MAYER • BROWN

November/December 2012

Bulletin for Pensions Managers

In this issue:

Pensions news

PENSIONS LIBERATION SCHEMES

From time to time, schemes may receive transfer-out requests that raise suspicions that a pension liberation scheme is involved.

As a matter of common sense, where suspicions are raised, trustees and their administrators should be particularly careful to check that the receiving scheme is a *bona fide* registered pension scheme (or QROPS) and (where relevant) that it is able to accept a transfer of contracted-out rights. They might also wish to warn individuals of the possible tax consequences of taking part in a pension liberation scheme.

In its Pension Schemes Newsletter 55, HM Revenue & Customs (**"HMRC"**) asks anyone concerned about the marketing of potential pension liberation schemes to contact its Pensions Counter Fraud and Avoidance Team, the Financial Services Authority (**"FSA"**) or the Pensions Regulator (the **"Regulator"**).

Action

Exercise caution when dealing with transfer requests and seek advice where necessary.

AUTOMATIC ENROLMENT: CHANGES TO QUALITY REQUIREMENTS FOR CARE SCHEMES

Regulations came into force on 1 November 2012 which make changes to the quality requirements which career average-related earnings (**"CARE"**) schemes must satisfy in order to be a qualifying scheme.

These changes mean that, if a scheme's inflation adjustments involve both a guaranteed increase below the "minimum rate" (the increase in the Consumer Prices Index or Retail Prices Index capped at 2.5%) and a further discretionary increase, then the scheme will be a qualifying scheme, provided that the scheme's funding and its statement of funding principles take account of the exercise of the discretionary power to provide increases at or above the minimum rate.

Action

No action required, but employers who had previously thought that their CARE scheme could not be used for automatic enrolment, or who were intending to amend their CARE scheme's revaluation provisions so that it could be used for automatic enrolment, may wish to review their decisions in light of these changes.

AUTOMATIC ENROLMENT: HYBRID SCHEMES TRANSITIONAL PERIOD LOOPHOLE

The Department for Work and Pensions (**"DWP"**) has announced that it will amend the Pensions Act 2008 to close a loophole whereby employers with a hybrid scheme which has an open defined contribution (**"DC"**) section and a closed defined benefit (**"DB"**) section could benefit from provisions allowing them to defer automatic enrolment until 1 October 2017.

The DWP has confirmed that the transitional period was only intended to apply where an employer was offered DB accrual to a jobholder, whether in a DB-only or hybrid scheme.

For more information, please see the ministerial statement.

Action

Employers who had planned to use the loophole will need to prepare to comply with their automatic enrolment duties using the transitional provisions applicable to DC schemes

Action

Employers who are currently using the loophole to defer automatic enrolment will need to automatically enrol any eligible jobholders who are not already members of a qualifying scheme and comply with all other automatic enrolment duties, backdating employer contributions where necessary to 19 December 2012.

AUTOMATIC ENROLMENT: EARNINGS REVIEW CONSULTATION RESPONSE

The DWP has published a response to its consultation on the level at which the earnings trigger and the qualifying earnings band should be set for the 2013/2014 tax year:

- the earnings trigger will be set at £9,440 (the PAYE threshold for 2013/2014); and
- the qualifying earnings band will be set at £5,668 to £41,450 (the lower and upper earnings limits for 2013/2014).

Action

If subject to automatic enrolment in the 2013/14 tax year, check that payroll systems are updated to reflect the revised earnings trigger and qualifying earnings band.

FAIR DEAL CONSULTATION: GOVERNMENT RESPONSE

HM Treasury (the **"Treasury"**) has published a response to its 2011 consultation on the future of the Fair Deal policy. In July 2012, the Treasury confirmed that the overall approach to the Fair Deal would remain, but that in future it would be achieved by offering access to public sector pension schemes for transferring staff.

The Treasury is still considering how best to implement and administer the new Fair Deal policy, but Annex A to the consultation response sets out draft guidance on the new policy.

Action

No action required.

SCHEME FUNDING: NEW INFORMATION TO BE FILED WITH REGULATOR

As of 26 November 2012, when filing a scheme's valuation information, the following must be submitted to the Regulator via Exchange, in addition to the recovery plan and schedule of contributions:

- a breakdown of recovery plan (i.e. deficit) contributions made to the scheme over the last 20 years;
- confirmation as to whether independent employer covenant advice was taken for the purposes of the valuation and recovery plan being submitted;
- the scheme's statement of funding principles; and
- the scheme's statement of investment principles.

For more information, please see the relevant page on the Regulator's website.

Action

Ensure that the additional information required by the Regulator is included when filing scheme funding information following a valuation.

