Sackers

Quarterly briefing

December 2016

Highlighting significant developments in pensions law, covering key areas such as pensions reform, regulatory developments, new legislation and cases

Q4
December 2016

On the front cover this quarter:
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Abbreviations

AA: Annual Allowance
CA: Court of Appeal
CPI: Consumer Price Index
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ESG: Environmental, social and governance
FAMR: Financial Advice Market Review
FCA: Financial Conduct Authority
FP16: Fixed Protection 2016
GMP: Guaranteed Minimum Pension
HMRC: HM Revenue & Customs
HMT: HM Treasury
ICAEW: Institute of Chartered Accountants in England and Wales
IGC: Independent Governance Committee
IP14: Individual Protection 2014
IP16: Individual Protection 2016
ISA: Individual Savings Account
LTA: Lifetime Allowance
MAS: Money Advice Service
MiFID: Markets in Financial Instruments Directive
PLSA: Pensions and Lifetime Savings Association
PPF: Pension Protection Fund
QROPS: Qualifying recognised overseas pension scheme
RPI: Retail Price Index
SIPP: Self-invested personal pension
SPV: Special purpose vehicle
TPAS: The Pensions Advisory Service
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator
VAT: Value Added Tax
WPSC: Work and Pensions Select Committee

In this issue

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The 2017 agenda

23 November 2016

Autumn Statement: A new chancellor, new pensions tax rules?
Will Philip Hammond turn to pensions to help him balance the books?

9 March 2017

Sustainability of DB schemes (see page 5 for more details)
The WPSC's inquiry is ongoing and a Government Green Paper is expected "soon".

31 March 2017

Brexit begins
The end of March is the Government's deadline for triggering "article 50" and kick starting the UK's exit process from the EU, but we could see delays in the wake of the High Court's ruling that Parliament must vote on whether this process can begin. The Government is appealing and a further hearing is expected in December 2016.[1]

Cap on early exit charges
FCA due to introduce 1% cap on exit charges for existing contract-based and workplace personal pensions. Detail awaited.

March 2017

Pensions dashboard prototype
A prototype of the Pensions Dashboard – a platform to allow savers to see all their retirement savings in one place – is expected in March 2017.[2]

5 April 2017

IP14 notification deadline
Notify HMRC before 6 April 2017 to claim protection against an LTA charge.[3]

6 April 2017

Lifetime ISAs introduced (see page 4)
New long-term savings product available from April.

PPF long service cap (see page 9)
The long service element of the PPF compensation cap due in force.

Tighter regulation for Master Trusts (see page 4)
New rules ahead for Master Trusts under the Pension Schemes Bill.

Pensions advice allowance (see page 6)
Individuals able to access DC pension pots to pay for regulated retirement advice.

7 May 2017

State Pension age review
Following a review in January 2017, the Secretary of State must present a report on the State Pension age by 7 May 2017.[4]

31 December 2017

VAT on fund management costs (see page 8)
End of extended transitional period for VAT on pension fund management costs.

2017?

GMP equalisation / guidance on conversion
Action by Lloyds Banking union will examine the legality of unequal GMPs, while DWP guidance is expected on converting GMPs into ordinary DB benefits.

Ban on member borne commission – existing arrangements
DWP regulations awaited to ban charges on members under existing commission arrangements (those in force before 6 April 2016).

1 See our Alert: What next for UK pensions after Brexit? (1 July 2017)
2 Pensions Dashboard prototype to be ready by spring 2017 (HMT, 11 September 2016)
3 See our Alert: Individual Protection 2014 (27 March 2014)
4 John Cridland CBE launches consultation on the State Pension age (DWP, 13 October 2016)

Retirement savings reforms

Lifetime ISAs

An overview

A new long-term savings product – the Lifetime ISA – is due to be introduced from April 2017. The Savings (Government Contributions) Bill,[5] which was published in September 2016, provides the framework.

