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NORTON ROSE FULBRIGHT

Essential UK Pensions News

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Updater

Introduction

Essential Pensions News covers the latest pensions developments each month.

The end of RPI is on the cards – but probably not before 2030

On September 4, 2019, the Chancellor, Sajid Javid, responded to a letter of March 4, 2019 from Sir David Norgrove, Chair of the UK Statistics Authority, which set out proposals to reform RPI by aligning it with CPI including owner occupiers' housing costs (CPIH).

Until 2030, the Chancellor's consent is required by law for the UKSA's proposed changes. Mr Javid announced that, as some or all users of RPI would need time to prepare for the switch, he would not give his consent before February 2025. The Government will consult in January 2020 on whether the change should be made at a date other than 2030, and if so when between 2025 and 2030. As part of the consultation, the UKSA will consult on technical matters on how the implementation of RPI alignment with CPIH will be achieved, and a response should be published before the Spring Statement and end of the financial year 2019/20.

Comment

The announcement signals a change that will be welcomed by many schemes that have RPI embedded in their rules, as the move will provide such schemes with an override for changing index. However, the timetable could not be described as ambitious. Although the eventual reform will be welcomed by schemes wishing to change index, they remain at the mercy of the specific drafting of their scheme's increase rule. The difference in cost for schemes of RPI and CPI is substantial and unless a change is permitted by the scheme rules, employers will need to continue making contributions on the existing basis.

Outside the pensions sphere, a move to CPIH will also bring an end to the Government's unfair habit of "Index shopping". The gap between the RPI and CPI has meant that increases to expenses such as rail fares and interest on student loans have been pegged to the RPI, while increases in benefits, tax thresholds and public sector and state pensions reflect CPI, which is generally lower.

Pensions Regulator publishes revised investment guidance for DB schemes

The Pensions Regulator has published updated guidance for trustees of defined benefit pension schemes on issues to consider when investing scheme assets. It contains practical examples to assist trustees on a wide variety of investment issues, with highlighted areas to emphasise key principles and questions for consideration, against the backdrop of related legal changes.

The new guidance replaces the previous version, last issued in March 2017. The key changes include updates to reflect

- new disclosure requirements concerning financially material and non-financial factors, and the scheme's stewardship activities, which will need to be incorporated into the statement of investment principles (SIP) before October 1, 2019 (pages 20-22 and 28-33). These relate principally to the disclosure of matters concerning environmental, social and governance (ESG) issues in pension investing

- requirements relating to the appointment and retention of fiduciary managers, and the setting of objectives for investment consultants, under the Investment Consultancy and Fiduciary Management Market Investigation Order 2019 (pages 17-19). The DWP is currently consulting on amending legislation in respect of both of these requirements, although the requirements of the Order come into effect from December 10 2019.

View the revised DB investment guidance.

Comment

As noted above, the main changes in the Regulator's guidance relate to the recent changes implemented by the CMA under its final Investment Consultancy and Fiduciary Management Investigation Order 2019, together with changes to disclosure obligations via the scheme's SIP under three further sets of regulations[1]. We examined in detail the Regulator's strengthening of its "green" investment guidance relating to ESG issues for revised SIPs in our July 2019 briefing, when we looked how the Regulator's investment guidance for DC schemes had been revised.

Trustees should start making preparations to comply with those parts of the CMA Order and the guidance applicable to them, and should engage with their Investment Consultants and Fiduciary Managers as appropriate. The DWP has also consulted on this area, and the consultation closed on September 2, 2019. However, any resultant regulations are not expected to come into force before April 6, 2020. Once the DWP regulations are implemented, trustees' compliance obligations will then be overseen by the Regulator rather than the CMA. Please see our September 2019 briefing for more detail.

DWP publishes tailored review of Pensions Ombudsman service and concludes not to merge with Financial Ombudsman

A DWP report has concluded that there is currently no "strong case" for a merger between the Pensions Ombudsman and the Financial Ombudsman Service without changes to the underlying regulatory framework of both organisations. In a Tailored Review of the Pensions Ombudsman, the DWP concludes that the issue of a merger may be reconsidered under a future tailored review.

