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Trustee Quarterly Review

In this edition we discuss:

- GMP equalisation: interim consultation response
- DWP's give and take: bulk transfers and amendment of contracted-out rights
- Budget 2013: relative calm on the pensions front
- DB schemes must pay VAT on investment management services
- Supreme Court confirms the scope of the rule in *Hastings-Bass*
- Trustees to receive information on public takeovers
- Further details on the automatic transfer of small DC pots
- Consultation on new disclosure of information regulations
- Consultations on changes relating to automatic enrolment
- Regulator launches thematic review on record-keeping
- EU pensions reform: results of impact study
- Upcoming Pensions Group events at Mayer Brown
- Dates and deadlines

GMP equalisation: interim consultation response

GMP equalisation legislation not expected until 2014

In April 2013, the DWP published its current thinking on equalising GMPs – the minimum benefits that schemes have to provide for members' contracted-out service between 1978 and 1997. It seems clear that the DWP will push ahead with legislation on GMP equalisation. But it also hopes to make it easier to convert GMPs into other benefits.

Background

The DWP has for several years taken the view that European law requires GMPs to be equal as between men and women. This view is not universally accepted within the pensions industry, and there have been no domestic UK court cases expressly saying that they must be equalised.

The issue of GMP equalisation was revived in January 2010 by the then Minister for Pensions, Angela Eagle. Intensive lobbying followed. The DWP repeatedly put back the date on which it would issue draft legislation for consultation; it finally issued a consultation, draft legislation, and a draft methodology for equalising GMPs in January 2012. The consultation closed in April 2012 and, after another year's thought, the DWP has now published its interim response.

The interim response

The DWP reiterates its view that European law requires GMPs to be equalised, and that domestic UK legislation will be amended to make this explicit.

The response states that the DWP received various suggestions for changing the law to make GMP equalisation easier (and cheaper), including abolishing anti-franking, converting GMPs into other scheme benefits, and giving members the opportunity of being treated as a man or a woman when GMPs come into payment. The response states that the Government is looking at these suggestions, and in particular that it may issue "statutory guidance" on converting GMPs into other scheme benefits.

Responses were split between those wanting the DWP to issue guidance covering every aspect of equalisation, and those wanting no guidance at all. The DWP does not plan to proceed with final publication of its draft methodology.

Comment

The argument that EU law does not require GMPs to be equalised has clearly been lost, at least in the DWP's eyes. The interim response states that legislation will be laid to amend UK law to make the requirement to equalise GMPs explicit.

Given that the draft methodology which the DWP published in January 2012 is perhaps the most expensive way of equalising GMPs (albeit the method which carries the least risk), it is debatable whether it is preferable for the DWP to issue detailed guidance on equalisation, or no guidance at all. Detailed guidance might provide a "safe harbour" if followed (although a Court would take its own view of what any legislation requires), but lead to an increased risk of a claim if it were not followed. No guidance would leave the industry in a similar quandary as it is now – unless every aspect of a GMP is levelled up, it would be difficult to exclude the risk of a successful claim entirely.

The solution may well be to make it easier to convert GMPs into other scheme benefits. Current legislation makes this very difficult – as far as we are aware, no scheme has ever gone down this route. The DWP's suggestion that it will issue "statutory guidance" is intriguing: a lot will depend on what the status of this guidance will be, and what protection a scheme (and scheme actuary) will gain from following it.

Andrew Block

The interim response states that the DWP will publish a full response to its January 2012 consultation "at a later date", and will delay laying regulations to make explicit a duty to equalise GMPs whilst it considers what guidance it can give on GMP conversion. The legislation is not expected until some time in 2014.

DWP's give and take: bulk transfers and amendment of contracted-out rights

New requirements imposed for amending contracted-out rights

New regulations affecting contracted-out schemes came into force on 6 April 2013. They have two key effects:

- transfers of groups of members between schemes (often called "bulk transfers") without member consent have become more viable; and
- amending post-1997 contracted-out rights has become more onerous.

Bulk transfers get easier

Before these changes, contracted-out schemes and formerly contracted-out schemes could make bulk transfers without member consent if the receiving scheme was currently contracted-out, but not (or not clearly) to a scheme that had stopped being contracted-out. Given the number of schemes that have closed to accrual and ceased to contract out as a result, this restriction was increasingly becoming an obstacle to scheme mergers.

