

Pensions Update

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BAKER & MCKENZIE

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If you wish to discuss any of these issues further, please contact your usual Baker & McKenzie lawyer.

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European Parliament approves General Data Protection Regulation

As we mentioned in our recent Breakfast Briefing, the General Data Protection Regulation (the "GDPR") has been approved by the European Parliament and will apply to all European member states from May 2018.

The GDPR includes measures to harmonise data protection procedures and strengthen enforcement across the European Union. Many of the new provisions in the GDPR are expected to have a significant impact on data controllers and data processors who are active within the EU, including more significant fines for non-compliance.

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The Pensions Regulator publishes response to consultation on DC Code

The final version of the new Defined Contribution ("DC") Code (the "Governance and administration of occupational trust-based schemes providing money purchase benefits") has been published by the Pensions Regulator (the "Regulator") and laid before Parliament. The new Code is likely to come into force in mid-June 2016 and replaces the version of the Code in place since 2013.

The Code covers matters such as scheme management skills (including managing risk, appointing advisers and conflicts of interest), investment governance and providing value for members.

Several changes have been made to the Code since the draft was published in November 2015. One particular change is the inclusion of a new paragraph clarifying the approach the Regulator expects trustee boards to take where the only money purchase benefits provided by the scheme are additional voluntary contributions ("AVCs"). The Code states that trustees of such schemes should "*consider the risks to members in the context of the significance of the value of AVCs relative to members' overall benefits in the scheme, and where the law applies to AVCs, apply a proportionate approach to meeting the relevant standards in [the] DC code*".

Please click [here](#) to view the new Code.

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The Pensions Regulator updates questions in annual DC scheme return

The Regulator has updated the questions that must be addressed in a DC scheme's annual return.

Unless an exemption applies, all DC schemes now have to produce a chair's statement, which must set out how their scheme is meeting the new governance standards.

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In addition, if a DC scheme has between 2 and 11 members, it will need to confirm whether the scheme has complied with the charge controls which came into force on 6 April 2015 and also confirm whether any of the employers have passed their automatic enrolment staging date (in which case, further confirmations will be required). This latter requirement previously applied only to larger schemes.

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Swindon Town football club fined by the Pensions Regulator for auto-enrolment failures

Swindon Town Football Company Limited ("STFC") received fines totalling £22,900 from the Regulator for repeatedly failing to comply with its auto-enrolment duties.

STFC was first issued with a compliance notice by the Regulator on 18 August 2014, which directed the club to automatically enrol staff and pay contributions. There were then further delays in the employer complying with its duties, leading the Regulator to take enforcement action.

In its statement on the case, the Regulator commented that employers should not be ignoring their duties, and deliberate non-compliance will not be tolerated.

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Consultation on secondary annuity market

HM Revenue & Customs ("HMRC"), HM Treasury and the Financial Conduct Authority (the "FCA") have published consultations on the creation of a secondary annuity market, which the Government intends to introduce from April 2017.

Proposals to establish a secondary annuity market to enable individuals to assign or surrender the income stream from their annuity policy for cash, or in exchange for a different pension product, were first announced in the March 2015 Budget. They are proposed in order to extend the Government's pensions flexibilities to individuals who have already purchased annuities.

The new tax regime will allow members of both defined benefit (DB) and DC schemes to assign or surrender annuities payable to them. Subject to meeting the relevant requirements, assignments and surrenders will not be treated as "unauthorised payments" for the purposes of HMRC's tax rules.

The HMRC consultation document confirms that occupational pension scheme trustees should be able to assign annuities that were bought in their name, but which are used to fund pension payments to members, to the members themselves. This was previously excluded from the scope of the secondary annuity market in the December 2015 response document.

HM Treasury is consulting on establishing three new regulated activities for the secondary annuity market of:

- buying annuity incomes;
- buying back annuity income; and
- acting as a market intermediary.

