

Pensions Update

November 2016

BAKER & MCKENZIE

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Welcome to the November 2016 edition of the Pensions Update which includes, for the first time, a section from our Pensions Disputes Group.

Autumn Statement 2016

The Chancellor of the Exchequer delivered his Autumn Statement on 23 November. A number of measures were announced which are relevant to pensions and pension schemes:

- **Money Purchase Annual Allowance - the level of the annual allowance which applies to a member aged 55 or over who has already taken money purchase benefits flexibly will be reduced from £10,000 to £4,000.** This measure is aimed at reducing the opportunities for "recycling" lump sums and benefits by taking them from a pension scheme and then contributing them again in order to claim additional tax relief. The Government has published a separate consultation in relation to this, which can be accessed [here](#);
- **Salary Sacrifice** - while various benefits (including healthcare costs) which were eligible for tax relief and employer National Insurance reductions when paid for via salary sacrifice will generally be removed from April 2017, pension contributions and pension advice payments (along with childcare, Cycle to Work and ultra-low emission cars) are exempted, so salary sacrifice contributions can still be made to pension schemes on the existing basis;
- **Pension Scams** - the Government has indicated it will consult on action to reduce pension scams, including a potential ban on "cold-calling" and giving powers to "firms" (as yet undefined) to block suspicious transfers; and
- **Foreign pensions** - a number of measures will affect overseas pensions, including aligning their tax treatment with that of domestic pensions by making them taxable for UK residents, closing "section 615" schemes (tax efficient schemes for overseas employees) to new savings, extending the period of potential liability to UK tax of lump sum payments from foreign schemes to members who have recently emigrated from five years to ten, and updating the qualifying tax criteria for overseas pension schemes.

The full text of the Autumn Statement can be found [here](#).

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Pensions Regulator issues automatic enrolment bulletin

The Regulator has issued its quarterly bulletin on automatic enrolment compliance and enforcement of employer duties. Its purpose is to give information on recent cases and use of the Regulator's powers. It indicates an increase in the use of these powers, issuing 26,000 Compliance Notices overall, 15,000 of which have been issued this quarter. **The Regulator has also issued over 3,700 Fixed Penalty Notices, fining employers £400 where they have failed to comply with their duties.**

The Regulator ascribes the increases in the use of its powers to the fact that large numbers of small and micro employers are reaching their staging dates, but are leaving it until the last minute to comply with their duties. However, the Regulator

also notes that the majority of employers do comply after receiving a Compliance Notice, with no further action taken, and only a very small number of Escalating Penalty Notices (for failure to comply with a statutory notice) have been issued. The bulletin also sets out some case studies illustrating issues which have arisen in practice for employers, and the statistics on the use of the Regulator's powers.

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The bulletin can be found by clicking [here](#).

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Government confirms implementation of General Data Protection Regulation

Whilst the industry has always believed that the General Data Protection Regulation (GDPR) would need to be implemented despite Brexit, this has now been confirmed by the Secretary of State Karen Bradley MP. The Secretary of State has said:

"We will be members of the EU in 2018 and therefore it would be expected and quite normal for us to opt into the GDPR and then look later at how best we might be able to help British business with data protection while maintaining high levels of protection for members of the public."

This statement from the Government makes it clear that Trustees and Employers will need to begin to consider what they will need to do to comply with the GDPR. Given the complex requirements of the GDPR this is something which should be considered early in the New Year. Some of these requirements are discussed by Kate Atkinson and Lauren Awoyinka in an article which first appeared in the August 2016 issue of Pensions World. The full article can be viewed by clicking [here](#).