The review notes that there is a potential problem in the overlapping jurisdiction of the two bodies, with the possibility of different decisions, under their respective rules, for cases that involve the maladministration of personal pensions. It notes that a canny consumer could evaluate which body would be more likely to determine in their favour when choosing which ombudsman should hear their complaint. The review states that this issue *"undermines fair and equal access"* and disadvantages less informed consumers. It recommends that both organisations should develop a collaborative process to reduce the potential for customer confusion and duplication of efforts.

The review also confirms that the relationship between the Pensions Ombudsman and the Regulator is growing stronger, but this could be further improved with increased joint working on such areas as research, evidence-gathering and information-sharing on issues that are common causes of complaints.

1 The Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018. The changes are implemented through amendments to the Occupational Pension Schemes (Investment) Regulations 2005 (the Investment Regulations) and the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (the Disclosure Regulations). The Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 were required following the transposition into UK law of the Shareholders' Rights Directive II.

As the Pensions Ombudsman has "*more than doubled in size in the past five years*" the review recommends the current governance arrangements evolve into a full board structure, with the immediate recruitment of two non-executive directors (in addition to those already on the Ombudsman's executive board), and the appointment of a chief operating officer.

The next tailored review is due in five years' time. The DWP confirmed changes to the Ombudsman's jurisdiction in a consultation response published in August 2019, and upon which we have previously reported.

FCA consultation on charging structures for advising on pension transfers

The Financial Conduct Authority is consulting on changes to pension transfer advice, contingent charging and other proposed changes in its consultation paper CP19/25. The deadline for responses is October 30, 2019.

The FCA believes that intervention on adviser charging structures is necessary due to difficulties in managing the conflicts of interest that exist when providing transfer advice in the form of commission-based remuneration. Despite the Government putting in place a mandatory advice requirement to prevent members of DB schemes transferring against their own best interests, the FCA still believes the rate of transfer is too high given the benefits of DB pensions.

The FCA is concerned that too many advisers are providing poor advice, much of it driven by conflicts of interest relating to the practice of contingent charging where advisers only get paid if a transfer proceeds creates an obvious conflict.

The FCA is therefore proposing

- a ban on contingent charging, except for groups of consumers with certain identifiable circumstances that mean a transfer is likely to be in their best interests.

- where contingent charging is permitted, to require advisers to charge the same amount (in monetary terms) for advice to transfer as they charge when the advice is non-contingent.

- to introduce a short form of "abridged" advice that can result in a recommendation not to transfer based on a high-level assessment of a client's circumstances. This will fall outside the proposed ban on contingent charging and should help maintain initial access to advice.

Regarding ongoing conflicts of interest, the FCA proposes to strengthen its existing requirements that advisers giving pension transfer advice should consider an available workplace pension as a receiving scheme for a transfer where one is available. This is intended to address the conflicts of interest created by ongoing advice charges. It will also reduce the level of transfers involving unnecessarily complex and expensive solutions.

Once responses to the consultation have been received, the FCA will consider the feedback provided and publish its final rules and guidance in a policy statement in Q1 2020.

DWP publishes factsheet on pensions aspects of Shareholder Rights Directive II

In our June 2019 update, we reported that the DWP had laid before Parliament the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019, which implement aspects of the revised Shareholder Rights Directive (SDR II) applying to workplace pension schemes. Under the Amending Regulations, trustees of occupational schemes will need to comply with new obligations on shareholder engagement. The amending regulations became necessary as a result of the extension of the Article 50 period past the SDR II deadline of June 10, 2019.

The DWP has now published a factsheet for trustees of occupational pension schemes. The SDR II aims to encourage long-term shareholder engagement, effective stewardship and transparency between traded companies and investors. There are now new SIP and investment disclosure requirements for trustees, including public disclosure of details of their investment strategy and the scheme's arrangements with their asset manager. Our July 2019 briefing sets out the requirements in detail.

The DWP's factsheet encourages trustees to prepare for implementation of the new requirements. A useful section "*What trustees need to do and when they need to do it*" summarises the key steps for DB and DC schemes respectively.

View the factsheet.

PPF publishes guide to the levy 2019/20

Schemes that are subject to the Pension Protection Fund levy will shortly be receiving their invoices for the 2019/20 levy year. In order to avoid interest, schemes have 28 days from the date of the invoice to pay the levy.

The PPF has published an online Guide which is designed to help pension schemes administrators understand their PPF levy invoice and it also provides contact details for any related queries.

