

# Pensions Update

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BAKER & MCKENZIE

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## The Pensions Regulator issues statement on Brexit

The Pensions Regulator (the "**Regulator**") has issued its first statement on Brexit, providing guidance for trustees and sponsors of occupational pension schemes following the referendum vote in favour of leaving the EU. In the statement, the Regulator encourages a "*considered approach*", and observes that "*it is too early to understand or assess the full consequences of the outcome of the EU referendum in detail*". It comments that trustees are expected "*to have an open and collaborative discussion with their sponsor about the possible effects to their business*".

The Pensions Regulator has separately [warned trustees against any knee-jerk reactions](#) to market volatility, and made the comment in its statement that "*pensions are long-term investments and trustees should as part of their ongoing risk management review their position*".

Trustees are encouraged to "*consider how exposed their employer may be to the various risks and opportunities which may come with the transition of trading relationships*" to ensure that the impact on their employer's covenant is adequately monitored.

The Regulator made it clear that its own operational approach will remain unchanged, but undertook to provide further guidance on Brexit when appropriate.

The statement can be accessed by clicking [here](#).

A recording of our Brexit webinar can be accessed by clicking [here](#).

**BREXIT: Keep up to date on the latest Brexit developments – follow the [Baker & McKenzie Brexit Blog](#).**

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## Parliament issues statement on Brexit

The UK Parliament has issued a briefing paper on the impact of Brexit on Pensions. It concludes that the implications are as yet unknown and brings together initial responses from relevant organisations including the Regulator (see above). Other material will be added as it becomes available.  
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7629>.

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## Lessons to be learnt from recent Regulator activity

The Regulator has been very active this month having published a number of documents and decisions that will be of interest to trustees and sponsors alike:

**Intervention Report for failure to produce an annual statement:** this related to the Abbey Manor Pension Scheme's failure to produce an annual statement signed by the Chair of Trustees within seven months of the end of the scheme year. As a result of this failure, the Trustees were issued with a penalty notice requiring them to pay the minimum fine of £500.

When determining the fine the Regulator took into account the Trustees' prompt breach of law report, and swift rectification of the failure. The important takeaway point for trustees is that responsive action and up-front communication with the

Regulator is looked upon favourably.

The Report can be accessed by clicking [here](#).

**Approval of a Regulated Apportionment Arrangement:** this concerned the approval of a Regulated Apportionment Arrangement ("RAA") for the Halcrow Pension Scheme.

Following High Court proceedings, where the Court refused to approve a proposal which would have seen the bulk transfer of all members (without their consent) to a new scheme with reduced benefits, the trustees, the sponsor, the sponsor's American parent and the Pensions Regulator agreed to a similar proposal but this time *with* member consent. Under the arrangement, members were offered the opportunity to transfer to the new scheme, thereby accepting reduced benefits. Those who did not agree to the transfer will remain in the scheme when it enters the Pension Protection Fund. The sponsor's parent provided a cash contribution and some additional support for the scheme. In return, the Regulator approved an RAA which reduced the sponsor's statutory debt to the scheme. Significant factors contributing to the approval of this proposal included independent advice confirming that the insolvency of the sponsor was inevitable, the fact there was no alternative outcome for members than the RAA, and an offer from the sponsor's American parent such that contributions to the new scheme were prioritised over the repayment of inter-company loans.

The Intervention Report can be accessed by clicking [here](#).

**Appointment of Independent Trustee:** following concerns that pension savings in the London Quantum Retirement Benefit Scheme were being put at risk, the Regulator conducted an investigation which found numerous governance failings including *"inappropriately high levels of risk which members were not made aware of"*, a lack of documentation, and the existence of sales personnel who benefitted from up to 30% commissions if they tempted members to transfer their existing pensions into the scheme. Following this investigation, the Regulator selected an independent trustee to replace the existing trustee.

The Regulator concluded that it was *"not able to determine conclusively whether or not the scheme was part of a plan for pension liberation"*, but warned *"all savers, pension scheme trustees and administrators to remain alert to the dangers of transferring pension savings in order to access unrealistically high returns often associated with exotic sounding investment opportunities"*.

The Regulator's Final Notice can be accessed by clicking [here](#).

**Criminal prosecution policy:** The Pensions Regulator has published its prosecution policy (the **"Policy"**) following a consultation which we reported on in January's monthly update (January 2016 Update [here](#)). The Policy will be of relevance to anyone who could be subject to criminal proceedings by the Regulator. In the Policy, the Regulator comments generally that *"we will apply our risk-based approach to prosecution decisions and consider each case on its particular facts"*. The offences which the Regulator can prosecute concern workplace pensions, and are listed in the Annex of the Policy.