The new regulations fill this gap so that, in principle, bulk transfers can now be made without member consent to formerly contracted-out schemes, as well as to currently contracted-out schemes.

The new regulations also allow bulk transfers to certain European pension schemes without member consent.

Amending post-1997 contracted-out rights gets harder

Since 6 April 1997, schemes have been able to contract out of the State Second Pension if they provide benefits which are broadly equivalent to, or better than, those provided by a so-called "reference scheme", a notional scheme which is described in the legislation. To ensure that scheme benefits continue to meet that standard, special restrictions have long applied to rule amendments that would change post-1997 contracted-out rights.

The new regulations do not change the requirements regarding the amendment of *future* post-1997 contracted-out rights. If the scheme is to remain contracted-out, the scheme actuary still has to provide written confirmation that benefits accruing in the future will continue to satisfy the "reference scheme" test.

However, the new regulations introduce new restrictions on rule amendments that change *accrued* post-1997 contracted-out rights. Broadly, an amendment will only be possible if:

- after the amendment, the benefits to be provided to affected members and survivors are at least equal to the benefits that the "reference scheme" would have provided (so "broad equivalence" will not meet this test); or
- the amendment is not adverse, or s67 Pensions Act 1995 (which restricts adverse amendments to accrued rights) does not apply for some other reason; or
- the amendment is adverse and s67 applies, but the s67 actuarial equivalence test is met and benefits for survivors are not reduced.

Comment

Giles Bywater

Most observers have welcomed the confirmation that bulk transfers without member consent can be made to formerly contracted-out schemes. However, the introduction of new requirements regarding the amendment of accrued post-1997 contracted-out rights is less welcome. The new requirements add to the complexities that schemes already face when considering amendments of this type. It is perhaps unfortunate timing that these new requirements were brought into force in the same month that, in the context of the DWP's response to the Red Tape Challenge, Steve Webb MP announced that "*we are finding new ways to cut red tape and ease the burden of regulations on employers*".

Budget 2013: relative calm on the pensions front

State pension reform in 2016 and new statutory objective for the Regulator

The Budget 2013 contained no major surprises, apart from announcing that the reform of the state pension, and resulting abolition of contracting-out, would be implemented a year earlier than planned, in 2016 rather than 2017. The Finance Bill 2013, which implements several of the measures announced in the Budget and the 2012 Autumn Statement, has also been laid before Parliament.

Budget 2013

The Budget contained the following new pensions-related announcements:

- The single-tier state pension (and the consequential abolition of DB contracting-out) will be introduced in 2016 – a year earlier than originally proposed.
- The Pensions Regulator will be given a new statutory objective to “support scheme funding arrangements that are compatible with sustainable growth for the sponsoring employer and fully consistent with the 2004 funding legislation”.
- The Government has also been consulting on giving non-economic regulators a duty to take into account the impact of their regulatory actions on economic growth. Depending on the results of that consultation, the Government is “attracted” to applying that duty to the Regulator.
- The Government will not pursue its proposal of introducing asset and liability smoothing for scheme valuations.

The Budget also confirmed a number of pensions-related measures which had been announced in the 2012 Autumn Statement – see our November 2012 Trustee Quarterly Review for more details.

Finance Bill 2013

This Bill was originally published on 28 March 2013. Though a revised version came out on 11 May 2013, the pensions-related content remains unchanged. It includes provisions to:

- Allow bridging pensions to be paid to the later of age 65 and the member’s state pension age.
- Reduce the lifetime allowance to £1.25m and reduce the annual allowance to £40,000 from 6 April 2014. It also contains details of a fixed protection regime which will enable members with substantial pension rights already accrued to retain the current higher lifetime allowance in exchange for ceasing future accrual. (The Government will consult this spring on an “individual protection regime” which may supplement the fixed protection proposals. Legislation to implement this will be in next year’s Finance Bill.)
- Increase the capped drawdown limit to 120% of an equivalent annuity with effect from 26 March 2013.

Comment

The Government’s decision to introduce the single-tier state pension, and therefore to abolish contracting-out in 2016, will pose challenges to schemes that remain open to accrual.

Jonathan Moody

The introduction of a new statutory objective for the Regulator has been welcomed, but it remains to be seen how the Regulator will change its approach to scheme funding in light of the new objective to support sustainable growth by sponsoring employers (and in light of the new duty for non-economic regulators to consider economic growth more widely, should the Government also decide to proceed on that front).

