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NORTON ROSE FULBRIGHT

# Essential UK Pensions News

## Briefing

December 2019

## Introduction

Essential Pensions News covers the latest pensions developments each month.

## Queen's Speech scheduled for December 19, 2019

With Boris Johnson having been returned as Prime Minister in the General Election, the State Opening of Parliament and the Queen's Speech is due to take place on December 19, 2019.

The Conservative manifesto included a commitment to progressing the Pension Schemes Bill after the election, with assurances to provisions on further protecting members from pension scams and from their pension funds being *"plundered by reckless bosses"*. The Bill also sets out the framework for the creation of multiple new pensions dashboard services feeding into a single dashboard, and the Conservative manifesto pledges to *"reintroduce legislation that … helps savers be better informed with pension dashboards"* and also extends to provisions introducing a new framework for collective money purchase schemes..

The Conservative election victory presumably means that the Pension Schemes Bill 2019 will be scheduled to make its way through the Parliamentary process in the same form as before the election campaign began. That being the case, we have been told to expect the Pensions Regulator's first consultation on the proposed new defined benefits funding regime "early in 2020".

The manifesto also contained a pledge to conduct an urgent review of the pensions tax taper relief problem affecting NHS high earners within 30 days of the new government being formed. The manifesto stated that the Conservatives would work with the British Medical Association and Academy of Medical Royal Colleges to 'solve the problem'. In the short term, interim measures are expected to be authorised as set out by Matt Hancock, the Secretary of State for Health and Social Care to address the possible tax charges faced by some of the higher-earning members of the NHS pension scheme (see item below).

## Health Secretary publishes statement proposing interim solution for senior NHS clinicians incurring annual allowance charges

### The NHS and the taper relief problem

Our November 2019 briefing looked at the main political parties' manifesto proposals regarding pensions law. The Conservative manifesto set out its plans to address the "taper relief problem" which results in senior members in the NHS pension scheme experiencing problems regarding the application of the pensions tax-free contribution annual allowance taper. Currently the annual allowance is capped at £40,000 per annum and exceeding it results in an annual allowance tax charge. Since April 2016, a tapered allowance has been in force in respect of income over £150,000 per year. The maximum reduction which can apply under the taper is £30,000, so that an individual with earnings of more than £210,000 will have their annual allowance capped at £10,000.

Matt Hancock, the Secretary of State for Health and Social Care, has published a statement which sets out plans to implement a "scheme pays neutralisation" for senior medical staff incurring an annual allowance charge for the tax year 2019/20. Under the proposal, affected members of the NHS scheme will run up annual allowance charges and the tax will then be paid by the scheme under the "scheme pays" mechanism, with a resultant reduction in scheme benefit. At retirement, the NHS employer will top up the members' benefits so that the individual suffers no detriment.

### Comment

This taper was introduced despite warnings that it would impact public service workers. There has been much publicity recently about senior doctors and consultants cutting down on overtime to avoid pension tax disadvantages, and which have contributed to increases to hospital waiting times. The interim solution promises to be a headache for NHS employers but it avoids consultants and senior doctors having to fund personally annual allowance charges.

However, it seems unfair that such changes will not apply across the board to private and public sector workers. The introduction of the taper, in combination with lowering the lifetime allowance, has stopped many high earners from contributing to pension schemes. It seems that the whole system of relief needs an urgent re-think. It makes no economic sense to prevent retirement savings in an ageing society. It is to be hoped that the review for NHS workers triggers a wider response.

## Pensions Ombudsman rejects member's challenge that Shell scheme failed to provide sufficient information on climate change – PO 27469

The member complained to the Trustee of the Shell Contributory Fund that he was not provided with the information he requested relating to how the Fund was taking into consideration the potential risks of climate change in its approach to investment strategies, risk management and covenant monitoring. The Pensions Ombudsman held that the Trustee had provided the member with information that went beyond its obligations under current legal requirements to disclose scheme documents and information, and no further action was required from the Trustee.

### Background

Over a 20-month period from April 2016, the member sought the information requested by means of correspondence and in face-to-face meetings with the Chairman of the Trustee and the Secretary to the Investment Committee, as well as senior personnel from the employer. Remaining dissatisfied with the information disclosed, the member went on to invoke stages 1 and 2 of the Fund's IDRP. When this failed to elicit further information, the member took his complaint to the Ombudsman.

