MAYER • BROWN

May/June 2013

# Bulletin for Pensions Managers

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## Pensions news

### PENSIONS BILL 2013

The Pensions Bill 2013 has been laid before Parliament. It includes provision for, among other things:

- introduction of the single tier state pension;
- abolition of DB contracting-out – employers will be given a power to increase employee contribution rates and/or change benefits payable under schemes to reflect the increase in employer NICs;
- establishment of the framework for the automatic transfer of small DC pots;
- a power to prohibit incentives to transfer out of DB schemes;
- a power to exclude certain categories of worker from the scope of automatic enrolment; and
- a new statutory objective for the Pensions Regulator to "minimise any adverse impact on the sustainable growth of an employer" when exercising its scheme funding powers.

The Pensions Minister also announced that the Government will ban consultancy charging in automatic enrolment schemes (whether occupational or personal pension schemes) (regulations to achieve this have now been laid before Parliament), and will consult this autumn on a cap on other charges.

#### Action

No action required.

### SCHEME PAYS: NEW REGULATIONS

Regulations have come into force which provide for a pension to be reduced in order to satisfy an annual allowance charge under "scheme pays" without triggering adverse tax consequences. The regulations apply in respect of pension reductions made on or after 6 April 2013.

#### Action

No action required.

### DIRECTORS' REMUNERATION: NEW REPORTING REQUIREMENTS

Regulations have been laid before Parliament which make changes to the requirements for the reporting of directors' remuneration by most quoted companies for financial years ending on or after 30 September 2013.

Amongst other information, companies will be required to disclose information about pension benefits accrued by directors (and payments made in lieu of retirement benefits) in the financial year covered by the remuneration report.

#### Action

Quoted companies should ensure that they keep sufficient records of directors' pension-related benefits to enable them to complete the relevant sections of the remuneration report.

### LIFETIME ALLOWANCE: INDIVIDUAL PROTECTION REGIME

The Treasury and HMRC have published a joint consultation on the proposed individual protection regime that is to apply in respect of the 2014 reduction in the lifetime allowance (LTA).

Essentially, a member with individual protection will have an LTA equal to the value of their pension savings on 5 April 2014 (subject to a maximum of £1.5m), but will be able to make further pension savings without losing the individual protection (unlike fixed protection).

#### Action

No action currently required.

## MAINTAINING CONTRIBUTIONS: CONSULTATION RESPONSE

The Pensions Regulator has published a response to its consultation on revised versions of its Codes of Practice 5 and 6 on reporting late payment of contributions to DC schemes. The revised Codes focus on maintaining the flow of contributions to schemes rather than just the reporting of late payment of contributions and will come into force this autumn. The Regulator has also issued employer guidance to accompany the Codes.

**Action** Employers and those responsible for administering DC schemes should review the new Codes to understand their obligations under them.

## FATCA: UK GUIDANCE

HMRC has published the final version of guidance on the implementation of the US-UK intergovernmental agreement on FATCA which clarifies that UK registered pension schemes will not be subject to reporting requirements under FATCA.

### Action

No action currently required, but, although exempt from the reporting requirements, schemes with US investments may need to provide confirmation to the managers of those investments of their registered pension scheme status.

## PENSIONS REGULATOR: GUIDANCE ON DC SCHEME RETURNS

The Regulator has published two guidance notes to help trustees/managers of DC schemes complete their scheme return. One is for schemes with 2 – 11 members, whilst the other is for schemes with 12 or more members. The DC scheme return contains a number of new questions this year.

### Action

Those responsible for completing the scheme return on behalf of DC schemes should read the relevant guidance note.

## PENSION SCHEMES NEWSLETTER 57

HMRC has published its Pension Schemes Newsletter 57 which covers:

- changes to the annual and lifetime allowances;
- pensions liberation;
- trivial commutation and similar payments;
- the re-write of the RPSM; and
- pension scheme registrations.

### Action

No action required, but those responsible for administering schemes may wish to review the section of the Newsletter dealing with trivial commutation and similar payments.

## PPF COMPENSATION: INCREASED CAP

The Pensions Minister has announced that the PPF compensation cap is to be increased for long-serving members. The new cap will be introduced "as soon as Parliamentary time allows", but will not be backdated.

### Action

No action required.

## DEFINED AMBITION: UPDATE THIS SUMMER

The Pensions Minister has confirmed that an update on the Government's defined ambition plans will be published this summer.

### Action

No action required.

## DUAL ACTUARIAL ADVICE APPOINTMENTS: REQUIREMENT FOR CONFLICTS POLICY

A reminder that from 1 July 2013, actuaries wishing to advise both the employer and the trustees of a scheme are required to put in place a written policy for managing conflicts of interests.

### Action

If the scheme actuary also advises the employer, ensure that a conflicts policy is in place.

## Pensions finance

### PENSIONS REGULATOR: ANNUAL FUNDING STATEMENT

The Regulator has published its 2013 annual DB funding statement which encourages schemes to make greater use of the existing flexibilities in the scheme funding regime.

