NORTON ROSE FULBRIGHT

Essential pensions news

Updater

October 2017

Introduction

Essential pensions news covers the latest pensions developments each month.

VAT exemption for pension fund management services provided to DB schemes to be withdrawn for insurers

In a development which will principally affect defined benefit (DB) schemes, on *October 5, 2017*, HMRC published an unexpected Revenue and Customs Brief 3 which announced that, with effect from *January 1, 2018*, there will be a change to the policy relating to the VAT treatment of services provided by insurers to pension funds without special investment fund (SIF) status. This means that insurers will no longer be able to treat as VAT exempt pension fund management services provided to pension schemes which do not have SIF status – effectively, those provided to DB schemes.

By way of a brief reminder of the relevant European case law, in *Wheels Common Investment Fund Trustees Ltd v HMRC*, the ECJ held that a DB scheme would not normally qualify as a SIF and, therefore, pension fund management services supplied to such a scheme would not be VAT exempt. However, in the subsequent case of *ATP Pension Service A/S v Skatteministeriet*, the ECJ held that a defined contribution (DC) pension scheme could qualify as a SIF which meant that VAT exemption could apply to pension fund management services supplied to DC schemes. This prompted fresh litigation to determine whether the difference in treatment between DB and DC schemes breached the principle of fiscal neutrality. This is to be addressed in *United Biscuits (Pension Trustees) Ltd v HMRC* which was listed for a 5-day hearing in mid-October 2017,and in which a decision is awaited. The same issue is due to be considered in further proceedings in *Wheels* which have been stayed pending the outcome in *United Biscuits*.

HMRC's position is that the provision of services of managing and administering pension funds with the characteristics of a SIF will attract VAT exemption while the provision of such services to non-SIFs will not. However, HMRC states that the majority of pension fund management services provided by insurers are supplied to SIFs, that is, DC schemes.

The current position means that the expected increased costs for insurance companies may be passed onto DB schemes, and the record keeping requirements for these schemes may also become more complex. HMRC has previously stated that it will provide updated guidance to the pensions industry on its position on the application of VAT to services provided to pension schemes as a whole and this is still awaited.

View the Revenue and Customs Brief.

The Money Laundering Regulations and HMRC's online trusts register – guidance published

In our update for September 2017, we reported that the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the New Regulations) came into force on *June 26, 2017*, the deadline for transposition into UK law of the EU Fourth Money Laundering Directive (the Directive).

The Money Laundering Regulations 2007 (the 2007 Regulations) require trust or company service providers to register with HMRC if they are not authorised by the FCA (or certain other specified professional bodies) and where they are in the business of offering services as a trustee or director of a trustee company.

The New Regulations define trust or company service providers in the same way as the 2007 Regulations, and thus registration will continue to apply to those acting as trustees by way of a business. However, the classification of occupational pension schemes as *low risk trusts* under HMRC's existing guidance, meant professional trustees of those schemes were *not* required to register with HMRC, and this had caused some confusion.

On *October 9, 2017*, HMRC published detailed guidance relating to the new online Trusts Registration Service, in the form of Frequently Asked Questions (FAQs). The guidance (which is not, however, pensions-specific) aims to clarify the registration deadlines, the issue which had caused some confusion. This is because HMRC's Trusts Register acts as both

- The beneficial ownership register required under the Directive.
- The new process by which trustees register trusts which pay certain taxes with HMRC to obtain a unique taxpayer reference and deliver tax returns.

This second point means that deadlines imposed by relevant UK tax legislation are relevant in addition to the registration dates under the New Regulations. The guidance clarifies that the registration deadline depends on whether a trust is already registered for self-assessment for income tax or capital gains tax as follows

Trust registered for self-assessment
If the trust is registered already for income tax or capital gains tax (CGT) under self-assessment (SA) and the trustees of the trust have incurred a UK tax liability, then registration must be completed by no later than *January 31* after the end of each tax year.

Trust not registered for SA
If the trust is not registered under SA and has incurred either an income tax or CGT liability for the first time, then registration must be completed by no later than *October 5* after the end of that tax year. However, this deadline has been extended to *December 5, 2017*, for the first year of the Trusts Registration Service only.