The Policy can be accessed by clicking [here](#).

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## Legislation implementing changes to DC auto-enrolment minimum contributions

Alterations to the transitional periods for the implementation of auto-enrolment contribution rates will take effect on 1 October 2016, following the announcement in the 2015 Autumn Statement to extend the implementation period by a further six months. The auto-enrolment minimum contribution levels, which will be phased in over two prescribed transitional periods, stipulate that an employer's contribution must eventually be equal to more than 3% of a jobholder's earnings, and that the total amount of contributions paid by the jobholder and the employer must be equal to more than 8% of earnings.

Prior to this, in the first transitional period, a jobholder's contribution must be equal to more than 1% of earnings, and the total amount of contributions paid by the

jobholder and the employer must be equal to more than 2%. In the second transitional period, an employer's contribution must be equal to more than 2% of earnings, and the total amount of contributions paid by the jobholder and the employer must be equal to more than 5%.

New legislation in the Employers' Duties (Implementation) (Amendment) Regulations makes it clear that the **first transitional period will now run from the employer's staging date to 5 April 2018**, and the **second transitional period will run from 6 April 2018 to 5 April 2019**.

There have been a number of developments in relation to the DC auto-enrolment regime, and we have reported on these in previous updates ([February](#) and [April 2016](#)).

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## Agreement on revised IORP Directive

The Permanent Representatives Committee of the Council of the EU has formally approved the text of a recast IORP directive, which is likely to be accepted by the European Parliament later this year.

The draft directive does not harmonise solvency rules for pension schemes across Europe on the basis that such rules are *"not realistic in practical terms and not effective in terms of costs and benefits, particularly given the diversity of IORPs within and across member states"*.

The rule that cross-border schemes should be fully funded at all times has, however, been retained but on the basis that if there is non-compliance with this rule, a regulatory authority may *"draw up appropriate measures and implement them without delay in a way that members and beneficiaries are adequately protected"*. This could enable cross-border schemes to continue with a deficit where they have a recovery plan in place, although for the time being the principle of requiring cross-border schemes to be fully funded continues to be imposed under UK legislation (Pensions Act 2004).

**Following the referendum vote in favour of leaving the EU, it is still unclear whether, and to what extent, the revised IORP Directive will be implemented in the UK.**

The draft directive can be accessed by clicking [here](#).

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## Pensions Ombudsman publishes Annual Report and Accounts

This year's report is of particular note as the Pensions Ombudsman (the "Ombudsman") has commented that he will depart from established practice not to participate in appeals at the High Court. **The Ombudsman has instead *"decided that going forward he will be more robust in participating in appeals (whether or not the respondent participates) if he considers that to do so would be beneficial to the pensions industry at large"***.

The Annual Report highlights that around 5,000 enquiries were handled this year (an increase of 18% from 2014/2015). Pensions liberation cases account for a substantial 20% of the 1,308 investigations that were completed this year, and the Ombudsman commented that he expects *"auto enrolment complaints to become more commonplace in the next three to four years"*.

The 2015/16 Annual Report, which details the Ombudsman's caseload, performance and finances, can be accessed by clicking [here](#).

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## Court of Appeal upholds implied contract between group companies when seconding employees

The Court of Appeal has delivered its judgment in a case (*MF Global UK Ltd (In Special Administration), Re [2016] EWCA Civ 569*) relating to an intra-group

arrangement where a service company seconded employees to another group company, which in turn reimbursed the service company for the applicable employment costs. The Court of Appeal had to decide whether an implied contract governed the arrangement, the existence of which was important in determining who was responsible for over £35 million of pension liabilities.

Despite there being no express agreement in place to govern the arrangement, the Court of Appeal found there to be an implied contract which imposed the obligation to reimburse the service company. One of the reasons given for implying the contract was that "*one cannot imagine*" that the substantial reimbursements being provided to the service company were intended to be left to a non-contractual arrangement. The Court of Appeal also found that there was no "*material uncertainty in the terms of the arrangement*" adding further weight to the existence of an implied contract.

**Companies with defined benefit pension schemes should consider how similar intra-group arrangements are documented, especially where significant pension liabilities are at stake.**

A link to the judgment can be accessed by clicking [here](#).

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## **STOP PRESS: New DC Code of Practice in force from 28 July 2016**

The revised Code of Practice no 13: Governance and administration of occupational trust-based schemes providing money purchase benefits (the "**New DC Code**"), which we reported on in our May [Update](#), will come into force on 28 July 2016. The Regulator has said that the accompanying "how to" guides (the "**Guides**"), which were issued in draft form in April, will be published in final form at the same time as the New Code comes into force. We will provide further detail on the New Code and Guides once the Guides have been issued in final form.

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