From 6 April 2017, individuals between the ages of 18 and 40 will be able to open a Lifetime ISA with an approved account provider. The product's key features will be that:

Lifetime ISA available from 6 April 2017

- individuals will be able to contribute up to £4,000 in each tax year
- at the end of each tax year, the Government will provide a 25% bonus on contributions for savers below age 50. Those saving the maximum annual amount into a Lifetime ISA therefore stand to receive a £1,000 Government bonus
- an individual who dishonestly obtains a bonus to which he/she is not entitled, or who assists someone else in doing so, will be liable to a penalty not exceeding the greater of £3,000 and the amount of the bonus.

Contributions to the Lifetime ISA will sit within the overall £20,000 ISA limit for the tax year 2017/18 (up from £15,240 for the tax year 2016/17).

Further detail on the design of the Lifetime ISA and the policy behind it has been published by the FCA and HMT.[6]

Master Trusts

New regulatory framework

With a view to improving consumer protection, the Pension Schemes Bill 2016-17[7] is set to provide for closer regulation of Master Trusts. Among other things, Master Trusts will need to meet five key criteria:

Master Trusts will be subject to stricter regulation

- persons involved in the scheme are fit and proper
- the scheme is financially stable
- the scheme funder meets certain requirements in order to provide assurance about their financial situation
- there are adequate systems and processes in place relating to governance
- the scheme has an adequate continuity strategy.

The Bill also includes measures designed to ensure that people are able to access their retirement benefits flexibly without being unnecessarily penalised by early exit fees.

Assurance guidance to be updated

Consultation response awaited

Meanwhile, the ICAEW is consulting on an update of its technical release[8] on assurance reporting for Master Trusts. In proposed updates to its 2014 paper (produced jointly with TPR), account has been taken of experience in applying the assurance framework, while references to TPR's DC quality features have been removed.

5 See our Alert: Government publishes draft legislation to introduce Lifetime ISAs (9 September 2016)
6 Lifetime ISA: updated design note (FCA); Lifetime ISA explained (HMT) (both 15 September 2016)
7 See our Alert: Pension Schemes Bill (21 October 2016)
8 Assurance reporting on Master Trusts (Master Trust Supplement to ICAEW AAF 02/07) (September 2016)

Retirement savings reforms cont.

Tax changes formalised

Finance Act 2016

The Finance Act 2016 received Royal Assent on 15 September 2016.[9] It confirms a number of previously announced measures, including:

- the reduction of the LTA from £1.25m to £1m with effect from 6 April 2016
- the introduction of transitional provisions, in the form of FP16 and IP16 (also from 6 April 2016), to help those with pension savings already at or around the £1m mark
- technical changes to the tax rules in line with the DC retirement flexibilities.

HMRC guidance

HMRC has updated its Pensions Tax Manual to reflect the changes introduced by the Finance Act 2016.

HMRC guidance explains how the tapered AA works

It has also published guidance[10] to help those who might be subject to the tapered AA. Using threshold and adjusted income, the guidance explains how individuals can work out how much AA they have for 2016/17 and subsequent tax years.

Sustainability of DB schemes

Work and Pensions Select Committee inquiry

The WPSC is considering evidence on a number of issues relating to DB pension provision, including the adequacy of regulatory powers, whether specific additional measures are required for private companies or those with complex and multinational group structures, and the pre-clearance system.[11]

Regulatory powers and procedures under the spotlight

The PPF has submitted evidence, calling for "more interventionist" regulation of scheme funding and for TPR to have greater powers – to require the winding-up of pension schemes at the request of trustees or the PPF and more punitive powers to fine employers.

TPR has also called for tighter regulation, including a mandatory clearance process for certain corporate transactions and the power to demand more regular scheme valuations when it has concerns about a particular scheme.

PLSA DB Taskforce

The PLSA's DB Taskforce outlined a number of challenges facing DB schemes in its interim report,[12] including fragmentation of the current system, an inflexible regulatory approach and a rigid approach to benefit design and benefit changes. The final report of the Taskforce is due to be published in March 2017.