Trust not registered for SA or does not need to register
If the trust is not registered under SA and has not incurred either an income tax or CGT liability but has incurred either an inheritance tax, stamp duty land tax or a stamp duty reserve tax liability in that tax year, the registration deadline is *January 31* after the end of that tax year.

The registration requirement will not affect the majority of schemes. However, trustees should ensure that they maintain up to date and accurate records in relation to all scheme beneficiaries.

Given the possibility of criminal liability and civil fines, we recommend that trustees act as soon as reasonably practicable to determine which of the above duties apply to them. In particular, trustees should review their records to verify whether they contain the necessary information and check whether their schemes have incurred any of the taxes that would require the schemes to be registered with HMRC.

If trustees have any concerns in relation to this issue, their usual Norton Rose contact will be able to offer scheme-specific advice.

View the guidance.

Pensions Regulator launches 21st century trusteeship governance campaign

The Pensions Regulator (TPR) has launched a new campaign as part of its “21st century trusteeship” initiative aimed at improving the standards of governance across pension schemes. The campaign is particularly aimed at trustees of small and medium schemes, as many of these have “*failed to act on TPR’s codes and guidance to meet standards of good governance*”.

TPR will be sending targeted emails to trustees, employers and scheme managers, directing them to a dedicated page on the TPR website that will act as a landing page for the campaign as it develops. The first stage of the new initiative will be to outline what TPR considers to be good governance and its importance to schemes. However, as well as encouraging compliance, TPR will also set out the steps that schemes should be taking to meet the expected standards and the sanctions that TPR will impose on those who fail to comply.

As we reported in our August 2017 update, TPR has published details of its revised monetary penalties policy setting out how it will use powers to impose monetary penalties under pensions legislation.

As the 21st century trusteeship campaign develops, it will cover additional core areas such as setting clear roles and responsibilities, clear purpose and strategy, competence and integrity, managing advisers and providers, and managing conflicts of interest. TPR has launched a new blog on what it means to be a trustee now and in the future.

We will be publishing a briefing on the 21st century trusteeship initiative in due course.

View TPR’s announcement.

Auto-enrolment: TPR reminds start-up businesses about instant pension duties

TPR has confirmed that the duty for start-up businesses to automatically enrol workers into a workplace pension scheme came into effect on *October 1, 2017*. New businesses employing staff for the first time from October 1, 2017, will have a legal duty to enrol eligible jobholders into a pension scheme on the day that the member of staff starts work.

In order to help smaller businesses adhere to their automatic enrolment duties, TPR has launched a new online resource page Setting up a business? What to do for automatic enrolment, providing information on employers' duties under the auto-enrolment regime, and when these duties apply.

The commencement of the new instant pension duties coincides with the fifth anniversary of auto-enrolment. Since 2012 when the staging process began, more than 8.5 million people have started saving into a workplace pension and almost 800,000 employers have met their automatic enrolment duties.

Auto-enrolment: when is consultation with affected employees required?

Following the Government's decision to delay from *October 1, 2017*, to *April 6, 2018*, the application of an extra two per cent workers' contribution, a potential consultation issue may arise for employers with 50 or more employees (which includes all employees, not just affected employees).

The consultation requirements of the Pensions Act 2004 (the 2004 Act) and the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendments) Regulations 2006 (the Regulations) require employers to consult with their workers for 60 days before, among other things, making an increase in a worker contribution rate to a pension scheme. There is an exception under the Regulations where the change is made for the purposes of complying with a statutory provision. Any consultation must be conducted in a spirit of co-operation, taking into account the interests of both sides.

It is unclear whether or not there is a requirement to consult where worker contributions are increasing to meet the auto-enrolment requirements. The question is whether the increase is being made for the purposes of complying with a statutory provision: if it is not, then consultation is required. For example

- The increase in worker contributions may not exactly correlate to the statutory step-up in minimum contributions, such as where the worker's pensionable pay is different from the level of qualifying earnings under the Pensions Act 2008, (which is very common).
- For ease of administration, the employer may wish to increase worker contribution rates from, for example, April 1, rather than April 6.