PPF makes first increased compensation payments to members affected by Hampshire ECJ ruling

The PPF has started making increased payments to pensioners affected by the ECJ's ruling in *Grenville Hampshire v The Board of the Pension Protection Fund* [2018], under which it was held that members are entitled to an individual minimum guarantee of 50 per cent of the value of their benefit entitlements, rather than an average level of protection.

The PPF has confirmed that it has now started making increased payments to pensioners whose benefits were reduced below 50 per cent of the value of their accrued pension due solely to the operation of the compensation cap. It will start making payments to a second group of affected pensioners in the coming weeks. The PPF is also continuing work on its approach for assessing remaining members who may be affected by the ruling, including pensioners for whom the compensation cap alone did not take them below the 50 per cent threshold.

However, the PPF has decided that it will not pay arrears on these increases until the Court of Appeal has considered the correct approach to be taken, as there could be a risk of having to recover overpayments if the Court decides on a different approach.

HMRC publishes Countdown Bulletin no. 48 and Pension schemes newsletter no. 113

Further issues of the Countdown Bulletin and Pensions Schemes Newsletter have been produced.

Published on August 30, 2019, the Countdown Bulletin highlights administrative issues relating to the final cuts of scheme data as the last step in the Scheme Reconciliation Service, based on HMRC records following the completion of all queries. The Final SRS Data Cuts will be produced by HMRC in November 2019.

The Bulletin also states that schemes which have undertaken GMP conversion do not need to notify HMRC of the fact, as HMRC no longer tracks contracted-out rights. However, notification is currently a legal requirement for a valid conversion process and until the Regulator makes clear that it will not penalise schemes for failing to do so (or the law is changed), schemes should continue to notify HMRC.

Published on August 29, 2019, the Newsletter reminds administrators that where the deadline for submitting annual return information has not been met, any subsequent interim repayments will be withheld until the outstanding return and declaration are received by HMRC. It is also important for schemes to submit their annual return of information for 2018/19 by September 30, 2019.

HMRC further reminds administrators that annual allowance pension savings statements for the 2018/19 tax year must be issued to members exceeding the annual allowance by October 6, 2019. However, members with a tapered annual allowance and those who accrue benefits across more than one scheme should also be on the alert and will need to make their own calculations. A link is provided for members with DC savings to HMRC's annual allowance calculator.

High Court refuses to sanction insurance business transfer of annuity portfolio - Part VII judgment puts life-transfers in the spotlight

The usually predictable world of portfolio transfers received a jolt on August 16, 2019 when Mr Justice Snowden declined to exercise his discretion to sanction the proposed insurance business transfer of a £12.9 billion book of in-payment annuities from The Prudential Assurance Company Limited (Prudentia) to Rothesay Life Limited (Rothesay). This is believed to be the first time ever that the Court has refused to sanction a Part VII scheme that has been passed by both the independent expert and the insurance regulators, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA).

Whilst certain commentators believe that this may signal the death knell for other large life insurance transfers, we believe that the scope of Mr Justice Snowden's judgement is of relatively limited effect. The judgment centres on

- the particular nature of in-payment annuities whereby (unlike general insurance and other types of life insurance) the policyholder is unable to surrender his policy or otherwise switch to a new provider if he doesn't like the transferee imposed on him under a scheme. In such a case, the choice by a policyholder of the original

insurer arguably bears significantly more importance than such choice for other types of insurance; and the age, history and reputation of the selected insurer may be relevant factors in determining whether the court should sanction the transfer.

- the contrast between an insurer that is part of a large financial services group where the parent company, which might be called upon to inject capital in the event of financial deterioration, is linked by reputation to the insurer in question, has substantial resources and a history of providing capital as required; and a relatively new entrant with a parent (or significant investor), such as an investment fund, which might not be able to raise further monies if further capital is required by the new insurer.

At the time of writing, we understand that Prudential and Rothesay will be pursuing an appeal. Unless this is expedited, this can be expected to take up to a year and in the meantime, all part VII transfers will have to take heed of, and seek to differentiate themselves, from the Prudential/ Rothesay scheme.

For more detail please see the online article written by Maria Ross, partner in our Financial Services team.

Pensions Ombudsman - Mr T (PO-24307): no direct link between reliance on incorrect benefit quotation and decision to purchase car

The Deputy Pensions Ombudsman has partly upheld a complaint by a member who argued he relied on incorrect information that he would be entitled to a tax-free lump sum, to purchase a car.

