

Bulletin for Pensions Managers

Welcome to the September/October 2015 issue of our Bulletin for Pensions Managers. This issue covers developments to the end of October 2015.

In this issue:

Pensions news	1.
Pensions finance	4.
Pensions litigation	4.
Mayer Brown events	5.
Dates to note over the next 12 months	6.

Pensions news

DON'T FORGET – EMPLOYER SURPLUS PAYMENT RESOLUTION DEADLINE

5 April 2016 is the deadline for schemes to pass a resolution preserving any power in their rules to make a payment of surplus to an employer whilst the scheme is ongoing. If a resolution has not been passed by this date, any such powers in scheme rules will become ineffective. Trustees must give the scheme employer(s) and members at least 3 months' notice before passing the resolution.

The requirement to pass a resolution does not apply to powers to make payments of surplus to an employer on a winding-up of the scheme. However, it may apply to a power to make a payment of surplus on a partial winding-up.

Action

Schemes which have a power to make employer surplus payments while the scheme is ongoing or on a partial winding-up should consider whether they wish to retain that power and, if so, pass the required resolution.

FURTHER HMRC GUIDANCE ON VAT RECOVERY

HMRC has published further [guidance](#) on the recovery of VAT charged on pension scheme services. The two most important elements of the guidance are that:

- the transitional period under which schemes and employers can continue to follow HMRC's pre-2014 policy on VAT recovery has been extended for a further 12 months until 31 December 2016; and
- HMRC considers that, where an employer pays for asset management services under a tripartite agreement, it cannot claim a corporation tax deduction in respect of those fees.

Further guidance is expected later this year. For more information, please see our [legal update](#).

Action

In light of the extension of the transitional period and the corporation tax issue, schemes and employers may wish to hold off on making any decisions on adjusting the scheme's arrangements for the provision of services pending publication of the further guidance later this year.

2016/17 PPF LEVY – DRAFT DETERMINATION

The PPF has [published](#) its draft 2016/17 Levy Determination, together with a [consultation paper](#) and drafts of the accompanying documents such as guidance on contingent assets and ABCs.

The PPF is not proposing major reforms to its levy calculation methodology and rules, but is proposing some changes designed to reduce burdens on schemes and improve practical elements of the rules. For more information, please see our November 2015 [Trustee Quarterly Review](#).

The consultation closed on 22 October 2015 and the finalised Levy Determination will be published by the end of the year.

Action

Schemes with ABC arrangements and/or contingent assets that they wish to certify/re-certify for PPF levy purposes should start planning for the (re-)certification process.

Action

Schemes which have incorrectly claimed the discount for “last man standing” schemes in previous levy years should consider what arrangements they may need to put in place to pay any additional levies charged in respect of those years.

MISCELLANEOUS LEGISLATIVE CHANGES – CONSULTATION

The DWP has published a [consultation](#) on draft regulations making a range of changes designed to reduce the regulatory burden on occupational pension schemes. These include:

- Amending the definition of “relevant multi-employer scheme” in the Charges and Governance Regulations so that the only schemes caught are those which are or have been promoted as being available to unconnected employers. This amendment is designed to make it clear that schemes which could fall within the current definition because the employers used to be connected but are not any longer (e.g. because one or more employers were sold out of the group) are not “relevant multi-employer schemes”.
- Deleting most of the detailed investment disclosure requirements from the Audited Accounts Regulations and instead requiring the auditor to provide a statement that the accounts have been prepared in accordance with FRS 102 and the pensions SORP and noting any material departures.

The consultation closes on 9 December 2015.

Action

Multi-employer schemes providing DC benefits should check whether they will be “relevant multi-employer schemes” under the revised definition.

ABOLITION OF CONTRACTING-OUT – FURTHER DRAFT REGULATIONS

The DWP has published a [consultation](#) on draft regulations making further consequential changes to legislation to reflect the abolition of contracting-out in 2016. The consultation closed on 16 November 2015.

A number of issues, including the question of reference scheme test underpins, remain undecided and will be the subject of future consultation responses or consultations.

HMRC has also published [issue 10](#) and [issue 11](#) of its Countdown Bulletin to the end of contracting-out. These issues cover various topics including an update on the Scheme Reconciliation Service.

Action

Schemes holding GMPs should ensure that they register for the Scheme Reconciliation Service by 5 April 2016 (if they have not already done so).

Action

Schemes that are currently contracted-out should start planning what action they need to take in light of the forthcoming abolition of contracting-out (if they have not already done so).