In addition, some employers may have made specific mention in the scheme rules of the planned dates and levels of contribution increases to comply with their auto-enrolment duties and these may no longer reflect the Government's amended timetable.

In this context, TPR's detailed guidance note 4, which was published in April 2014 and updated in April 2016, says that consultation will be required where the proposed increase does not explicitly match the statutory increases; for example, the increase in contribution

rates may be different, or the date that the increase takes effect may be different. While TPR cannot definitively determine what the legislation means, and there are alternative arguments, TPR can initiate proceedings to fine employers that breach the consultation requirements. The 2004 Act says that failure to consult in accordance with regulations does not invalidate a change to a scheme. Workers may, however, be able to claim damages for breach of the employer's duty of trust and confidence in some circumstances where there has been a failure to consult, or if a consultation was not genuine.

Comment

Although we think it unlikely that TPR would impose penalties in these circumstances, many employers will wish to consult on any worker contribution increases in order to reduce a potential risk of regulatory action and the likelihood of worker complaints.

Financial Conduct Authority publishes policy statement on transaction cost disclosure in workplace pensions

Of interest to all schemes with defined contribution (DC) investments is the policy statement published by the Financial Conduct Authority (FCA) on September 20, 2017. The FCA intends to publish Handbook rules that require firms managing money on behalf of DC workplace pension schemes to disclose administration charges and transaction costs to the governance bodies of those schemes, using a standard approach.

With effect from *January 3, 2018*, in response to a request from the governance body of a relevant pension scheme, firms must provide

- Information about transaction costs calculated according to the 'slippage cost' methodology
- Information about administration charges
- Appropriate contextual information

Where firms do not have the relevant information themselves, they must seek it from other firms, and those other firms, where they are FCA authorised, must provide the information.

By setting out a methodology for calculating transaction costs in a consistent way, and by placing obligations on firms to respond to requests for information about costs, the FCA seeks to build the foundations that will enable the governance bodies of these schemes to meet their obligations to review and consider the value for money of transaction costs and administration charges.

View the policy statement.

FCA and TPR publish joint guidance for employers and pension trustees on regulatory implications of helping employees with financial matters

On *September 28, 2017*, the FCA and TPR published a joint factsheet guide for employers and trustees. The factsheet guide (which is only four pages long) provides a non-exhaustive explanation of the type of assistance that employers and pension trustees may provide to help employees, without needing to be authorised by the FCA under the Financial Services and Markets Act 2000 (FSMA). It also signposts other publicly available guidance.

The factsheet

- Clarifies why it is unlikely that employers and trustees would need to be authorised in these circumstances (that is, because they are not in the business of giving investment advice and do not normally receive any commercial benefit for giving advice to, or helping employees with, pensions and other financial matters). The factsheet clarifies where a commercial benefit might be received.
- Outlines the type of advice an employer or trustee should not give, as well as the type of general information and support that would be acceptable.
- Addresses the extent to which information provided by an employer or pension trustee on a financial product (including different types of pension schemes) might fall within the financial promotion restriction in section 21 of FSMA.
- Includes two practical examples that consider the provision of information by trustees of an occupational pension scheme, and the provision of factual information at an employer-sponsored retirement seminar for employees.

The factsheet was developed to address Recommendation 11 of the final report of the FCA's Financial Advice and Markets Review (FAMR). The FCA consulted, in April 2017, on a draft version of the factsheet in its guidance consultation on part one of its implementation of the FAMR.

The FCA has separately published a summary of feedback received to that consultation, which includes its response to feedback provided on the draft factsheet. The FCA confirms that it intends to retain its existing guide, "Promoting pensions to employees – a guide to employers", on the grounds that its content remains of value.

FCA update on defined benefit pension transfers work

On *October 3, 2017*, the FCA published an update on its work relating to defined benefit (DB) pension transfers.

There has been significant growth in individual transfers being sought from DB schemes to personal pensions in order to take advantage of the pensions freedoms introduced in April 2015. The FCA has focused on how advisory firms have adapted their business models and processes, and the risk of harm to consumers transferring out of DB schemes.