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Draft amendments to Provision of Information Regulations published

New draft Regulations which would amend the Registered Pension Schemes (Provision of Information) Regulations 2006 have been published by HMRC, who will be accepting comments on them until 5 December. The proposed amendments would require scheme administrators to tell the trustees of trusts (except bare or nominee trusts) into which lump sum death benefits are paid what the amount of the death benefit is, and how much tax the administrator paid. They would also require the trustees of those trusts to give the same information to beneficiaries at the point benefits are paid to the beneficiary. The rationale is to provide sufficient information to permit the beneficiaries to reclaim tax which may have been paid by the scheme administrator, if the beneficiary pays tax at a lower marginal rate. Where a lump sum is taxable, the administrator will have paid tax at 45% (unless the lump sum was paid to an individual or a bare trustee), and some or all of this tax might be reclaimable by the trust beneficiary.

The draft Regulations, and details of how to submit any comments on them, can be found [here](#).

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Regulations on tax treatment of Bridging Pensions come into force

The Registered Pension Schemes (Bridging Pensions) and Appointed Day Regulations 2016 came into force on 8 November 2016. They are aimed at bringing the provisions of the Finance Act 2004 governing bridging pensions up to date following the implementation of the single-tier state pension. The Finance Act 2004 permits schemes to bring a higher rate of pension into payment before a member's state pension age, and for that pension to be reduced accordingly once the state pension becomes payable. The new Regulations replace the relevant provisions of the Finance Act 2004 to set out the levels of reductions, and when they can take place, for members reaching pensionable age on or before 5 April 2016 and on or

after 6 April 2016.

The Registered Pension Schemes (Bridging Pensions) and Appointed Day Regulations 2016 can be found by clicking [here](#).

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DWP issues consultation response on exit charges

The DWP has published the Government's response to its May consultation paper on capping early exit charges for occupational pension scheme members, in which it had proposed capping of exit charges imposed on members who leave schemes in order to access the pension freedoms. The consultation had been run in parallel with a Financial Conduct Authority consultation on a similar cap for contract-based personal and stakeholder pension schemes.

The Government expressed its intention to implement legislation to cap early exit charges in occupational pension schemes. Early exit charges are taken to mean charges which are imposed on members who flexibly access their pension savings early, and which would not have been imposed had they accessed those same benefits at their pension age (which is the age at which, under the scheme rules, they may take an unreduced pension). The cap for occupational pension schemes will take a similar approach to that followed by the FCA in capping exit charges from personal and stakeholder schemes, and is intended to have the same effect as that cap.

The cap levels will be 1% for existing occupational pension scheme members, and 0% (nil) for new members. Neither "market value adjustments" (which can be made to with-profits investments) nor "terminal bonuses" will be covered by the cap, as they are not "charges" for the purposes of pensions legislation. However, other exit charges will be within scope, including those arising from investments in with-profits funds. The response can be found by clicking [here](#).

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Investments - new EMIR rules for OTC derivatives

New EMIR rules have been published by the European Commission regarding risk management requirements for "over the counter" (OTC) derivatives, which affect the margin, or collateral, which must be exchanged where OTC derivatives are not cleared by a central counterparty. Assuming there are no objections by the Council of the EU, these rules may come into effect as early as January 2017.

Whilst pension schemes which use derivatives have been granted a deferral from the EMIR clearing obligation until 16 August 2017 (and it is proposed that this may be extended to 16 August 2018), the margin requirements for uncleared OTC derivatives may nonetheless still apply to pension schemes with OTC derivatives transactions. The new margin rules are likely to come into effect for the largest derivatives dealers in January 2017 and then impact in-scope pensions schemes from as early as March 2017. The requirements are complex, and pension schemes may be able to take advantage of a number of different exemptions, including being below certain thresholds based upon their volume of derivatives trading or based upon their level of hedging related derivatives transactions.

Further details of the requirements can be found in a Client Alert which can be found [here](#).

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Revaluation Order giving rates for deferred pensions published

The Occupational Pensions (Revaluation) Order 2016 has now been laid before Parliament and will be coming into force on 1 January 2017. The Order sets out the revaluation percentages which will apply for deferred members who reach their scheme's retirement age in 2017. **Both the higher and lower revaluation percentages for 1 January 2016 to 31 December 2016 are 1.0%.** The relevant revaluation percentage for a deferred member is dependant upon the number of complete years between a member leaving pensionable service and reaching his

scheme's retirement age. The cumulative percentages are set out in the Order, which can be found [here](#).