MEMBER-BORNE COMMISSION IN OCCUPATIONAL PENSION SCHEMES – CONSULTATION

The DWP has published a [consultation](#) on the most effective way of banning member-borne commission payments in DC qualifying schemes (for automatic enrolment purposes). The ban will also apply to money purchase AVC arrangements in DB qualifying schemes. The consultation proposes that a duty should be created to:

- ensure that members are not charged for the cost of any commission payments to advisers in relation to any new commission arrangements (from 6 April 2016); and
- use best endeavours to remove any such existing member-borne commission arrangements (from a date later in 2016).

The consultation asks for views on whether trustees or service providers should be subject to the duty, and on viable alternative options. The consultation closed on 27 November 2015.

Action

No action required.

PUBLIC FINANCIAL GUIDANCE – CONSULTATION

The Treasury has published a [consultation](#) on how the public provision of free-to-client, impartial financial guidance should be structured so that consumers receive the information they need to make financial decisions. The consultation closes on 22 December 2015.

Action

No action required.

FURTHER PENSIONS REFORM – DWP ANNOUNCEMENT

The DWP has published a written ministerial [statement](#) announcing that implementation of the parts of the Pensions Act 2014 and the Pension Schemes Act 2015 relating to defined ambition arrangements, “collective DC schemes”, and “pot follows member” has been put on hold. It says that this is to allow the industry to focus on completion of the implementation of automatic enrolment and the introduction of the new state pension.

Action

No action required.

HMRC PENSION SCHEMES NEWSLETTERS 72 AND 73 – FIXED AND INDIVIDUAL PROTECTION 2016

HMRC has published [issue 72](#) and [issue 73](#) of its Pension Schemes Newsletter. These issues cover a wide range of topics including an update on the fixed and individual protection 2016 regimes.

The relevant legislation will be included in the Finance Bill 2016 so members will not be able to apply until after 6 April 2016. Members wishing to rely on fixed protection will nonetheless need to take steps to cease benefit accrual by 6 April 2016.

Applications will be made online, and there will be no deadline for registration. Members will no longer be issued with a certificate confirming their protection. Instead they will receive a reference number which they must provide to the scheme administrator when they take their benefits.

The online registration system will be available from July 2016 – an interim process has been developed for the period between April 2016 and July 2016.

HMRC is also planning to develop an online service for scheme administrators to check the protection status of scheme members.

Action

Schemes and employers should consider what changes are required to their member/employee communications to reflect the introduction of individual and fixed protection 2016, and whether a special communication is required.

Action

Schemes should consider whether any changes will be required to their administration processes in light of individual and fixed protection 2016.

DC CHARGES AND GOVERNANCE STANDARDS – REGULATOR MATERIALS

The Regulator has published webpages summarising the April 2015 reforms on [DC charging restrictions](#) and [DC governance standards](#).

The Regulator has also issued a [reminder](#) to trustees of the need to take action to meet the new DC governance standards, and has published a series of [FAQs](#) on trustee duties in relation to DC governance.

Action

Schemes should ensure that they have taken the necessary measures to comply with the relevant DC governance and charging requirements.

AUTOMATIC ENROLMENT – QUALITY REQUIREMENTS FOR HYBRID SCHEMES

The [Hybrid Schemes Quality Requirements Rules 2015](#) have been published by the DWP. They set out the detailed quality requirements that certain hybrid schemes (i.e. schemes providing both DB and DC benefits) must satisfy in order to be used for automatic enrolment, and replace the 2012 rules with effect from 1 April 2015.

Action

Hybrid schemes that are being used for automatic enrolment should check that they meet the requirements of the 2015 rules.

INCREASES ON GMPS – POSITION FROM APRIL 2016

Pension schemes are not required to pay increases on GMPs that accrued prior to 6 April 1988 and need only increase GMPs accrued after that date by inflation capped at 3%. Currently, increases on pre-1988 GMPs and any increases over 3% on post-1988 GMPs (where inflation exceeds 3%) are paid as part of the additional state pension.

From 6 April 2016, the state pension regime is being replaced with a new single tier state pension. As there will no longer be an additional state pension, individuals who reach state pension age on or after 6 April 2016 will not receive:

- increases on their pre-1988 GMPs; or
- any increases over 3% on their post-1988 GMPs (where inflation exceeds 3%),

unless their scheme rules contain a provision requiring the scheme to pay such increases.

Action

Schemes should check whether their rules require them to pay increases on pre-1988 GMPs or increases over 3% on post-1988 GMPs (where inflation exceeds 3%).

Action

Schemes should check that their member booklets contain the correct information regarding the payment of increases on GMPs.