The FCA has proposed new rules to detail how these new activities will be regulated, and has set out its expectations of insurers, brokers and prospective buyers operating in this new market.

Links to the consultation documents can be viewed by clicking [here](#) and [here](#).

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The Pensions Regulator publishes 2016 annual funding statement

The Regulator has published its annual funding statement, which shows its analysis of market conditions and how employers and trustees of DB schemes can agree appropriate funding plans.

The annual funding statement is primarily aimed at schemes which are undertaking valuations with an effective date in the period from 22 September 2015 to 21 September 2016. It notes, in particular, that there was significant volatility in the financial markets, especially in early 2016, and this may have an impact on schemes' funding positions. The Regulator also comments that it expects most schemes to have a larger than expected deficit as at their valuation date, which means that trustees will need to review recovery plans and make appropriate changes. However, it also notes that many employers have experienced increased profitability, allowing them to pay more into company pension schemes.

Please click [here](#) to view the statement.

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The High Court considers the meaning of "*broadly no less favourable*" in bulk transfers under the Preservation Regulations

In the recent case of *Pollock v Reed*, the High Court has confirmed that a scheme actuary need not take into account the security of benefits in a receiving scheme when giving a certificate in respect of a bulk transfer without consent.

The trustees of the Halcrow Pension Scheme sought the court's declaration in respect of the pensions aspects of a restructuring of the scheme's principal employer. The principal employer was stated as being "heavily balance sheet insolvent", whilst the scheme had a buy-out deficit of £600 million. The restructuring involved the transfer of assets and liabilities of the scheme to a new pension scheme (in which the benefits would be the same as in the transferring schemes, except in relation to future increases to pensions in payment and deferment, which would drop to the minimum statutory level). The transfer was to be carried out without the members' consent, which required an actuarial certificate under regulation 12(3) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991. The applicable certificate would have to confirm that the benefits to be provided under the new pension scheme should be "*broadly, no less favourable than the rights to be transferred*".

A key point in this case was the trustees' argument that, when determining whether the new pension scheme were "*broadly no less favourable*", the actuary should take into consideration the security of the benefits in each of the schemes. In their view, there was a high likelihood that, if the transfer did not proceed, the employer would go into liquidation and the original pension scheme would enter the Pension Protection Fund ("PPF"). As a result, members' benefits would be reduced to PPF levels. By comparison, benefits under the receiving scheme (although reduced) were significantly more likely to be received in full.

The judge held, "with some reluctance", that there were no grounds for the trustees' construction of the relevant regulations. She found that the actuary's assessment did not include the security of benefits as a factor to be taken into account, irrespective of whether the transferring scheme was winding up. The judge concluded that "*had it been intended that such a factor be taken into account, the regulations would have said so*".

The decision is significant to the extent that, if the transaction had been approved and gone ahead, this type of arrangement could have been an attractive prospect in circumstances where both the principal employer of a pension scheme and the scheme itself are in financial difficulties. The mechanism could potentially provide a more secure pension scheme in the long-term. However, in this case, the precise wording of the regulations was found to be the main bar to what might otherwise have been a helpful arrangement for many of the parties concerned.

The judgment can be viewed by clicking [here](#).

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The Pensions Regulator publishes corporate plan for 2016-2019

The Regulator has published its corporate plan for 2016-2019. This document sets out the Regulator's priorities for the next three years.

They key areas identified as the focus of the Regulator's operational approach to "educate, enable and enforce" are in relation to ensuring auto-enrolment requirements are met by all relevant small and micro-employers and to protect consumers from poorly governed master trusts. The latter point is to be addressed in proposed legislation.

The corporate plan can be viewed by clicking [here](#).

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DWP launches new online tracing service for lost pension pots

A new Department of Work and Pensions ("DWP") website has been launched by the Pensions Tracing service to help people find their lost pension savings.

According to the DWP, there is currently an estimated £400 million in unclaimed pension savings, and the new service has been described by the DWP as being simple to use, providing trace results immediately.

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