

90 Days – December 2011

Abbreviations commonly used in 90 Days

CPI: Consumer Prices Index

CN: Contribution notice

DC: Defined contribution

DWP: Department for Work and Pensions

FSD: Financial Support Direction

PPF: Pension Protection Fund

RPI: Retail Prices Index

TPR: The Pensions Regulator

Legislation

Pensions Act 2011 – definition of money purchase benefits

- The Pensions Act 2011 (the "Act") will amend the main definition of "money purchase benefits" (set out in the Pension Schemes Act 1993) so that it excludes benefits which could give rise to a funding deficit.¹
- The DWP decided to legislate on this issue following the decision in *Bridge Trustees*,² which stated that DC "pots" which are converted into a pension within a scheme fall within the original statutory definition of "money purchase benefits".
- With the definition due to be changed retrospectively with effect from 1 January 1997, the Secretary of State will have power to make transitional provisions and to legislate further by regulation.

Legislation

Pensions Act 2011 – other changes

- The Act will also:
 - equalise State Pension Age between men and women by 2018, and increase it to age 66 for both sexes by October 2020;
 - allow schemes which specify RPI for calculating pension increases or revaluation in deferment to continue to use this measure without providing a CPI underpin, subject to certain conditions being met;
 - amend section 251 of the Pensions Act 2004³ with the aim of restricting its application to payments of surplus to employers from an ongoing scheme and extending the deadline for trustees to take action to 6 April 2016; and
 - make certain changes to the automatic enrolment regime.

¹ Please see our Alert: "[Better late than never – The Pensions Act 2011](#)" (3 November 2011)

² Please see our Alert: "[Bridge too far? DWP set to legislate](#)" (28 July 2011)

³ Section 251 provides trustees with a transitional power to confirm or amend powers in scheme rules to make payments to an employer after 6 April 2006 (A-Day)

Pensions Reform

Finance Bill 2012

- The Finance Bill 2012 includes provisions which are designed to ensure that the value of tax relief given to employers accurately reflects (but does not exceed) the amount of payments received by schemes under an asset-backed contribution arrangement.⁴
- Regulations will extend the ability to access small pension pots to members of personal pension schemes to allow individuals over the age of 60 to commute savings of up to £2,000.⁵
- The conditions for transferring pension benefits overseas are also to be revised.

DC contracting-out

- DC contracting-out will be abolished from 6 April 2012. The DWP has proposed an easement to allow trustees of affected schemes to remove certain restrictions in scheme rules relating to protected rights.

PPF

2012/13 Pension Protection Levy

- The Board of the PPF intends to fix the rules of the levy calculation for three years to deliver "stability and predictability".⁶
- Investment risk will be incorporated into the levy calculation for the first time.
- Trustees of schemes with new or existing Type A contingent assets⁷ will have to certify, as at the date of the certificate, that they have no reason to believe that each guarantor could not meet its full commitment under the contingent asset.
- The contingent assets guidance sets out what the PPF might consider acceptable steps for trustees to take when considering whether they can give the above certification. For example, a review of the guarantor's most recent accounts.

PPF

Data deadlines

- The PPF levy determination confirms the key deadlines for the 2012/13 levy year:
 - 30 March 2012 (by 5pm): final submission of Scheme Return information on Exchange for use in calculating of PPF levies;
 - 30 March 2012 (by 5pm): Certification / recertification of contingent assets;
 - 10 April 2012 (by 5pm): Certification of deficit reduction contributions for contributions made up to and including 31 March 2012.

GMP equalisation

- The PPF has confirmed the method which it will use to equalise compensation. The DWP intends to issue a separate consultation on GMP equalisation for schemes outside of the PPF.

⁴ Please see our Alert: "[Autumn Statement 2011](#)" (1 December 2011)

⁵ Please see our Alert: "[Finance Bill 2012](#)" (8 December 2011)

⁶ Please see our Alert: "[Pension Protection Levy 2012/13: Don't leave it to the last minute!](#)" (18 November 2011)

⁷ Parent or group company guarantees

TPR

Latest publications

- TPR has issued several publications aimed at trustees of DC and hybrid schemes, including
 - a [statement](#) to help trustees understand the risks that can arise in hybrid schemes and what action to take to mitigate them;
 - a [statement](#) on the role of DC trustees; and
 - a [set](#) of six draft principles for good design and governance of workplace DC schemes.
- TPR aims to improve standards of DC provision and ensure that the pensions sector is ready to support automatic enrolment from 2012.

Cases Round-up

Court of Appeal: *Bloom v The Pensions Regulator*⁸

- In 2010, TPR issued FSDs against companies within the Lehman Brothers and Nortel groups, both of which were involved in insolvency proceedings. The administrators challenged TPR's ability to enforce the FSDs.
- Confirming the High Court's decision, the Court of Appeal found that, where an FSD is issued by TPR against a company in administration, the cost of complying with that direction is an expense of the administration.
- This means that both FSDs and CNs have "super-priority" in an insolvency and must be paid before any distributions to unsecured creditors.
- Given the importance of this decision for banks and other creditors, it is likely to be appealed to the Supreme Court.

Cases Round-up

High Court: *Pioneer GB Ltd v Webb*⁹

- The trustees and employer agreed to equalise the scheme at age 65 for all members with effect from 1 April 1995.
- This was discussed and agreed at meetings and announcements to members were approved and issued. However, the scheme's trust deed and rules were not amended.
- As both the employer and the trustees positively believed that an amendment to equalise retirement ages had been included in the deed, the judge was satisfied that there was sufficient evidence to demonstrate the parties' common intention and therefore ordered rectification by summary judgment.¹⁰

⁸ [2011] EWCA Civ 1124

⁹ [2011] EWHC 2683 (Ch)

¹⁰ Without the need for a full hearing

Cases Round-up

High Court: HR Trustees v Wembley PLC and another¹¹

- The scheme's trustees sought to amend the pension increases rule so that benefits accrued on or after 6 April 2000 would increase by RPI (capped at 5%) instead of at 5% (flat-rate).
- The amendment power required several steps to be taken, including a declaration of the alteration by the trustees "in writing under their hands".
- Although one of the trustees failed to sign the declaration, the judge decided the amendment was not invalidated by this "administrative error" as "equity looks on that as done which ought to be done".

Cases Round-up

High Court: The Staff Side of the Police Negotiating Board and others; Piper and Others v Secretary of State for Work and Pensions and others¹²

- Several of the public sector unions brought judicial review proceedings to challenge the Government's decision to switch to using CPI rather than RPI as the measure for applying increases to public sector pensions from April 2011.
- Dismissing the application, the High Court concluded, among other things, that CPI was an appropriate index for the Secretary of State to adopt and that it was open to him to take into account economic considerations when making this decision.
- We understand that this decision will now be appealed.

Sackers Extra

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¹¹ [2011] EWHC 2974

¹² [2011] EWHC 3175 (Admin)