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## Work and Pensions Committee publishes report on the "flaws in DB schemes and their regulation"

Following the Work and Pensions Committee's (the "**Committee**") involvement in the report on the BHS defined benefit (DB) pension scheme and the actions of Sir Philip Green, the Committee has undertaken a wider review of the management and regulation of DB pension schemes.

The Committee has made a number of recommendations for inclusion in the Government's green paper (expected early this year) in its report which was published on 21 December 2016.

The key recommendations and comments made in the report are:

- **A nuclear deterrent to avoidance** - the Committee suggests that the Government consults on proposals to give the Pensions Regulator (the "**Regulator**") the power to impose punitive fines which could treble the amount payable under a contribution notice or financial support direction.
- **Mandatory Regulator clearance in certain circumstances** - the Committee recommends that mandatory clearance should be imposed where there is the greatest risk of material detriment.
- **More powers for trustees and scheme members** - two of the Committee's suggestions are that, subject to Regulator approval, trustees should be empowered to demand that the employer provides timely information and to agree changes to indexation where needed to make a scheme sustainable (with the ability to revert to the original index).
- **A rebalancing of regulatory action** - the Regulator should be able to intervene earlier and the timetables for valuations should be flexible to reflect the riskiness of schemes, with a short statutory timescale for submitting valuations and recovery plans (the length of the latter should very rarely exceed 10 years).

- **Adjustments to the risk based PPF Levy** - the calculation should be adjusted to incentivise good scheme governance and ensure certain types of employer are not unfairly disadvantaged.
- **Streamlining of the Regulated Apportionment Arrangement (RAA) process**. - for restructurings enabling PPF entry and the management of statutory debt

Click [here](#) to read the report in full.

## First Regulator fines against Master Trusts issued

Trustees of occupational defined contribution (DC) pension schemes are required to complete an annual statement within seven months of the end of the scheme year. **The Regulator has issued fines against a number of master trusts for failing to comply with this requirement.** The maximum fine of £2,000 was levied against MC Trustees Ltd, as the trustee of Nurture Master Trust, due to there being a professional trustee on the board and no mitigating factors.

A spokesperson from Frontline Regulation at the Regulator has commented that these fines are a result of an *"ongoing focus on ensuring that trustees comply with the requirements for good governance... Trustees should be aware that this type of breach will result in a fine"*.

## Consultation on changes to DC bulk transfers: call for evidence published

The Department for Work and Pensions ("**DWP**") is seeking views on the current legislative restrictions that apply on the bulk transfer of DC pensions from occupational and stakeholder schemes without member consent.

The DWP acknowledges that the legislative requirements were designed in a DB context and so need to be reviewed to reduce any unnecessary burdens whilst ensuring adequate protection remains in place.

Currently, the two main requirements for a transfer without consent are:

- The actuary must certify that the benefits to be provided under receiving plan are no less favourable than the benefits under the transferring plan and the transfer must take place within three months following the date of the certificate.

The requirement for benefits to be "no less favourable" is not always suitable on DC transfers and some other measures may be more appropriate in addition to, or in replacement of, the relative value of past service rights and transfer credits.

- The transferring plan and the receiving plan must have a certain relationship. The "relationship" requirement can sometimes be a barrier to the transfer of DC pots in respect of former employees.

The call for evidence will be open for nine weeks and can be read [here](#).

## Regulations introduce new information requirement on payment of certain taxable lump sum death benefits

Lump sum death benefits paid to a person over age 75 are subject to tax. Where paid to a "non-qualifying person" (which includes trustees other than bare trustees) the scheme administrator is liable for the flat-rate 45% special lump sum death benefits charge. **From 6 February, the scheme administrator will be required to provide certain information to the trustee within 30 days of the scheme paying a lump sum death benefit to that trustee (other than a bare trustee). Within 30 days of the trustee making payment to the beneficiary, the trustee must then pass this information to the beneficiary.**

The intention is that this will provide the beneficiary with sufficient information to apply to HMRC for recovery of any excess tax deducted by the scheme administrator.

Note that "scheme administrator" in this context refers to the trustees of the scheme making the

payment.

The Regulations can be viewed [here](#).

## **Pension Protection Fund (PPF) publishes provisional levy rules for 2017/18**

In our October 2016 update, we reported that the PPF was consulting on changes to the PPF levy for 2017/18. The PPF has now issued its levy determination and confirmed that the levy rules for 2017/18 remain largely unchanged. As noted in our October update, minor changes will include a new facility through which schemes can notify Experian where the move to new UK accounting standard FRS 102 causes an artificial move in a company's insolvency risk rating.

The levy estimate will remain at £615 million.

The provisional levy rules can be viewed [here](#).