The member was mistakenly told he would be entitled to a tax-free lump sum of over £7,000. However, his benefits under the plan had been transferred out in 1990. The plan's administrator apologised and offered to pay the member £850 in compensation. The member argued the sum was insufficient, the administrator had a duty to inform him of the earlier transfer and not doing so breached their contractual relationship. The member claimed had he been informed sooner he would have bought a less expensive car. He also argued he could not mitigate his losses because if he had sold the car when he was made aware of the incorrect information, he would have lost more than the tax-free lump sum.

The DPO held the administrator's failure to inform the member as soon as it was aware of the error was maladministration. However, the DPO did not think the member could demonstrate that he reasonably relied on the incorrect statement when he purchased the car and could find no direct causal link between the lump sum available and how much the member chose to spend on the car. In addition, the member had not taken any steps to show that he tried to mitigate the loss of his pension by selling the car when he was notified of the error.

However, the DPO did recognise that the member had suffered distress and inconvenience and considered a payment of £2,000 to be justified.

Comment

This is one of several decisions in recent years in which the Ombudsman has held that even though the member may have relied on information that stems from an error, this does not mean that there is an entitlement to rely on incorrect information in substitution of the correct position.

While the figures in this case provided to the member were incorrect (and this was maladministration), it does not follow that the complainant should receive the overstated benefits, and instead the entitlement is limited to the benefits provided under the scheme rules. While the administrator had provided an incorrect quotation and had told the member he was entitled to a tax free lump sum, when he had, in fact, already transferred out of the scheme, the scheme was not bound to provide the incorrect sum quoted. The member was therefore already in receipt of the correct benefits under the scheme rules.

This determination is another example of where the Ombudsman's office is not willing to accept that a member is entitled to misstated benefits. Once again, the inability to prove detrimental reliance will restrict the complainant from being able to claim the overstated amount. For members the position is clear and an overstatement is not a potential windfall.

However, it seems the Ombudsman may sometimes be willing to award higher than expected compensation for distress and inconvenience where there are numerous and repeated errors by an administrator. Here, the payment of £2,000 for distress and inconvenience falls into the "severe" category of Ombudsman compensation payments and seems to reflect the compounded errors over the prolonged period between 1990 when Mr T's benefits were actually transferred and 2017 when the then administrator eventually informed Mr T of this fact, despite having been aware of the error and the receipt of erroneous contributions from HMRC which had needed to be repaid since 2011.

Again, this case emphasises that good communication with members is essential, particularly when information relates to key financial decisions.

Issues in the pensions pipeline

October 31, 2019 – the UK withdraws from the EU, although it is (currently) unclear exactly what form Brexit will take.

October 1, 2019 – new SIP requirements beginning to come into force relating to environmental, social and governance (ESG) factors.

GMP Equalisation – DWP conversion guidance has now been published. The cross-industry working group has now published its Call to Action paper and guidance is expected throughout the rest of 2019.

Revised Funding Regime – consultation on a revised Code of Practice is expected “in the summer” with technical provisions expected to remain broadly as they are, with the main change being the addition of a secondary long-term funding target.

New Pensions Bill – in the latest Brexit-related drama, Boris Johnson’s prorogation of Parliament and been declared unlawful by the Supreme Court and MPs were recalled on September 25, 2019. At time of writing, it is unclear whether the Queen’s Speech will still be delivered on October 14, 2019. The new Bill is expected to include provisions covering the Pensions Dashboard, the Regulator’s powers, the revised Funding Regime, DB Consolidators and the Money and Pensions Service.

EMIR – new requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. A further EMIR temporary exemption extension for pension scheme arrangements applied to August 16, 2018 and has now expired. On May 28, 2019, the EMIR amending regulation was published and was implemented on June 17, 2019. Under the amendments, the clearing requirement is not activated for the first two years, and the exemption may also be extended twice more, each time by a further year if *“…no viable technical solution has been developed and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remains unchanged.”* The UK Government has confirmed that, as far as possible, the regime set out in the EMIR legislation will not change after the UK has left the EU.

October 1, 2020 – new disclosure obligations apply for trustees in relation to scheme’s Statement of Investment Principles under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

October 1, 2021 – new requirements apply for trustees to publish information on a publicly available, free website relating to voting and capital structure of investment companies under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

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