The Regulator will consult this autumn on a revised code of practice on scheme funding. That consultation will also cover how the Regulator assesses risk as it is moving away from setting triggers focussed on individual items such as technical provisions.

#### Action

Employers and trustees of schemes undergoing valuations with valuation dates between September 2012 and September 2013 should review the statement.

### IORP II DIRECTIVE: SOLVENCY PROPOSALS DROPPED

The EC has announced that it will not proceed with proposals to introduce new solvency requirements for occupational pension schemes in the revised IORP Directive which it is currently preparing.

#### Action

No action required.

## Pensions litigation

### FUTTER V HMRC; PITT V HMRC

The Supreme Court has rejected both appeals against the Court of Appeal's interpretation of the rule in *Hastings-Bass*, holding that the Court of Appeal had correctly clarified the scope of the rule.

The Supreme Court however held that Mrs Pitt's decision could be rescinded on the grounds of equitable mistake. It is not clear to what extent this remedy will be available in the pensions context.

### LB RE FINANCING NO 1 LIMITED & OTHERS V THE TRUSTEES OF THE LEHMAN BROTHERS PENSION SCHEME & OTHERS

The Court of Appeal has upheld the High Court's decision that the trustees of a scheme are "directly affected persons" for the purposes of the moral hazard legislation (and can therefore refer a determination of the Pensions Regulator to the Upper Tribunal).

### TRUSTEES OF THE OLYMPIC AIRLINES SA PENSIONS AND LIFE INSURANCE SCHEME V OLYMPIC AIRLINES SA

The Court of Appeal has overturned the High Court's decision that it had jurisdiction to wind up the principal employer of the Olympic Airlines pension scheme even though the employer (a Greek company) was already in liquidation in Greece.

The relevance for the pension scheme is that a Greek liquidation of the employer is not a qualifying insolvency event for PPF purposes and the scheme will not therefore be eligible for PPF entry if a UK winding up order cannot be issued.

### SELDON V CLARKSON WRIGHT & JAKES

In 2012, the Supreme Court held in this case that imposition of a mandatory retirement age in a partnership could be a means of achieving the legitimate aims of dignity and inter-generational fairness, but it remitted the case back to the employment tribunal to determine whether the choice of age 65 was a proportionate means of achieving those aims such that enforcing retirement at that age did not involve unlawful age discrimination. The employment tribunal has now held that the choice of age 65 was a proportionate means of achieving the legitimate aims in question.

### HOGAN V MINISTER FOR SOCIAL AND FAMILY AFFAIRS, IRELAND

The ECJ has held that Ireland has not properly transposed into Irish law an EU Directive which requires member states to take measures to protect accrued pension rights under occupational pension schemes in the event of the employer's insolvency as members of Irish schemes are not guaranteed to receive at least 50% of their accrued benefits in the event of employer insolvency.

The decision raises the question of whether the UK is also in breach of the Directive because in some cases the PPF would not cover at least 50% of a member's pension benefits.

### WILLEY V HMRC

The First-tier Tribunal (Tax) has rejected a scheme administrator's appeal against a scheme sanction charge which was imposed by HMRC as a result of an unauthorised employer loan being made by the scheme. Although the scheme administrator did not know that the loan had been made, the Tribunal held that the administrator should have had in place a system to identify unauthorised payments being made.

### PENSIONS OMBUDSMAN ROUND-UP: CHANGE OF POSITION

Where a member has received an overpayment, they may have a defence to a repayment claim by the scheme if they can show that they have changed their position in good faith as a result of the overpayment and that it would therefore be unjust to require repayment.

Similarly, if a member has received incorrect information about the terms of their pension benefits, the scheme or employer may be obliged to provide the benefits on the incorrectly stated terms if the member can show that they changed their position in reliance on the incorrect information.

Some recent Ombudsman decisions give a flavour of what the Ombudsman may and may not consider amounts to a change of position in these circumstances.

In Wytch, the Ombudsman held that a member who received overpayments totalling just over £3,000 over a period of 5 years had changed her position by "living to her means" – ultimately the overpayment had allowed her to have a somewhat more generous lifestyle than she would otherwise have had.

In John, the Ombudsman held that a member who received overpayments from an income drawdown plan had changed his position by factoring those overpayments into his financial planning, including his decision to make a number of financial gifts to his children.

In McNicholas, the Ombudsman held that a member's spouse who had been overpaid nearly £100,000 under a pension sharing order which had been based on an incorrect valuation of the member's pension benefits had changed her position by relying on the incorrect valuation when negotiating her divorce settlement.

In Brand, the Deputy Ombudsman held that a member who had received clear and unequivocal albeit incorrect statements as to her retirement age over a considerable period of time had chosen to retire when she did in reliance on the incorrect information provided and that she would have been in a more favourable financial position had she received the correct information. The trustees could therefore not reduce her pension on the grounds of early retirement.