## **New initiative to be launched by the Regulator to improve governance in occupational schemes**

The response to the Regulator's 21st Century Trusteeship and Governance discussion paper has now been published. The discussion paper was issued by the Regulator to obtain views on how it can best support the increase of standards of pension scheme governance and trusteeship.

The following common themes are noted in the response:

- While the trustee chair should be able to demonstrate leadership skills, the majority of respondents felt that minimum qualifications were not necessary.
- Regular assessment and reporting along with simplified guidance are good ways to ensure trustees focus on good governance.
- Schemes which fall short of expected standards should be targeted by the Regulator, rather than additional burdens being placed on all schemes.

**The Regulator has stated that it will undertake a targeted education and enforcement drive this year to clarify its expectations of trustees and the enforcement actions that will be taken when standards are not met.**

## **EMIR clearing obligation: pension funds to benefit from further exemption until 16 August 2018**

The European Commission has further extended transitional relief for pension scheme arrangements from central clearing for their over-the-counter (OTC) derivative contracts until 16 August 2018.

EMIR requires specified standard OTC derivative contracts to be cleared through an authorised or recognised central counterparty (CCP) when traded by two in-scope entities.

The European authorities acknowledged in EMIR that pension schemes might have difficulties complying with the clearing obligation, chiefly due to the requirement to post cash collateral to CCPs, which would lead to them divesting a significant proportion of their assets for cash. Accordingly there is transitional relief available in EMIR where a pension scheme enters into an OTC derivative contract which is objectively measurable as reducing investment risks directly relating to the financial solvency of the pension scheme.

Originally this transitional relief was granted for three years to enable CCPs to develop a suitable technical solution for the transfer of non-cash collateral by pension schemes to CCP as variation margin. The Commission has concluded that CCPs need additional time to find solutions for pension funds. This is the second time that the Commission has used its power under EMIR to extend the temporary clearing exemption for pension schemes which now runs until 16 August 2018. The European Commission's 2017 work programme involves a review of EMIR when this issue will be looked at in depth.

Despite having transitional relief from the clearing obligation, pension schemes nonetheless have to comply with the EMIR margin requirements with respect to non-cleared OTC derivatives. The variation

margin rules will begin to apply to the bulk of the derivatives market from 1 March 2017. More detail can be found [here](#).

For further background on this topic, see a previous [Client Alert](#) issued by our Structure Capital Markets team.

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## Comments from our Pensions Disputes Group

### Court of Appeal confirms secured "top-up" pension scheme did not require shareholder approval

The Court of Appeal has upheld the High Court decision in the case of *Granada Group Ltd v The Law Debenture Pension Trust Corporation Plc* that the provision of security by the employer to the trustees of an unfunded unapproved retirement benefit scheme (an "UURBS") did not require prior shareholder approval.

The UURBS was set up to provide top-up pensions to directors who exceeded the limits on pensionable pay in the main pension scheme. The employer granted a charge to the trustees to provide security in respect of the UURBS, to mitigate the risk of the scheme being unfunded. Several years later, following various company restructurings, the employer sought to recover the gilts which provided security for the UURBS (valued in excess of £40 million) by arguing that the UURBS was voidable under section 320 of the Companies Act 2006. Broadly, section 320 requires shareholder approval before a director can acquire a "non-cash asset".

The Court of Appeal agreed that the UURBS did not fall within section 320 as it was not intended to apply to the rights or interests of a director when the non-cash asset was held in trust for him by someone other than the company itself. The directors' rights in this case were those of a beneficiary against the trustees of the UURBS. Further, an exemption in section 346(3)(b) was intended to exclude pension schemes from the scope of section 320.

Click [here](#) to read the judgment.

### Coats agrees £255 million settlement with the Regulator

Following the exercise by the Regulator of its anti-avoidance powers in relation to three DB schemes sponsored by companies within the Coats group, the Regulator has now secured settlement for two of the schemes.

The main points of the settlement (as reported by the Regulator) are:

- Payments totalling £255.5 million will be made into the Coats Pension Plan and the Brunel Holdings Pension Scheme ("BHPS"), including the agreed recovery plan contributions paid to the BHPS since 1 January 2016.
- A substitution of the statutory employer for both schemes to improve covenant.
- A full guarantee from Coats to cover the liabilities of both schemes.

An offer has been made to the third scheme and is being discussed with the trustees.

### Revised High Court Chancery Guide 2016 includes guidance on pensions litigation

The Chancery Guide published by the HM Courts and Tribunals Service includes express guidance on pensions litigation for the first time. Kate Atkinson and Patrick Harte summarise the new pensions section of the Guide and also outline some of the innovative procedures being used in pensions litigation today in an article which first appeared in the December 2016 issue of Pensions World. The full article can be viewed by clicking [here](#).

## Contact us

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

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