

# 90 DAYS

SEPTEMBER 2007

90 Days is an “at a glance” summary of legal developments affecting occupational pension schemes over the last three months.

Our Sackers Extra “Quarterly” provides more in-depth detail of the topics covered in 90 Days, as well as featuring other news emerging over the last quarter. To receive a regular copy of this alternative publication, please email: [quarterly@sackers.com](mailto:quarterly@sackers.com)

## The Deregulatory Review

### The July report

- Initiated by the Government back in 2006, this Review is aimed at making private pension regulation simpler and easier to understand.
- Key recommendations emerging from this July’s report include:
  - making legislation less detailed and prescriptive;
  - pioneering simpler rules on disclosure to members (for example, a light touch regulatory framework supplemented by guidance);
  - focusing the requirement for trustee knowledge and understanding across the board as a whole, not on the individual;
  - making it easier for scheme surplus to be repaid to employers.

## FAS

### The other pensions lifeboat

- Set up for members who lost out on benefits when their employer became insolvent (but whose scheme is not eligible for the PPF), Government thinking on FAS is currently undergoing a sea change.
- Proposals (with implementing legislation yet to be finalised) include:
  - all members of qualifying schemes receiving 80% of their core pension benefits;
  - raising the FAS compensation cap to £26,000 (up from £12,000);
  - extending FAS to schemes where a debt was compromised to avoid the sponsoring employer being forced into insolvency<sup>1</sup>;
  - removing the 31 August 2007 cut-off date for an employer insolvency event;
  - generally preventing qualifying schemes from purchasing annuities for a nine-month window from 26 September 2007.

<sup>1</sup> FAS may be extended more generally to schemes in wind-up with solvent employers (such schemes are therefore being encouraged to contact FAS urgently)

#### Abbreviations commonly used in 90 Days

DB: defined benefit

DC: defined contribution

DWP: Department for Work and Pensions

FAS: Financial Assistance Scheme

FSA: Financial Services Authority

HMRC: HM Revenue & Customs

PPF: Pension Protection Fund

TPR: The Pensions Regulator

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## Consultations

### DWP's employer debt proposals

- The legislation governing debts payable by DB scheme employers on the occurrence of certain triggering events is set for an overhaul.
- In multi-employer schemes, proposed draft amending regulations will:
  - make it clear that a debt is triggered whenever an employer ceases to have active scheme members (not just employees);
  - allow a period of grace of up to a year before a debt is triggered;
  - introduce five potential ways of dealing with a deficit when an employer leaves a multi-employer scheme;
  - amend the test currently used by TPR in approving one of these mechanisms, “Approved Withdrawal Arrangements” (AWAs);
  - allow “Scheme Apportionment Arrangements” or “Cessation Agreements” as possible trustee approved alternatives to AWAs.

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## Consultations

### Pension transfer values

- The current law on pension transfers will be revamped from 6 April 2008. Planned regulatory changes are likely to:
  - make trustees responsible for calculating their scheme's cash equivalent transfer values (CETVs);
  - change the current statutory basis for calculating CETVs to reflect (as a minimum) the expected cost to the scheme of providing the alternative deferred pension;
  - permit the reduction of CETVs in certain circumstances, for example, to reflect underfunding;
  - introduce new disclosure requirements such as the need to inform members contemplating a transfer that both the FSA and TPR provide information about transfers which may assist them.

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## Legislation Update

### The two Bills become Acts

- The Pensions Act 2007 lays the groundwork for significant changes (at some point in the future) to state pensions and to contracting-out in occupational pension schemes.
- More imminently, by clearing up uncertainty in the Pensions Act 2004's drafting, it paves the way for occupational pension schemes to switch to a one-stage internal dispute resolution procedure<sup>2</sup>.
- The Finance Act 2007 makes several changes to the current pensions tax regime, including reinstating the possibility of reducing certain ill-health pensions and more time to pay tax-free cash.