FINANCE BILL 2013 AND AUTUMN STATEMENT 2012

Draft clauses for inclusion in the Finance Bill 2013 have been published for comment, together with an accompanying overview of the draft legislation. The pensions-related content includes:

- changes to reduce the lifetime allowance (**"LTA"**) to £1.25m and to reduce the annual allowance (**"AA"**) to £40,000 from 6 April 2014;
- provisions setting out the fixed protection regime which will apply to the 2014 LTA reduction;
- changes removing certain restrictions in the 2012 fixed protection regime;
- changes to restrict the terms of the employee's income tax exemption on employer pension contributions so that it only applies where the contributions are made to the employee's own pension arrangements;
- changes to allow bridging pensions to be paid to the later of age 65 and the member's state pension age; and
- provisions increasing the capped drawdown limit for all pensioners from 100% of the value of an equivalent annuity to 120% with effect from 26 March 2013.

The draft clauses are open for comment until 6 February 2013.

In addition, in the Autumn Statement (delivered on 5 December 2012), the Chancellor announced that the DWP will consult on:

- introducing a new statutory objective for the Regulator to consider the long-term affordability of recovery plans for sponsoring employers; and
- whether to allow smoothing of asset and liability values for valuations from 2013 onwards.

For more information on the Autumn Statement, please see our client alert.

Action

Consider reviewing schemes for particular features which could cause members to breach the reduced AA.

Action

Where arrangements have been made, contractually or by rule amendment, to cap accrual to prevent the AA being exceeded, review the terms of those arrangements.

Action

Consider whether such arrangements should be extended to other members, and what communications should be made about them.

INDUSTRY CODE OF CONDUCT ON DC CHARGES

A joint industry code of conduct has been launched on telling employers about DC pension charges.

The code applies to all parties which provide services to employers in connection with the establishment and administration of pension schemes for automatic enrolment purposes, including trust-based schemes.

Parties to whom the code applies and who deal directly with employers must provide the employer with a clear "Summary of Charges" document which sets out details of the services provided and the charges payable in connection with the pension scheme.

The code will come into effect in two stages, starting from 1 January 2013, and will be reviewed annually.

The code does not have statutory force but the Pensions Ombudsman and the FSA may have regard to it when considering complaints.

Action

Employers should ensure that they receive a Summary of Charges document in respect of the scheme which they plan to use for automatic enrolment.

PPF LEVY CONFIRMATION

The Pension Protection Fund (**"PPF"**) has confirmed that the 2013/2014 levy estimate will be £630 million. The levy scaling factor will be reduced, meaning that fewer schemes will have their levy capped.

In addition, the PPF has relaxed the minimum credit rating requirements for financial institutions holding or issuing the following types of contingent asset to A3/A- (from Aa3/A--):

- Type B(i) contingent assets (where the scheme has a charge over cash in a bank account);
- Type B(iii) contingent assets (where the scheme has a charge over shares held by a custodian); and
- Type C contingent assets (where a letter of credit or bank guarantee is issued to the scheme).

Although no changes have been made to the requirements for Type A contingent assets, the PPF has updated its guidance on such assets. Type A contingent assets are a parent or group company guarantee granted to the scheme. Among other things, the updated guidance states that, when considering the strength of the guarantor, trustees should bear in mind the fact that the guarantee is only likely to be called upon in the event of an insolvency of the sponsoring employer and should factor this into their assessment.

Action

Schemes with Type B(i), B(iii) and C contingent assets held at or issued by financial institutions whose credit ratings are below the level previously required by the PPF should consider whether those contingent assets are now capable of certification.

Action

Schemes with Type A contingent assets should ensure that they read and consider the PPF's updated guidance before certifying/re-certifying such assets.

PPF LEVY DEADLINES

The relevant deadlines for submitting information and documentation for the purposes of the 2013/2014 PPF levy are as follows:

- 28 March 2013 (5pm): deadline for scheme data to be updated on Exchange.
- 28 March 2013 (5pm): deadline for certification/ re-certification of contingent assets (and submission of any accompanying hard copy documents).
- 30 April 2013 (5pm): deadline for submission of deficit reduction contribution certificates.
- 28 June 2013 (5pm): deadline for submission of full block transfer certificates (and any accompanying hard copy documents).

Action

Schemes should ensure that their scheme records on Exchange are fully updated by 28 March 2013.

Action

Schemes wishing to use a contingent asset for levy purposes should ensure that the process of obtaining and certifying that asset is started well ahead of 28 March 2013.

Action

Schemes should ensure that any deficit reduction contribution certificates are submitted by 30 April 2013.

Action

Schemes should ensure that any full block transfer certificates are submitted by 28 June 2013.

Pensions finance

NAPF STEWARDSHIP POLICY

The NAPF has launched a stewardship policy which explains how and why pension schemes should back the FRC's Stewardship Code, as well as taking forward recommendations from the Kay Review on short-termism. The policy sets out six best practice principles for pension schemes to follow.

Action

No action required, but schemes (or their investment subcommittees) may wish to review the policy as a matter of good practice.