The FCA's key findings relate to

Specialist transfer firms
Most advice on DB transfers is provided by specialist transfer firms who obtain a significant portion of their business through client introductions by other adviser firms. The FCA found that some of these firms made transfer recommendations without considering a receiving scheme or investments, or knowing the introducing adviser's intentions for investment. This gave rise to the risk of consumers' pension savings ending up in inappropriate or scam investments. The FCA found that many firms have failed to take on board the general risks associated with firms accepting introductions, which it set out in August 2016. The FCA expressed disappointment that firms had failed to take account of its expectations of what a firm must do in preparing and providing a transfer analysis. The FCA found that several firms simply had inadequate compliance resources to deal with the increased number of referrals appropriately.

Suitability of advice
The FCA notes that not all the firms that it assessed were specialist pension transfer firms and it reminds all firms that they should ensure that their personal recommendations are suitable for their clients. Many firms had designed processes and procedures that result in transfers where the suitability of advice could not be established by the firm.

Reasons for this included

- Failing to obtain enough information about clients' needs and personal circumstances.
- Failing to consider the client's needs alongside the client's objectives when making a recommendation.
- Not making an adequate assessment of the risk a client is willing and able to take in relation to their pension benefits.

The FCA also found that advisers had failed to make appropriate comparisons between the DB scheme and the intended receiving scheme. As a result, advice was based on incorrect or inaccurate comparisons.

The FCA's work on scams has resulted in 32 firms no longer providing advice, or limiting their pension transfers activity, and its wider work on DB transfers has led to four firms deciding to no longer advise on DB transfers.

The findings from this supervisory work has informed the FCA's consultation on proposed changes to its rules and guidance as set out in a June 2017 consultation paper on advising on pension transfers and will be taken into account when the FCA responds to the feedback to the consultation.

We will report further once the FCA responds to the feedback it has received.

PPF publishes draft 2018/19 levy determination and policy statement for third triennium

The Pension Protection Fund (PPF) has published for consultation its draft levy determination for 2018/19 alongside a policy statement for the third triennium running from 2018/19 to 2020/21. Consultation on the draft determination closes on *November 1, 2017*.

The draft levy determination reveals that the overall amount the PPF plans to collect under its levy estimate will fall by more than 10 per cent from £615 million in 2017/18 to £550 million in 2018/19. The drop reflects the PPF's view that its funding position is "strong", and a reduction is therefore "appropriate" despite the ongoing significant risks to schemes within the PPF-eligible universe.

Insolvency risk
The PPF confirms it will implement (with only limited changes) the proposals regarding assessment of insolvency risk contained in its March 2017 consultation paper. We reported on the proposed changes in detail in our April 2017 update, including the PPF's suggested changes to the scorecard system and the proposal to use alternative bases for assessing insolvency risk for different types of sponsors. The PPF is to proceed with these changes.

Contingent asset certification

The PPF confirms it will consult separately on changes to its contingent asset certification documents, in line with plans outlined in the March 2017 paper. The March consultation proposals included a requirement for a "guarantor strength report" where a Type A contingent asset was of a "very high value". The intention is that new standard forms will be consulted on "during October" and published in December 2017 alongside the finalised levy rules for 2018/19.

The PPF's combined Policy Statement and Consultation Document states that new contingent asset agreements entered into for the 2018/19 levy year will be required to be on the new forms. For *existing* Type A (parent company guarantee) and Type B (usually security over property) agreements, the PPF is likely to require action to be taken for 2019/20, but not for 2018/19.

The imminent consultation will set out the PPF's proposals as to how caps should operate and will also provide draft Type A and Type B contingent asset standard form agreements for comment.

We will report in detail on the final determination and on the new forms once they are available.

Sponsoring employers should now take the opportunity to

- Check how their insolvency risk will be assessed under the new policy, and consider the effect of any changes on their expected PPF levy. Most likely to be affected are large companies, which may find that the new scorecard adversely affects their credit rating.

- Whether it is worth implementing a new parental guarantee on the updated standard PPF form once it is published.