End of the road for secondary annuities

HMT scraps plans for a secondary market for annuities

After an "extensive programme of engagement" with the pensions industry, financial regulators and consumer groups, HMT has dropped plans to introduce a secondary market for annuities. Consumer protection was deemed to be the main challenge, with HMT unable to guarantee that consumers would get good value for money in a market that was "likely to be small and limited".

9 See our Alert: Finance Bill receives Royal Assent (19 September 2016)
10 Pension schemes: work out your tapered annual allowance (27 September 2016)
11 WPSC Pension Protection Fund and Pensions Regulator inquiry
12 DB taskforce interim report (PLSA, 20 October 2016)

Advice and guidance for retirement savers

Guidance delivery

New public body to offer debt advice, money and pensions guidance

Consultation on design of new guidance body awaited

HMT and the DWP are taking forward plans to develop a single financial guidance body that will be responsible for delivering debt advice and money and pensions guidance to the public.[13]

The body will combine services previously provided by MAS, TPAS and Pension Wise. The Government believes that a single body will be better able to respond to the different financial guidance needs of consumers, making it easier for them to get access to the help they need to make effective financial decisions.

Simplifying the advice requirement

Valuing benefits

To coincide with the introduction of the retirement flexibilities (generally for DC benefits) from 6 April 2015, a new requirement to take appropriate independent financial advice from an FCA authorised adviser was introduced for members with "safeguarded benefits" (generally speaking, DB benefits). The exception to this requirement is where the total value of a member's (or survivor's) safeguarded benefits is £30,000 or less.

Changes to be made in 2017 – either April or October

The DWP is reviewing the way benefits which are regarded as both "safeguarded" and "flexible" ("safeguarded-flexible benefits") are valued for the purpose of the advice requirement.[14] Currently, such benefits can have two different values – the estimated present value of the pension the member could secure by exercising their guarantee at a future date and a transfer value (which is usually lower) representing the realisable value of the member's DC pot.

Because having two calculation methods causes confusion, the DWP proposes simplifying the rules so that the value of the benefit is treated as equal to the actual transfer payment to which the member would have a statutory right.

Tailored risk warnings

In the same consultation, the DWP proposes the introduction of new tailored risk warnings to be sent to members with safeguarded-flexible benefits who are contemplating either transferring their benefits to a DC arrangement, converting their benefits into DC, or directly accessing their benefits flexibly.

Non-compliance with the requirement to provide such risk warnings could see trustees and managers facing a fine from TPR of up to £5,000 (for an individual) or £50,000 in any other case.

13 New public body offering debt advice, money and pensions guidance to be set up (HMT & DWP, 9 October 2016)

14 See our Alert: Retirement savings and financial advice – changes in the pipeline (7 October 2016)

Overseas pension transfers

Individuals who have a statutory right to transfer their pension benefits have the option of transferring them overseas. For the transfer to be made free of UK tax, the receiving scheme must be a QROPS.

The appropriate independent advice requirement applies equally to domestic and overseas transfers of safeguarded benefits. But, as those seeking to transfer their benefits overseas have run up against a number of practical difficulties, the DWP has issued a call for evidence[15] which looks at three options for simplifying the advice requirement in these circumstances, with options including:

Call for evidence closes 31 December 2016

- leaving the advice requirement as it is
- removing it entirely, or
- permitting overseas members to seek equivalent advice in their country of residence and introducing a way for trustees / administrators to check that the member has genuinely received advice from a local adviser.

The Government is keen to ensure that any alternative process includes some form of protection for members and that it only applies to members with safeguarded benefits who are resident overseas (or, potentially, those intending to move overseas).

Proposed changes to the definition of financial advice

HMT is meanwhile consulting[16] on proposals to amend the definition of regulated financial advice.

The idea behind the changes is to give firms the confidence to develop better and tailored guidance services to help customers make informed financial decisions, which falls short of regulated financial advice.