DB pension schemes must pay VAT on investment management fees

Trustees of Wheels Common Investment Fund lose VAT case

The Court of Justice of the European Union ("**ECJ**") has ruled that investment management services supplied to occupational DB pension schemes are not exempt from VAT.

Background and facts

The ECJ ruled in 2007 that investment trusts are "special investment funds", and that fund management services supplied to investment trusts are therefore exempt from VAT. Following that ruling, the trustees of the Wheels Common Investment Fund (and three associated DB schemes) sought to recover the VAT they had paid on investment management services. They argued that there is a close analogy between DB schemes and investment trusts, and investment management services supplied to DB schemes should therefore also be exempt from VAT. HMRC opposed the claim. In essence, HMRC's argument was that DB schemes are not special investment funds (and therefore do not benefit from the VAT exemption) because they are not open to the public, and because the amounts invested in DB schemes are disconnected from the contribution to the fund and the investment performance of the underlying assets.

The ECJ agreed with HMRC that the analogy between DB schemes and investment trusts is not close enough to require the VAT exemption to be extended. The ECJ's main reasons for this conclusion were that:

- DB schemes provide an employment-related benefit and are not open to the public; and
- unlike private investors, members of DB schemes do not bear investment management risk: they are promised certain benefits regardless of how the scheme assets perform.

Occupational DB pension schemes (and associated common investment funds) will not therefore be able to reclaim VAT paid on investment management fees.

Comment

The ECJ's decision will not be welcomed by trustees of DB schemes. Had the ECJ ruled the other way, it could have resulted in repayment of up to £2bn to schemes.

As the *Wheels* case expressly relates to DB schemes only, the question remains about how the ruling will affect occupational DC pension schemes. Although occupational DC schemes also provide employment-related benefits and are not open to the public, members of DC schemes do bear the risk arising from the management of investment funds in which a scheme's assets are pooled. In other words, DC schemes share one characteristic that the ECJ thought relevant with DB schemes, and one with investment trusts. The ECJ is due to consider the definition of "special investment fund" in relation to a Danish pension fund shortly. Whilst any ruling in this case will not be directly applicable to UK DC schemes, there are similarities between Danish pension schemes and UK DC schemes so it will hopefully provide some guidance.

Beth Brown

Supreme Court confirms the scope of the rule in *Hastings-Bass*

Trustees cannot rely on the rule in *Hastings-Bass* to correct decisions which had unforeseen consequences

The Supreme Court has upheld the Court of Appeal's clarification of the scope of the rule in *Hastings-Bass*.

Background and facts

Prior to the Court of Appeal's decision in 2011, the decision in *re Hastings-Bass, deceased* had been interpreted as giving trustees a route to unwind decisions that later turned out to have unforeseen and undesirable consequences.

In two separate cases, certain fiduciaries made decisions which created tax liabilities that neither they nor their advisers had expected. In both cases, the High Court set aside the fiduciaries' decisions on the basis of the rule in *Hastings-Bass*. HMRC appealed, and the appeals were heard together.

The Court of Appeal allowed both appeals. It decided that *Hastings-Bass* had been misinterpreted in the cases that followed it, and that the correct interpretation of the rule was as follows:

- If trustees have acted outside the scope of their powers, the purported exercise of the power will be void.
- If the trustees have not acted outside the scope of their powers, the exercise of those powers can only be voidable (rather than void) where the trustees have acted in breach of fiduciary duty. The duty to take into account relevant matters and not to take into account irrelevant matters is a fiduciary duty.
- Trustees will not normally be in breach of fiduciary duty, and the exercise of their powers will not be voidable, where they have acted on professional advice.
- Assuming the exercise of the discretion is voidable, it will normally be for the beneficiaries, rather than the trustees, to seek to have the decision set aside, by proving that the trustees acted in breach of trust.
- As the exercise of the discretion (within the trustees' powers) is at most only voidable rather than void, it will be a matter for the court's discretion whether it should be set aside in a given case and, if so, on what terms.

The Court of Appeal also rejected an argument by one of the fiduciaries that their decision should be set aside on the grounds of mistake. The fiduciaries appealed to the Supreme Court.