### Determination

The Ombudsman determined that the Trustee had provided the specific information required under the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013, and its decision to provide nothing further was "valid and reasonable, based on balanced consideration". The member claimed he had a right to see information over and above that laid out in the Regulations in order to provide assurance that climate change was being considered seriously. The Trustee had tried to reassure the member by explaining that only 1 per cent of the Fund's total assets were invested in the equity of companies associated with fossil fuels. When making its decision not to share further information, the Trustee took into account issues of confidentiality, commercially sensitive information, proportionality and potential conflicts of interest.

The Ombudsman found that the Trustee had a duty to ensure proper consideration was given to protecting the Fund and its members, and the fact that the Trustee and Secretary to the Investment Committee had met with the member in person was in excess of their disclosure duties under the Regulations.

### Comment

Since this compliant was considered by the Ombudsman, the position has changed. Under regulations that came into force on October 1, 2019, trustees of affected schemes face tougher disclosure rules from 2020 relating to their stewardship and engagement policies. New disclosure requirements mean trustees must provide information, in their statement of investment principles (SIP), on their policies in relation to *“financially material considerations”* including, but not limited to, environmental, social and governance (ESG) considerations which may include climate change. Schemes will have obligations not only to consider ESG issues as a compliance exercise, but to focus on the meaningful implementation of ESG policies across their investment portfolios in a way that aims to achieve the best long-term outcome for members. Please see our July 2019 briefing *“Regulator ramps up “green” investment guidance for revised SIPs”* for further detail.

ESG considerations are also part of the UK’s wider future policy and regulatory agenda. In summer 2019, the Government announced a new taskforce as part of a Green Finance strategy to look at the most effective way of enhancing climate-related disclosures. This was followed shortly afterwards by a joint declaration on climate change from the FCA, FRC, PRA and the Pensions Regulator, recognising the financial risks posed by climate change and looking forward to collaboration to address these issues.With the return of the Conservative Government in the General Election, it is probably safe to assume this strategy be implemented.

There are also strong industry pressures on pension schemes regarding climate change considerations and ESG. This complaint was supported by ClientEarth, an environmental charity. In their press release on the decision, it is stated that the member will not appeal the ruling, but they call on the Ombudsman to review its internal processes, as in their view, the *“spotlight will be on schemes who fail to adequately manage climate risks”*.

View the Determination.

## Guidance from the Pensions Regulator: additional work for trustees on DB to DC transfers

The Pensions Regulator has updated its guidance on defined benefit (DB) to defined contribution (DC) transfers and conversions to reflect changes to the FCA’s Financial Services Register. While most amendments are minor, there is one material change applying from December 9, 2019 for trustees to note.

Where a member has DB benefits valued in excess of £30,000, appropriate independent advice must be sought before such benefits (which are known as safeguarded benefits) are transferred to a DC scheme in order to be accessed flexibly. The Regulator’s DB to DC transfers and conversions guidance sets out at paragraph 39 how trustees can check the Financial Services Register. It explains that trustees should continue to consult the register for details of the adviser’s firm, but they should also contact the firm to ensure the adviser works for them. Alternatively, a new FCA directory containing data on certified individuals can be consulted, but this is not due to be released until 2020.

### Comment

In the short term, the changes will mean more work for trustees but it is hoped that the forthcoming FCA directory improve this situation.

## More guidance from the Pensions Regulator: tendering and setting objectives for investment service providers

In our September 2019 briefing we looked at the new requirements for trustees under the CMA's Investment Consultancy and Fiduciary Management Market Investigation Order 2019. The Order requires trustees receiving investment consultancy and fiduciary management services to seek clear information about those services and put in place strategic performance and monitoring objectives. Draft regulations have been consulted on by the DWP which will establish in pensions law the relevant provisions, and enable the Pensions Regulator rather than the CMA to oversee schemes' implementation of the new regime. In the meanwhile, from December 10, 2019, trustees must comply with the provisions of the Order.

The Pensions Regulator has finalised and published a new four-part guide for trustees on their duties to tender for fiduciary management services and set objectives for providers of investment consultancy services.