Building on a recommendation from the FAMR, HMT proposes amending the definition of "regulated advice"[17] to bring it into line with the simpler definition found in MiFID. This would mean that only advice which makes a personal recommendation would be regulated.

Allowance for accessing financial advice

Response to consultation awaited

HMT has been consulting on plans to allow people to use £500 tax-free from their DC pension pots to pay for regulated retirement advice from April 2017. This measure was recommended by the FAMR, which suggested that high quality financial advice can have a significant impact on retirement incomes if received early.[18]

The consultation sets out the Government's preferred design for this allowance and invites comments. Among other things, it seeks views on the eligibility age, whether multiple uses of the allowance should be permitted, and how best to promote awareness of the allowance.

15 See our Alert: Retirement savings and financial advice – changes in the pipeline (7 October 2016)
16 As above
17 In Article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001
18 Introducing a Pensions Advice Allowance: consultation (HMT, 30 August - 25 October 2016)

Regulatory

Financial Conduct Authority

Transaction cost disclosure in workplace pensions

In April 2015, new requirements were introduced for both IGCs and occupational pension scheme trustees to report on the level of transaction costs in their schemes. However, no corresponding duty was placed on asset managers to disclose this information.

Consultation closes 4 January 2017

The FCA is therefore consulting[19] on rules and guidance aimed at improving the disclosure of transaction costs in workplace pensions, including a requirement for those managing investments to report administration charges and transaction costs when a pension scheme that is required to obtain this information asks for it.

It is proposed that transaction cost disclosures will be based on a comparison of actual prices with the value of the asset immediately before the order to transact entered the market. As trustees and IGCs are required to report on transaction costs annually, the FCA suggests that this information is included within the standard reporting cycle of the provider or investment manager.

HM Revenue & Customs

Recovery of VAT on professional fund management costs

In the past, HMRC allowed employers to recover VAT on invoices for general administration fees for work commissioned by and delivered to the trustees of UK occupational pension schemes under VAT Notice 700/17. But in the wake of two European cases, HMRC revised its position and, in November 2014, set out its interpretation of the legal position. HMRC's view was that an employer could recover input tax in relation to the management of its pension scheme ("management" covers investment management and day-to-day administration) only if there is contemporaneous evidence that it:

- is the recipient of the services
- is party to the contract for those services, and
- has paid for them.

Transitional period extended again – to December 2017

Possible VAT routes put forward for evidencing an employer's entitlement to deduct VAT include the use of tri-partite contracts and VAT grouping.[20]

A transitional period (to 31 December 2015) was introduced to allow trustees and employers to continue to use the VAT treatment outlined in Notice 700/17 and later extended until December 2016. HMRC's latest brief (14 (2016)) announced a further 12 month extension of the transitional arrangements, to the end of December 2017, as it is "taking longer than expected to reconcile the [European cases] with pension and financial service regulations, accounting rules and emerging case law". Brief 14 (2016) also covers the options available to those who have already made changes to their arrangements for recovering VAT.[21]

HMRC plans to review its position towards the end of 2017 and to "consider the need for a further extension if necessary". This suggests that there are unlikely to be further developments in this long running saga any time soon.

19 See our Alert: FCA consults on transaction cost disclosure in workplace pensions (6 October 2016)
20 See our Alert: VAT on professional fund management costs – latest news (5 November 2015)
21 See our Alert: VAT on professional fund management costs – further extension of transitional period (8 September 2016)

Regulatory cont.

Institute of Chartered Secretaries and Administrators

Guidance on minute taking

The Governance Institute has published guidance[22] on the practice of minuting meetings. It covers the legal and regulatory framework, drafting principles, and issues such as access to minutes, retention of notes and recording meetings. The guidance sets out a principles based approach, noting that it is up to each individual organisation to decide how best its meetings should be recorded.

This guidance is relevant to trustee boards established as companies, and will also be of use to individual trustees with minute taking responsibilities.