Supreme Court's decision

The Supreme Court rejected both appeals, holding that the Court of Appeal had correctly clarified the scope of the rule in *Hastings-Bass*. However, unlike the Court of Appeal, the Supreme Court considered that the possibility that trustees may have a claim for damages against their professional advisers should have no effect on the operation of the rule in *Hastings-Bass*.

The Supreme Court also allowed a separate appeal by one of the fiduciaries on whether their decision could be set aside on the grounds of mistake. The Court of Appeal had held that it was necessary to establish a mistake either as to the legal effect of the transaction or as to an existing fact which is basic to the transaction. The Supreme Court was inclined against an approach based on rigid classifications and held that the true requirement is simply for there to be a causative mistake of sufficient gravity. It accepted that normally the test will be satisfied only by a mistake as to the legal nature or character of the transaction or as to a matter of fact or law which is basic to the transaction. However, it said that consequences are relevant to the gravity of the mistake and each case must be assessed closely on its facts. In this particular case, the fiduciary's mistake as to the tax consequences of their decision was grave enough to allow the decision to be set aside.

Comment

Although the two appeals both concerned private trusts, the Supreme Court's reformulation of the so-called rule in *Hastings Bass* seems to be of general application to all types of trustees, including to decisions about discretionary powers in pension schemes. The Supreme Court's decision to uphold the Court of Appeal's view of the rule in *Hasting-Bass* is not especially surprising – many pensions lawyers over the years had expressed the view that the scope of the rule had become distorted by subsequent cases.

Stuart Pickford

The Supreme Court's decision to uphold the appeal on the grounds of mistake does not provide much additional clarity on what will and will not constitute a sufficiently serious mistake to merit a transaction being set aside. It remains to be seen how far that remedy will actually be available in the pension scheme context.

Trustees to receive information on public takeovers

Bidders to provide information to the trustees of the target's pension scheme

Under changes to the Takeover Code, trustees of pension schemes will receive prescribed information when another company (a bidder) proposes to take over a DB pension scheme's sponsoring employer (the target).

Background and facts

In 2012, the Takeover Panel consulted on whether provisions of the Code requiring bidders to disclose certain information to employee representatives of the target should be extended so that similar information is also given to pension scheme trustees.

The Takeover Panel has published a response to this consultation confirming that the proposed amendments to the Code will be made, subject to some minor changes to reflect comments received on the consultation. In particular, the provisions will only apply to DB schemes.

Following the Code amendments:

- the trustees of the target's pension scheme will receive information on the offer and its implications for the scheme, and they will be able to communicate their views on those implications publicly;
- the bidder will be required to state their intentions with regard to employer contributions, future accrual, and the admission of new members, and will be bound for a year by those statements; and
- details of any future funding arrangements for the pension scheme agreed by the bidder and the trustees must be made public if those arrangements are considered material within the context of the offer.

The amendments will take effect from 20 May 2013.

Martin Scott

Comment

Whilst the changes to the Code are meant to ensure that trustees receive more information about a bidder's plans in relation to the scheme, it remains to be seen how much information they will receive in practice, and indeed what trustees will be able to do with that information – they are unlikely to be able to hold substantive discussions with the bidder on the implications of the takeover for the scheme before the takeover completes.

Further details on the automatic transfer of small DC pots

Legal framework for automatic transfer system in Pensions Bill

The DWP has published a command paper with more details on its proposed system for the automatic transfer of small DC pension pots.

Background and facts

In 2012, the DWP announced that it would introduce a system whereby small DC pension pots would automatically move with individuals as they move from job to job. The system is intended to deal with the multitude of small DC pots which are likely to arise through automatic enrolment.

The DWP has been exploring with industry stakeholders how the proposed automatic transfer system should work, and has now published a command paper with further details. The system will have the following features:

- the system will only apply to pots created after a prescribed date;
- the system will apply to all members of workplace pension schemes who are workers for automatic enrolment purposes;
- transfers will only take place between DC schemes;
- pots will become eligible for transfer once contributions cease and the individual leaves employment, or once contributions have ceased for a prescribed period;
- the system will apply to pots of £10,000 or less, with the limit being reviewed from time to time;
- members will be able to opt out of automatic transfer and leave their pot in the existing scheme (whilst retaining the statutory right to transfer out);
- standards may be prescribed for automatic transfer schemes;
- the DWP will work with interested parties to develop a transfer process;
- regulations will specify the disclosure requirements which will apply in relation to the system; and
- the Pensions Regulator will be the main enforcement body.