The four guides cover the areas set out below

- tendering for fiduciary management – this provides trustees with practical information and key considerations when carrying out a competitive tender exercise for the appointment of a fiduciary manager
- tendering for investment consultancy services – while there is no legal requirement under the CMA Order for trustees to apply the tendering process when selecting investment advisers, the guidance provides examples of good practice
- setting objectives for investment consultancy services – this provides assistance to trustees in understanding their duty under the CMA Order during the period before the DWP regulations come into force
- choosing an investment governance model – this guide was produced to address some of the gaps in knowledge and understanding which the CMA identified as part of its investigation and of which it was aware through its own engagement with trustees on investment governance. It explains the differences between investment consultancy and full fiduciary management and notes that there is a range of governance structures and levels of delegation between these two models.

Draft regulations consulted on earlier in 2019, the Occupational Pension Schemes (Governance and Registration) (Amendment) Regulations 2019, are due to incorporate these new governance requirements into pensions legislation. Once finalised, they are expected to come into force on April 6, 2020.

## PPF publishes final determination for 2020-21 levy, mainly in line with that consulted on in September 2019

On December 16, 2019, the PPF published the its final determination in respect of the levy for 2020-21, the final year of the current levy triennium. The PPF states that the determination deviates little from the draft determination published, and consulted on, in September 2019 and on which we provided detail in our October 2019 update.

The policy statement confirms that the levy for 2020-21 will increase to £620 million, a £45 million increase over the amount expected to be collected for 2019-20

Schemes should note the following points

- there are no major proposed changes in relation to the assessment of insolvency risk and insolvency scores are expected to be available online by the end of January 2020
- the ECJ judgment in the *Bauer* case, which may determine that the PPF's 10 per cent reduction for those below normal pension age is not compatible with EU law, is expected on December 20, 2019, and its conclusions will be reported in our January 2020 update. However, the PPF states that the judgment will be too late for any resultant change to be incorporated in 2020-21
- for a small number of cases, taking account of guaranteed minimum pension (GMP) equalisation costs as a result of the 2018 *Lloyds Bank* judgment may change an entity from profit to loss, and could generate a move to a higher levy band. The PPF will therefore allow affected companies to request an adjustment in their levy calculations.

### Comment

Most schemes' levies will be unaffected by GMP equalisation but for the small number of schemes that will suffer adverse and expensive consequences, the PPF's pragmatic stance is welcome.

As regards, the *Bauer* judgment, despite acknowledging that it could have a financial impact on the PPF, it has been decided not to delay this year's levy policy statement. Even if there is an impact that makes a case for increasing the levy, there is little scope to do so for 2020-21, and the PPF's approach seems sensible.

## HMRC pension schemes newsletter 115: reminder about annual allowance charges

The latest edition of HMRC's regular Pension schemes newsletter was published on 26 November 2019.

The newsletter highlights that HMRC is aware some scheme members are forgetting to declare on their self-assessment tax returns the details of annual allowance charges incurred. This has arisen in the main where members have arranged for their scheme to meet any annual allowance charges under "scheme pays" arrangements, rather than paying the charges themselves.

Some members may face an additional annual allowance charge if they have been affected by the annual allowance taper. This applies when a member has

- "adjusted income", which includes the value of pension contributions, of over £150,000
- "threshold income", which excludes the value of pension contributions, above £110,000.

In a tax year. HMRC has asked scheme administrators to remind members who have exceeded their annual allowance, and who do not have sufficient unused allowance to carry forward to cover the excess, that they must declare this on their self-assessment return, even if their scheme is paying the tax charge.

## Issues in the pensions pipeline

New or changed items are in italics.

January 31, 2019 – the UK is due to withdraw from the EU, although it is still 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 – GMPEWG conversion guidance has now been published although guidance from HMRC (promised "in December") is still awaited.

Revised Funding Regime – consultation on a revised Code of Practice was 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. However, now a General Election has been held, the Pension Schemes Bill has been delayed and may be amended when the new Government is in place. The DWP and TPR will also postpone the progress of documentation for consultation on the new DB funding regime.

*New Pension Schemes Bill – in the latest political drama, the Conservatives were returned to Government with a majority of 80. The new Pension Schemes Bill includes provisions covering the Pensions Dashboard, the Regulator's powers, and the revised Funding Regime, and its passage through Parliament is now likely to proceed.*

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).

As regards, the Bauer judgment, despite acknowledging that it could have a financial impact on the PPF, it has been decided not to delay this year's levy policy statement. Even if there is an impact that makes a case for increasing the levy, there is little scope to do so for 2020-21, and the PPF's approach seems sensible.

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