However, in Sutton, the Deputy Ombudsman held that oral and written representations to a member that his right to take early retirement at age 60 without employer consent would not be lost on a bulk transfer did not give him a right under the receiving scheme to take early retirement at age 60 without employer consent. When considered with other information provided at the time of the transfer, the representations were not sufficiently clear and unambiguous to create the right claimed by the member. Moreover, the Ombudsman was not persuaded that the member would have acted any differently in choosing whether or not to transfer had the representations not been made to him.

## Mayer Brown events

If you, any of your colleagues or any of the trustees of your scheme(s) 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.

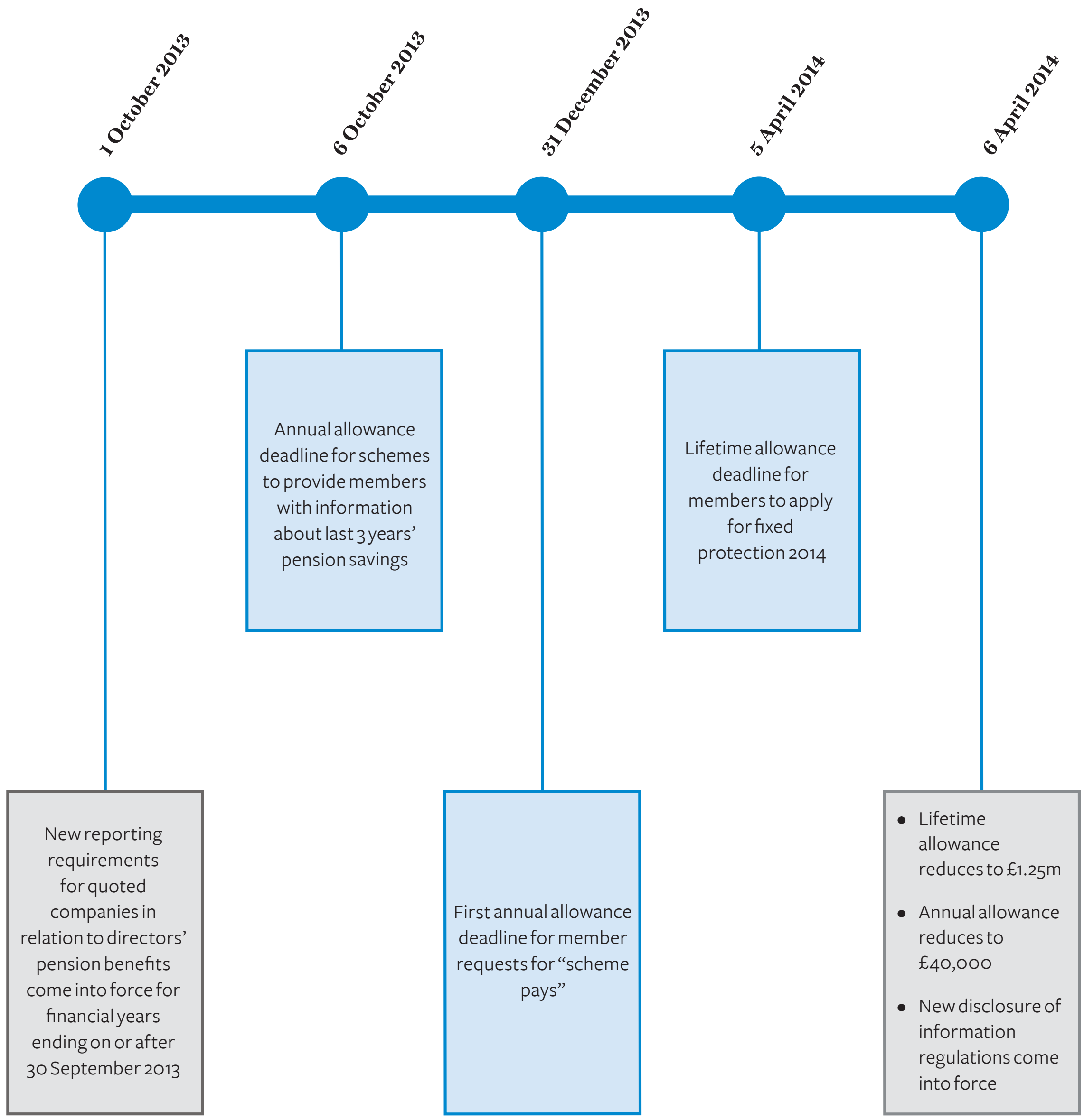
17 September 2013
10 December 2013

- **Trustee Building Blocks Classes**

Our Building Blocks Classes look in more detail at some of the key areas of pension scheme management. Each class considers a specific issue which trustees are likely to face in their role.

19 November 2013 – topic to be confirmed

# Dates to note over the next 12 months




Key: Important dates to note For information

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We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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