In addition, short service refunds from DC schemes will be abolished from 2014. The DWP plans to consult in due course on draft regulations implementing the regime. The legal framework for the new automatic transfer system has been included in the Pensions Bill currently before Parliament.

Comment

Whilst the command paper does provide some further detail on the new system, such as the level of pot to which it will apply, much of the detail remains unclear. In particular, it remains to be seen how the DWP will ensure that members are not disadvantaged by the system, for example, where there are differences in fees between the transferor and transferee schemes.

Katherine Dixon

Consultation on new disclosure of information regulations

Most disclosure requirements to be consolidated in a single set of regulations

In February 2013, the DWP published a consultation on draft regulations on disclosure of information. The new regulations are designed to harmonise, consolidate and simplify the disclosure requirements for occupational and personal pension schemes. The consultation closed in April and the new regulations are expected to come into force this October.

Background

The current regime is widely considered to be inconsistent and difficult to navigate, as the requirements are contained in several different sources, and there have been numerous changes in the law since the requirements first came into force. The DWP is hoping that the new regulations will:

- make the disclosure requirements clearer for trustees and managers;
- provide consistency for different types of schemes;
- extend the scope of electronic disclosure to areas where it is not already available;
- allow members to access the information they need to understand and manage their pensions; and
- fit in with the future changes to the pensions landscape.

The draft regulations

In addition to making the disclosure requirements easier to follow, the new regulations are intended to make several changes to the disclosure regime including:

- **New "lifestyling" requirements**

  "Lifestyling" is where the investment strategy in a DC scheme changes as a member gets closer to retirement – generally a gradual move from riskier to less risky investments. For schemes that offer lifestyling, the new regulations will require trustees to inform members about the lifestyling strategy as part of the basic scheme information and also in advance of the strategy being adopted. Lifestyling is not compulsory, so this will only affect schemes that have adopted a lifestyling strategy.

- **Electronic communications**

  The new regulations will simplify and extend the current electronic disclosure regime. Broadly, electronic disclosure (i.e. provision of information by email and/or website) will be possible in most contexts as an alternative to providing information in hard copy where a member confirms that this is acceptable. It will also be possible if the member has not asked to receive the information in hard copy, provided that the member has been asked in writing three times for an email address and has been told that he or she can request in writing to receive information in hard copy.

- **Statutory money purchase illustrations** ("**SMPIs**")

  A SMPI is part of an annual statement which provides personalised information to members with money purchase rights, including an illustration of their likely projected pension at retirement using today's prices. The new regulations will

remove a large amount of accompanying information that is currently required to be provided with a SMPI. The hope is that this will give schemes more flexibility to tailor SMPIs to the individual needs of their members. The changes are also intended to make SMPIs appropriate for people who will be joining pension schemes in light of automatic enrolment (as well as existing scheme members).

The new regulations will also remove some of the specific annuity assumptions that are currently required for SMPIs to allow for more meaningful annual projections based on members' individual circumstances.

Comment

Melissa Pullen

Whilst the new regulations are likely to be a step in the right direction, trustees should be aware that they do not entirely achieve the DWP's aim of harmonisation and consolidation. In particular, some disclosure requirements which are not currently contained in the main disclosure regulations (for example, notice requirements ahead of bulk transfers without consent) are not covered by the consultation draft of the new regulations. This means the new regulations are not yet a "one-stop shop", despite the DWP's aims to provide this.

Consultations on changes relating to automatic enrolment

Draft regulations seek to improve regime and clarify interaction with TUPE

Two DWP consultations issued in February and March 2013 concerned improvements to the automatic enrolment regime, and the interaction of automatic enrolment with the regime protecting employee pension rights on a so-called TUPE transfer.

Background and consultations

The automatic enrolment regime requires employers to enrol the majority of their workers in a pension scheme which meets certain criteria and to make contributions on behalf of those workers. Where employees transfer to a new employer by operation of TUPE, the new employer must provide them with a minimum level of pension benefits if they were members of an occupational pension scheme immediately before the transfer.

Sally MacCormick

Devora Weaver

In light of feedback from some of the first employers to implement the automatic enrolment regime, the DWP is proposing to make a range of technical improvements to the automatic enrolment legislation. The DWP also consulted on changes which are intended to clarify how the minimum contribution requirements under the automatic enrolment legislation interact with the minimum contribution requirements under the pension protection legislation which applies on a TUPE transfer.