- Decide whether to respond to the PPF's consultation, especially where the proposals in the draft Determination may reduce anticipated levy savings or even increase the levy due.

HMRC publishes issue no. 28 of its Countdown Bulletin

Of interest to formerly contracted-out DB schemes is the publication on *September 29, 2017* of HMRC's latest edition of its Countdown Bulletin.

The Bulletin provides further detail for administrators of such schemes about the end of contracting-out and is available here.

HMRC publishes pension Schemes Newsletter no. 91

Of general interest is the latest edition of HMRC's Pension Schemes Newsletter, which was published on *September 29, 2017*.

The topics relating to pensions include

- An explanation of how HMRC will cleanse scheme data before moving scheme and administrator details across to the new pensions online service.

- A reminder of the launch earlier in September 2017 of the lifetime allowance look-up service, whereby administrators can check the protection status of their scheme members.

However, we understand the system has certain limitations as it gives only a "current status" of the protection and shows neither member identity, nor protection history.

- How to report overseas transfer charges, which must be submitted quarterly from *October 1, 2017*.
- A reminder that administrators must alert members who have exceeded the £40,000 annual allowance for the 2016/17 tax year, and who do not have sufficient carry forward allowance from previous years, that this must be declared by the member on their self-assessment tax return. The deadline is *January 31, 2018*, online and *October 31, 2017*, for a paper return.
- Pensions tax registration – a reminder of HMRC's earlier policy paper on proposed new legislation to be included in the Finance Bill 2017/18 which will widen the circumstances in which HMRC may refuse to register a scheme, the aim being to combat pension scams.

View the Newsletter.

HMRC publishes Countdown Bulletin no. 29

Of interest to all formerly contracted-out DB schemes is the publication on *October 12, 2017*, of the latest edition of HMRC's Countdown Bulletin.

In the principal news item related to termination and transfer notices, HMRC notes that although contracting-out on a DB basis came to an end in April 2016, schemes continue to submit notices with end dates on or after April 6, 2016.

HMRC reminds scheme administrators that it stopped tracking contracted-out rights after April 5, 2016, after which date such tracking became the responsibility of the scheme administrator. However, schemes are reminded that HMRC must be advised of any movement or method of preservation occurring prior to April 6, 2016 by *December 2018* at the latest.

View the Countdown Bulletin.

Data Protection Bill

We reported in our August 2017 update that major reform is due in data protection legislation. The General Data Protection Regulation (GDPR) is an EU regulation which will take effect on *May 25, 2018*. This major reform will affect all organisations that hold personal data, including pension schemes. Although the UK intends to leave the EU, the provisions of the GDPR will be implemented by way of a new Data Protection Act to ensure legal continuity post-Brexit.

The Data Protection Bill was given a first reading in the House of Lords on *September 13, 2017*. This formality signals the start of the Bill's passage through the Lords. A second reading including general debate on all aspects of the Bill took place on October 10, 2017.

The Bill will replace the Data Protection Act 1998 (DPA) to provide a comprehensive legal framework for data protection in the UK supplemented by the GDPR until the UK leaves the EU. When the UK leaves the EU, the GDPR will be incorporated into UK domestic law under the European Union (Withdrawal) Bill currently before Parliament. Strong data protection laws enable UK businesses to operate across international borders and unrestricted data flows are essential to the UK post-Brexit.

The Bill will

- Set new standards for protecting general data in accordance with the GDPR, giving individuals more control over use of their data and new rights to transfer or erase personal data.
- Preserve existing exemptions which worked well in the DPA. These include exemptions for journalists, research organisations, financial services firms in relation to money laundering and processing of sensitive and criminal conviction data without consent to allow employers to fulfil employment law obligations.
- Provide a bespoke framework tailored to the needs of the UK's criminal justice agencies and national security organisations.

The Information Commissioner's Office (ICO) will be given more power to defend consumer interests and issue higher fines of up to £18 million or four per cent of global turnover in case of the most serious data breaches.