Pension Protection Fund

Levy changes for 2017/18

The PPF is consulting on changes to the pension protection levy for 2017/18.[23] The key points are that:

Consultation closes 31 December 2016

- the rules will be largely the same as in 2016/17, in line with the PPF's aim of keeping the levy calculation stable during each three-year period
- a new mechanism is proposed for notifying Experian (the PPF's insolvency risk services partner) where the move to new UK accounting standard FRS 102 (or FRS 101) would otherwise cause an artificial movement in a levy rating.

Other adjustments include a change to the way in which small companies' accounts are assessed for insolvency risk purposes, the date from which Experian use data to calculate scores when accounts are restated, and clarifications to the scope of mortgage exclusions and guidance.

Levy estimate remains at £615m

The PPF also reiterates its position for schemes that have no genuine sponsor (for example, where the sponsor is a shell company or SPV) and proposes an approach for calculating risk-based levies for such schemes.

Long service compensation cap

Long service cap due to apply from 6 April 2017

The Pensions Act 2014 includes measures to increase the PPF compensation cap for those with long service by 3% for each full year of pensionable service above 20 years, up to a maximum of twice the standard compensation cap. The PPF has recently been consulting on draft legislation[24] to bring the new long service cap into effect.

Current compensation payments are expected to be recalculated to take account of the new long service cap but there will be no backdating.

Levy data correction principles

The PPF has set out the key principles it will apply when considering a data correction request from schemes and advisers.[25] While its main aim is for levies to be based on accurate information, the PPF will only correct data where it feels the particular circumstances merit it, rather than routinely. Schemes and their advisers are reminded that they "bear primary responsibility for ensuring that their levy is based on correct data".

22 ICSA guidance note: minute taking (19 September 2016)
23 See our Alert: PPF publishes consultation on levy changes for 2017/18 (27 September 2016)
24 See our Alert: PPF compensation cap – increase for long service (16 September 2016)
25 Levy Data Correction Principles (PPF, 4 August 2016)

Regulatory cont.

Guidance on restructuring and insolvency

The PPF has updated its guidance[26] on how insolvency practitioners and official receivers should interact with the PPF in the event that a sponsoring employer of an eligible occupational pension scheme suffers an insolvency event. This sets out criteria that restructuring practitioners should incorporate into any proposals they make in respect of the insolvent employer.

The PPF has also published a new factsheet[27] to explain why the PPF enters into restructuring and rescue agreements, and to summarise the principles it uses to make its decisions.

Consultation on actuarial assumptions

By law, the PPF has to set its valuation assumptions to reflect pricing in the bulk annuity market. It has recently been consulting[28] on proposed changes to the actuarial assumptions used for valuations under section 179 (used to determine scheme liabilities for the purpose of paying the PPF levy) and section 143 (to determine whether a scheme should enter the PPF following an insolvency event).

Changes due in force December 2016

The most significant changes proposed are:

- the use of separate discount rates for pensioners and non-pensioners post retirement
- the use of yield indices that have durations that better match average liability durations, including the introduction of a new index-linked gilt yield
- updated mortality assumptions.

The Pensions Advisory Service

New pension tracing service

TPAS has developed an online tool[29] to help customers understand whether a pension is likely to be due to them and which provides tips on what customers can do to find those pensions. The tool also explains how TPAS may be able to help.

The Pensions Regulator

Comply with governance requirements or face a fine

TPR has issued two reminders to trustees that they must comply with governance requirements or face a mandatory fine.[30]

TPR takes tough stance on compliance

In the first case, the warning came after a professional trustee firm was ordered to pay fines for failing to meet the statutory requirement to prepare an annual governance statement signed by the chair of trustees, for three separate DC schemes. The maximum fine of £2,000 was imposed for each scheme because a professional trustee was in place and there were no mitigating factors.