Comment

We expect the drafting of both sets of regulations to change significantly before they come into effect, and we have therefore only discussed what they are intended to achieve. Whilst the policy aims behind both sets of draft regulations are helpful, in our view the drafting of both sets will need significant work to ensure that those aims are met in practice.

Regulator launches thematic review on record-keeping

Regulator to examine record-keeping practices of 250 schemes

The Pensions Regulator has launched a thematic review into record-keeping to check whether schemes have met the Regulator's targets for scheme data quality and how they have addressed the Regulator's record-keeping guidance.

Background

In 2010 the Regulator set two targets for schemes to achieve in the quality of their scheme data: (a) for 100% of common data to be in place for post-June 2010 data, and (b) for 95% of common data to be in place for pre-June 2010 data. Common data is data which all schemes will hold in relation to members, irrespective of the type of scheme, e.g. member names, addresses, dates of birth and National Insurance numbers. Schemes were to achieve these targets by 31 December 2012.

Record-keeping review

Following expiry of the 31 December 2012 deadline, the Regulator will approach a sample of around 250 schemes, including DC, DB and hybrid schemes and including both trust-based and contract-based schemes, and both old and new schemes. Schemes will be selected on the basis of their scheme and membership profile and their previous interaction with the Regulator.

The review will be conducted in phases, with schemes initially being asked to submit information on how they have gone about meeting the data targets, and on what controls and procedures they have put in place to maintain or improve the quality of their scheme data. Some schemes will then be taken forward for further scrutiny and will receive individual feedback reports. Upon completion of the review, the Regulator will publish a report of its findings. The Regulator also plans to update its record-keeping guidance later this year to reflect the results of the review and to focus more on conditional data.

Katherine Dixon

Comment

The review will only have immediate implications for those 250 schemes which the Regulator chooses to include in its scope. However, if they have not already done so, trustees should be liaising with their administrators about whether any changes are required to their record-keeping procedures to ensure that the scheme data continues to meet the Regulator's targets.

EU pensions reforms: results of impact study

Preliminary results indicate extra £150 billion funding shortfall for UK schemes if Solvency II applies

Preliminary results from a study on the potential impact of European proposals for scheme funding have been published. As expected, they show that the proposed changes would have a huge impact, especially in the UK.

Background

In 2011, the EC began reviewing the IORP Directive. This sets out the European legislation governing pension schemes. As part of that review, the EC issued a call for advice from the European Insurance and Occupational Pensions Authority (**"EIOPA"**) on how the Solvency II Directive (which sets out capital requirements for insurers) could best be extended to pension schemes. In its response, EIOPA supported a modified extension of the requirements of Solvency II to pension schemes, but emphasised the need for an impact study. It carried out this impact study in 2012.

Preliminary results

EIOPA has now published the preliminary results of the impact study. The study covered eight countries: Belgium, Germany, Ireland, the Netherlands, Norway, Portugal, Sweden and the UK. The preliminary results show that, for the benchmark scenario, the aggregate funding shortfall in UK schemes alone would increase from around EUR350 billion (£295 billion) to around EUR527 billion (£445 billion). Other scenarios also considered in the study would result, in the main, in a lower funding shortfall.

EIOPA expects to publish the final report on the impact study in mid-2013, but notes that follow-up impact studies will be required.

Comment

Anna Rogers

In light of the preliminary results, Steve Webb MP has urged the EC to abandon its plans to impose Solvency II-style funding requirements on pension schemes. Schemes will have to wait until the EC publishes the draft revised IORP Directive to see whether the EC has listened to his call. The revised draft was expected this summer, but given EIOPA's statement that further impact studies are required, it seems likely that this timetable will slip.

Upcoming Pensions Group events at Mayer Brown

If you are interested in attending any of our events, please contact Katherine Dixon (kdixon@mayerbrown.com) or your usual Mayer Brown contact. All events take place at our offices at 201 Bishopsgate, London EC2M 3AF.

TRUSTEE FOUNDATION COURSE

Our Foundation Course aims to take trustees through the pensions landscape and the key legal principles relating to DB funding and investment matters, as well as some of the specific issues relating to DC schemes, in a practical and interactive way.