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<sup>2</sup> As implementing regulations are required under the 2004 Act, this is unlikely to be a reality until next year

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## Legislation Update

### Protecting trustee directors from liability<sup>3</sup>

- Under the Companies Act 2006, from 1 October 2007:
  - any provision exempting (or exonerating) a director of a corporate trustee from liability in relation to the trustee company will be void;
  - subject to certain exceptions, indemnities provided by a trustee company (or an associated company) to its directors will be void;
  - an associated sponsoring employer will be able to indemnify trustee directors if certain conditions are met.

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## PPF

### Regular round up

- A new initiative, “Protecting People’s Pensions”, has been launched to raise awareness of the PPF and the compensation it provides to help build public confidence in DB schemes.
- The “7800 index” provides monthly updates on the latest estimated funding positions of 7,800 DB schemes.
- A consultation paper has been published on the evolution of the pension protection levy.
- By bringing forward the date for collecting data in relation to the 2009/10 levy year to 31 March 2008, the PPF hopes to stabilise the levy estimate and to make financial planning easier for schemes.

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## TPR

### Regular round up

- Following a review, the “Whistleblowing” code of practice has been deemed still fit for purpose. However, parts of the accompanying guidance have been updated.
- The cross-border guidance has been updated to reflect the inclusion of Norway, Iceland and Liechtenstein within the cross-border regime.
- TPR is consulting on revised clearance guidance, the procedure which allows parties to obtain reassurance that TPR will not use its anti-avoidance powers on a particular event affecting a DB scheme<sup>4</sup>.
- TPR’s landmark decision in Sea Containers to issue its first financial support direction (part of its anti-avoidance armoury) is under appeal.

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<sup>3</sup> See our Sackers Extra Alert: “The Companies Act 2006 – Exonerations and Indemnities” dated 8 August 2007

<sup>4</sup> See our Sackers Extra Alert: “Clearance – the present danger?” dated 13 September 2007

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## Cases Round Up

Court of Appeal: *Cripps v. Trustee Solutions Ltd & Dubery*

- This appeal looked at the priority to be given on the winding-up of a DB scheme to certain male members with “Barber window”<sup>5</sup> benefits.
- Statutory provisions (which applied in this case) used to give top priority to members whose entitlement to benefits had arisen (pensioners and late retirees).
- The High Court initially decided that men aged 60 plus with Barber window benefits had an entitlement on winding-up to all of their benefits from that age (and therefore fell in the top priority).
- Although the Court of Appeal agreed that such members became entitled to their Barber window benefits at age 60, crucially it decided that entitlement to benefits falling outside this period did not arise until the scheme’s normal retirement date (age 65).

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## Cases Round Up

European Court of Justice (ECJ): *Claverhouse v. HMRC*

- Following an ECJ ruling, the UK VAT and Duties Tribunal must now consider whether the management of investment trust companies (ITCs) should be exempt from VAT.
- The case hinged on the way in which the UK had implemented the EC VAT Directive, specifically as regards competing investment vehicles.
- If the ECJ’s reasoning is followed, it will mean that ITCs should not pay (or historically have paid) VAT on management fees.
- But, with the ECJ steering clear of extending its conclusions beyond the types of fund in question, a test case is probably required to clarify whether the ruling might apply to occupational pension schemes.

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<sup>5</sup> In the 1990 Barber case, the European Court of Justice ruled that it was discriminatory for pension schemes to provide different retirement ages for men and women. The period between the date of the Barber decision and a scheme’s equalisation of benefits (during which time benefits had to be provided on the more favourable basis - commonly, retirement at age 60) is known as the “Barber window”

**SACKER**<sup>5</sup>  
& PARTNERS

Solicitors specialising in pensions law

Sacker & Partners LLP  
29 Ludgate Hill  
London EC4M 7NX  
Tel 020 7329 6699  
Fax 020 7248 0552

[enquiries@sackers.com](mailto:enquiries@sackers.com)  
[www.sackers.com](http://www.sackers.com)