The trustees of two schemes in a later case had failed to complete their scheme returns on time. TPR advised them to submit their returns but, as neither took any reasonable steps to do so, TPR imposed a £300 penalty notice on each of them.

26 General Guidance for Restructuring & Insolvency Professionals (updated August 2016)
27 The PPF Approach to Employer Restructuring – protecting people's futures (August 2016)
28 Consultation on assumptions to be used for valuations under section 143 and section 179 of the Pensions Act 2004 (15 September-31 October 2016)
29 TPAS online tool: Trace a lost pension
30 See TPR's press releases of 17 August 2016 and 25 October 2016

Cases

Court of Appeal

Horton v Henry[31]

The CA has confirmed that a bankrupt's pensions that are not yet in payment cannot be accessed by a trustee in bankruptcy.

No access to pensions not yet in payment for trustee in bankruptcy

Mr Henry was adjudged bankrupt in 2012, when his assets included a SIPP and three other personal pensions. The trustee in bankruptcy sought an income payments order over the 25% tax-free lump sum potentially available from the SIPP, flexible drawdown payments from the SIPP, and the annuity value of the personal pensions for the next three years. Having reached normal retirement age, Mr Henry had a right to draw his various pensions but had not yet done so. In order to give effect to an income payments order, he would have had to bring those pensions into payment.

The general rule in bankruptcy is that all property vests in the trustee in bankruptcy. But there are certain exceptions, one of which relates to pension scheme rights. A trustee in bankruptcy can access pension income which is already in payment but, as the CA found in this case, rights to draw down a pension are not within scope. By contrast, the court can recover excessive pension contributions if the bankrupt is considered to have attempted to make such contributions in order to abuse the protections of the bankruptcy legislation, unfairly prejudicing their creditors.

Barnardo's v Buckinghamshire[32]

The CA has upheld the High Court's decision that the trustees in this case did not have the power to select the index by reference to which indexation and revaluation would be calculated.

No power to switch from RPI to CPI

Broadly, the scheme rules referred the "General Index of Retail Prices […] or any replacement adopted by the Trustees without prejudicing Approval". Lewison LJ considered this to be a two stage process, in which RPI is replaced by another index, which the trustees then adopt. As such, the index could only be replaced by the authority responsible for publishing it, not by the trustees.

An application for permission to appeal to the Supreme Court has been made. As things stand, the decision will continue to leave employers and trustees in an unsatisfactory place. Unless the Government consults more widely on amending primary legislation to relax existing section 67 requirements, the ability of schemes to switch from RPI to CPI will continue to depend on how scheme rules were originally drafted many years ago.

TPR Determinations Panel

DCT Engineering Staff Pension Fund[33]

TPR has used its powers to ensure that members of a closed DB scheme receive PPF compensation after the scheme's rules were amended.

TPR reverses rule amendment

The scheme's rules were changed by mistake, resulting in accrued benefits being calculated on a DC, rather than DB, basis. This meant some members would not be eligible for PPF compensation. Following an investigation, TPR declared the rule change void. Its Determinations Panel's order had the effect of confirming the scheme as DB, enabling the PPF to take on the scheme and its 11 members.

31 See our full summary of the decision in Horton v Henry
32 See our full summary of the decision in Barnardo's v Buckinghamshire
33 See our update in 7 Days on 10 October 2016

Upcoming seminars

We offer an extensive programme of client workshops and seminars. In addition to the quarterly legal updates, our seminars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on particular topics.

Quarterly legal update	09/02/17	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	11/05/17	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	27/07/17	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world
Quarterly legal update	09/11/17	Breakfast seminar (9:00am-10:30am) The latest legal and regulatory developments in the pensions world

If you would like to attend any of our seminars, please contact our marketing team at marketing@sackers.com.

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Guide to ESG

With ESG increasingly on pension trustee agendas, there is an increasing need for clarity on trustees' legal duties and how these factors might be taken into account in the investment decision making process. Our guide to ESG provides an overview of the legal duties and offers practical tips for trustees.

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