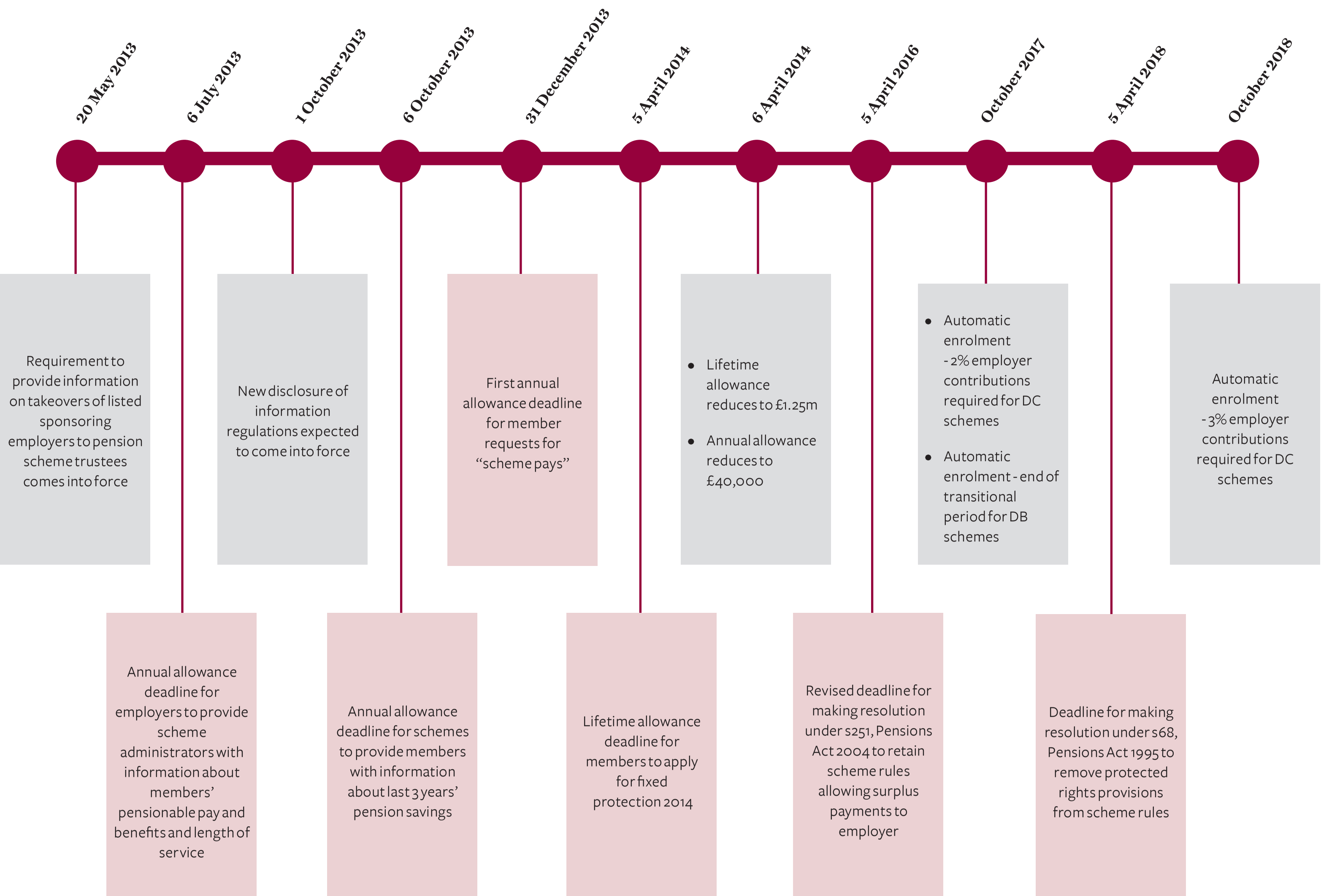
Tuesday 28 May 2013
Tuesday 17 September 2013
Tuesday 10 December 2013

TRUSTEE BUILDING BLOCKS CLASS

Our Building Blocks Classes look in more detail at some of the key areas of pension scheme management. They are designed to be taken by trustees who have already taken our Foundation Course.

Tuesday 18 June 2013 - Benefit changes
Tuesday 19 November 2013 - topic to be confirmed

Dates and deadlines



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