ICO consults on GDPR guidance on contracts and liabilities

Also in relation to data protection reform, the ICO is consulting on draft guidance on contracts and liabilities between controllers and processors under the GDPR, with comments being sought up to *October 10, 2017*.

The draft guidance contains practical guidance for UK organisations including examples and checklists. It frequently refers to further guidance which is in the pipeline.

The ICO has set out what must be included in the contract to ensure GDPR compliance including compulsory details about the processing, minimum contractual terms and what should be included as good practice. Although not required by the GDPR, the ICO suggests that the processor's direct responsibilities and liabilities under the GDPR are covered in the contract explicitly and the extent of any indemnity specified.

Any processing contracts in place on *May 25, 2018* (when the GDPR takes effect) need to meet the new requirements. The ICO recommends businesses review existing and template contracts to ensure compliance. The ICO also advises ensuring that data processors understand the reasons for the contract changes and are aware of their new responsibilities and liabilities, and the consequences and penalties for non-compliance.

The ICO has issued an Overview of the GDPR, which includes a "What's new" section at the beginning. This is updated monthly to highlight new content and to indicate where specific guidance is forthcoming either from the ICO or from the Article 29 Working Party. Links will be published in the Overview to the guidance as it is available.

Pensions Act 2014 (Commencement No. 11) and the Pension Schemes Act 2015 (Commencement No. 2) Regulations 2017 – transaction cost disclosure provisions

Section 44 of the Pensions Act 2014 came into force on *September 18, 2017*. This requires the Secretary of State to publish regulations that mandate the disclosure of information about the transaction costs in certain occupational and personal pension schemes.

The Pensions Act 2014 (Commencement No.11) and the Pension Schemes Act 2015 (Commencement No. 2) Regulations 2017 are the relevant regulations and are intended to clarify the transaction costs in such work-based money purchase schemes.

The regulations require details of transaction costs to be disclosed to workers who are auto-enrolled, or contractually enrolled, in their employer's pension scheme. Certain schemes will remain outside these compliance requirements, including public service schemes, executive schemes and those whose only money purchase benefits come from AVCs.

Also with effect from *September 18, 2017*, a similar duty is imposed on the FCA to make rules in relation to certain personal pension schemes, by inserting a new section 137FA into the Financial Services and Markets Act 2000.

Safeway v Newton: Court of Appeal upholds High Court decision that formal deed required to equalise pension benefits

On *October 5, 2017*, the Court of Appeal (CA) dismissed an appeal by Safeway Limited, against a decision by the High Court in February 2016, that normal pension age (NPA) in its defined benefit scheme was equalised at 65 for men and women by virtue of announcements to members made in September and December 1991. A formal rule amendment was not made until a new definitive deed was executed on May 2, 1996, but equalisation was expressed to have taken effect from December 1, 1991.

The High Court refused to grant a declaration to Safeway Limited confirming that NPA had been equalised at 65 with effect from December 1991. While announcements to members had been issued in 1991, the scheme's trust deed was not amended formally to reflect equalisation until May 1996. Warren J found that the announcements were not effective to equalise NPA in December 1991. Following his previous decision in *Harland & Wolff*, Warren J held that the equalised NPA of 65 could not take effect retrospectively and therefore only applied from May 1996.

The issues in the High Court case were explored in depth in our March 2016 briefing.

In a decision which emphasises the need for pension schemes to follow the exact terms of the power of amendment in order to effect rule changes, the CA dismissed the employer's first ground of appeal. It concluded that the High Court had been correct to hold that the scheme's power of amendment required rule changes to be implemented by deed, not by written announcement.

The second issue considered by the CA was whether the equal treatment requirements of Article 119 should override a clear power under the Safeway scheme rules to "level down" NPAs. Under EU law, following the Barber decision on May 17, 1990, scheme benefits are required to be "levelled up" so that the disadvantaged male members are granted a retirement age of 60 (rather than 65) during the "*Barber window*" which applies before equalisation is achieved by a formal rule amendment. In the Safeway scheme, the rules permitted retrospective levelling down, meaning female members' NPA would be raised to 65 during the Barber window, and the CA decided that this was a question on which the ECJ should rule.

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