who have flexibly accessed their pension which will help determine when the money purchase annual allowance applies, what the alternative money purchase annual allowance is and if they need to pay tax on their pension savings.

Age discrimination legislation: draft statutory instrument amending bridging pension exemption. The DWP is consulting on a technical change to age discrimination legislation that will permit occupational pension schemes paying bridging pensions (until the member starts receiving their state pension) to continue to do so without breaching equality requirements. This change is required to take account of the gradual rise in state pension age that came into effect in December 2018 as the age discrimination exemption currently only applies to a reduction in pension "between age 60 and 65 - the age 65 reference will be changed instead to refer to the "member's state pension age".

Pensions Regulator: improvements to regulation of pension scheme restructurings recommended. The Pension Regulator's report on its independent review of communications and the support given to members of the British Steel Pension Scheme (BSPS) has been published. There had been concerns around BSPS communications and its members' ability to make informed decisions over the options provided. The review recommended that the Regulator (together with the DWP) consider whether two possible legislative changes should be made: (1) whether in restructurings, legislation should simplify the choices available to members, namely a partial default into a new scheme or requiring the new scheme provide better than PPF benefits, and (2) whether the Regulator should be empowered to consider a scheme's preparedness to handle member consultation in the event of a regulated apportionment arrangement (RAA) and delay or stop the RAA if necessary. The review also highlighted the need for the Regulator and DWP to consider whether duties for DB scheme trustees should more explicitly cover a duty to communicate effectively with members.

Pensions Regulator: procedure for authorising master trusts updated. The Regulator has made some changes to the decision making procedure it uses when assessing whether to authorise a master trust. The authorisation team will only send a full preliminary recommendation letter to an applicant where it recommends to the decision-maker delegated to act on behalf of the Regulator's Determinations Panel that the master trust should not be authorised. If the authorisation team has recommended authorisation, the applicant will be notified of this, but will not receive the letter.

FCA, Pensions Regulator and TPAS: joint regulatory protocol regarding DB schemes. This has been drawn up for the purpose of enabling early intervention to ensure members of DB pension schemes are adequately and fully informed about their options especially when considering transferring their DB pensions. The organisations will work alongside the PPF as necessary and share information in order to identify potential issues that may arise and improve communication channels when working with pension schemes. Further, the Regulator will share information with the FCA and TPAS about its regular market intelligence DB report and will let the FCA know if it requires any company-specific information about a company regulated by the FCA appearing in a report.

High Court: BA trustee successful in application for Beddoe relief to appeal Court of Appeal decision. The granting of a Beddoe order by the High Court enables the BA pension scheme trustee to proceed with its appeal against the Court of Appeal's majority decision that the exercise of the trustee's unilateral power of amendment allowing it to pay essentially discretionary pension increases were made for an improper purpose. The High Court judge concluded that trustees were entitled to be indemnified from trust assets if they would be acting in the interests of the trust as a whole by appealing, even if this involved balancing the interests of different beneficiaries or classes of beneficiaries and here, considering the merits of the case, this would be met by the trustees pursuing the appeal.

Deputy Pensions Ombudsman: trustees to pay investment losses on delay to transfer. The Deputy Pensions Ombudsman upheld a complaint where transfer delays caused a member to lose potential investment returns as the trustees had failed to complete his transfer within 6 months and also had initially incorrectly told him he could not transfer his DC and DB benefits (causing further significant distress and inconvenience and an award of £1,500). The £18,156.04 award reflecting investment losses due to the delay was paid into his new scheme but not paid as a cash amount as this would not have put the member back in the position he would have been in had the transfer completed in time.

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