Pensions litigation

IBM UNITED KINGDOM PENSIONS TRUST LIMITED V IBM UNITED KINGDOM HOLDINGS LIMITED AND OTHERS [2012] EWHC 3540

In a supplemental judgment to its 12 October 2012 judgment (see our September/October 2012 Bulletin for Pensions Managers for a summary of that judgment), the High Court has held that IBM was not required by its implied duties of trust and confidence to consent to amendment of the trust deed and rules governing the IBM Pension Plan to give effect to the preservation requirements, as they stood prior to 6 April 2005, in respect of service prior to that date. The amendment would have meant that deferred members would be able to retire without consent from age 60.

Action

No action required.

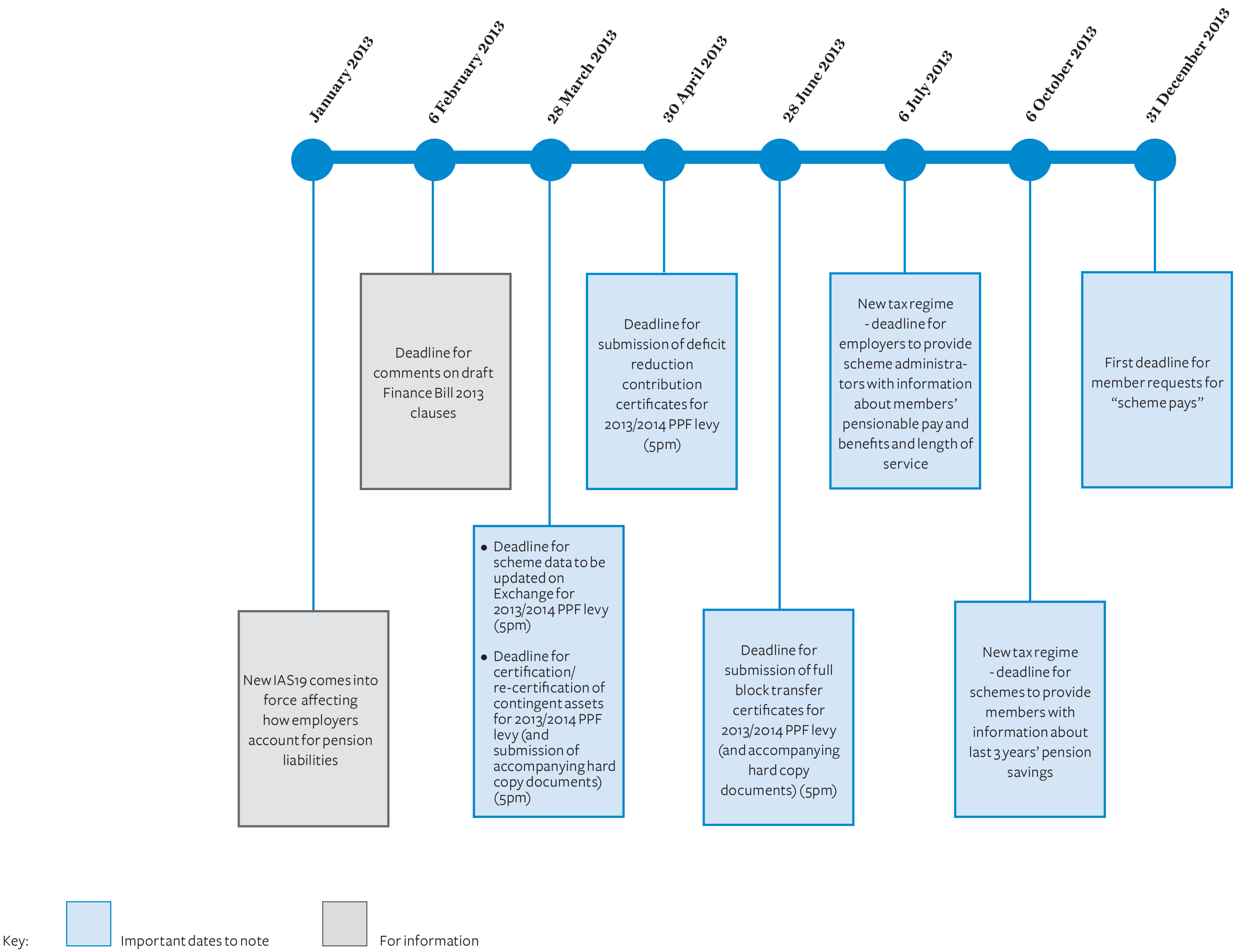
Mayer Brown events

TRUSTEE FOUNDATION COURSE

Tuesday 26 February 2013
10.15am – 12.45pm, followed by lunch
201 Bishopsgate, London EC2M 3AF

For further details, please contact Katherine Dixon (kdixon@mayerbrown.com).

Dates to note over the next 12 months



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