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NEW Comment from our Pensions Disputes Group

Judgment issued in *Barnardo's & Ors v Buckinghamshire & Ors*

The Court of Appeal has issued its Judgment regarding whether, under the rules of the Barnardo's pension scheme, the basis for annual increases in pensions can be changed from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI). The scheme rules provided for increases to be based on RPI, or "*any replacement adopted by the Trustees without prejudicing Approval*". The case therefore turned on whether it was possible for the Trustees to adopt CPI as the increase basis while RPI continues to be published by the Government (the so-called "one-stage" process), or whether RPI needed to be officially replaced before the Trustees would have a discretion to adopt another index (the "two-stage" process).

The Court of Appeal found, by a majority judgment (Lewison LJ and McFarlane LJ), that the "two-stage" test was correct - in this case, the Trustees had no power of selection unless and until the RPI was officially "replaced" by CPI.

The Court based its conclusion on a natural reading of the definition of "Retail Prices Index" in the rules, and the use of the word "replaced" in the definition, which it ruled was a reference to an official replacement of that index.

The Court also made comments regarding whether, if the rules had given the Trustees the power to select CPI instead of RPI, the accrued rights of members, protected under section 67 of the Pensions Act 1995, would be affected. The Court was unanimous in finding that there would be no breach of section 67 in that case, as annual increases were determined at each annual increase date, so it was not possible to say in advance whether a member had a "right" to an annual increase measured in a particular way.

The judgment of the Court of Appeal can be found by clicking [here](#).

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Pensions Regulator takes action over BHS

The Pensions Regulator (the "Regulator") has begun enforcement action in relation to the BHS pension schemes by sending Warning Notices to a number of parties, including Sir Philip Green and Dominic Chappell, and their associated companies. The Notices set out the Regulator's evidence and arguments for why the parties should be liable to provide financial support for the schemes, and serves as a prelude to a potential use of the Regulator's anti-avoidance powers to issue Contribution Notices and/or Financial Support Directions.

The parties will have a set period of time to respond to the Warning Notices with any representations, which will be considered by the Regulator before the case is referred to the Regulator's Determinations Panel. The Panel determines whether the Regulator's anti-avoidance powers will be exercised.

The Regulator's press release on this case can be found [here](#).

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Upper Tribunal rules in *ITV plc vs The Pensions Regulator*

The Upper Tribunal has issued its judgment in an application by ITV plc, Granada UK Rental and Retail Ltd, Granada Media Group Limited, Granada Group Limited and Granada Limited (the "**Targets**") for strike-out in relation to Financial Support Directions issued to them by the Regulator, requiring them to provide financial support to the Box Clever Group Pension Scheme. This judgment is the latest in a series of judgments in this long-running case. In this application, the Targets had argued that new claims brought against them by the Regulator should be struck out on the grounds that they sought to widen and revise the scope of the Regulator's claims against the Targets, leading to "*an oppressive and wholly unacceptable change of case*".

However, the Upper Tribunal dismissed the strike-out application, on the grounds that, while the Regulator's arguments were new, they were based on existing facts, which had been part of the cases made since the Regulator had served a warning notice on the Targets. The Targets' arguments that the facts in question were "common ground" between the parties, and therefore were matters not in issue, was rejected by the Upper Tribunal, which found that the Targets would not have any particular difficulty dealing with the new arguments, and so were not unfairly affected.

The full text of the judgment can be found [here](#).

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STOP PRESS

The Government has published a consultation covering the following contracting-out issues, where clarity is required following the abolition of contracting-out on 6 April 2016:

- technical changes to improve scheme administration;
- review of existing provisions to ensure they are effective; and
- a proposed methodology for equalising guaranteed minimum pensions.

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