INCENTIVE EXERCISES – REVISED CODE OF PRACTICE

The Incentive Exercises Monitoring Board has announced that it is currently reviewing the code of good practice for incentive exercises and that it expects a revised code to be published by the end of the year.

Action

Schemes that are currently planning or considering an incentive exercise may wish to postpone any final decisions until the revised code is published.

DWP BULK TRACING SERVICE – GUIDANCE

The DWP has published updated guidance on its bulk tracing service.

Action

No action required.

NAPF – REBRANDING

The NAPF has rebranded itself as the Pensions and Lifetime Savings Association (PLSA).

Action

No action required.

Pensions finance

EMIR – CENTRAL CLEARING REQUIREMENTS EXEMPTION

The extension of the exemption for pension scheme arrangements from the central clearing requirements under EMIR came into force on 16 September 2015. The exemption will now expire on 16 August 2017.

Action

No action required.

CHANGES TO THE INVESTMENT REGULATIONS – CONSULTATION RESPONSE

The DWP has published a response to its February 2015 consultation on proposed changes to the Investment Regulations. The DWP has concluded that:

- It will not amend the Investment Regulations so that they more clearly reflect the distinction between financial and non-financial factors or to require trustees to comply with the Stewardship Code, as this is an area where guidance can be more effective than regulatory change.
- It will seek evidence on how schemes currently make certain information available to members about how the scheme invests, including their approach to stewardship. (The response includes a call for evidence on these points.)

Action

No action required.

Pensions litigation

SURVIVORS' BENEFITS PAYABLE TO SAME SEX PARTNERS

The Court of Appeal has confirmed that, where a pension scheme gives civil partners/same sex spouses less generous benefits than opposite sex spouses for service before 5 December 2005, this difference in treatment does not breach the provisions of the EU Equal Treatment Directive covering discrimination on the grounds of sexual orientation.

However, this decision relates only to whether different treatment breaches the Directive. There are separate duties, in contracting-out legislation, which require contracted-out schemes to provide benefits for civil partners and same sex spouses for service from 1988 onwards, and the Court's decision does not affect those duties.

CHANGING PENSION INCREASE RULES – HIGH COURT GUIDANCE

The High Court has ruled on the construction of a replacement pension increase rule which was expressed to apply both prospectively and retrospectively. The original rule provided for annual increases of 3% compound, while the replacement rule provided for annual increases of RPI capped at 5%. The Court held that the replacement rule should be construed so that pensions accrued in respect of service prior to the rule's introduction were to be increased annually by the higher of 3% and RPI capped at 5%.

CHANGING INDEXATION MEASURES – FURTHER HIGH COURT GUIDANCE

The High Court has held that a scheme's rules which defined RPI as the "*General Index of Retail Prices or any replacement adopted by the Trustees without prejudicing Approval*" did not allow the trustees to change the indexation measure used to calculate pension increases and revaluation from RPI to CPI. In light of the general balance of powers in the scheme, the Court held that the wording used in the definition meant that the trustees could only adopt a "replacement" index if RPI ceased to be an officially published index. We understand that permission to appeal the Court's decision has been granted.

DATA PROTECTION – EU-US "SAFE HARBOR" AGREEMENT NO LONGER VALID

The EU Court of Justice has ruled that the EU-US "Safe Harbor" agreement for data transfers from the EU to the US should be declared invalid following Edward Snowden's revelations about the surveillance by the US National Security Agency of data held by Safe Harbor participants. This decision may have implications for pension schemes whose data is being transferred to the US, but only if the legal basis of those transfers is the Safe Harbor agreement rather than, for example, the use of the EU "Model Contract Clauses".

TRANSFERS – PROCESSING TIMESCALES

Two recent decisions from the Pensions Ombudsman demonstrate the difficulties that trustees face in knowing what the Ombudsman will consider to be a suitable timescale for processing a transfer request. In one case, the Ombudsman upheld a member's complaint that his transfer request had not been processed within a reasonable timeframe (even though the transfer was completed by the six month statutory

deadline), concluding that a month would have been a reasonable timeframe for the scheme to have processed the transfer. However, in the second case, the Ombudsman rejected a member's complaint that his transfer request had not been processed by the statutory deadline as, based on the facts of the case, there were "valid reasons" for the delay.

Mayer Brown events

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

- **Trustee Foundation Course**

1 December 2015
23 February 2016
17 May 2016
13 September 2016
6 December 2016

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.

- **Trustee Building Blocks Class**

14 June 2016 – topic to be confirmed
15 November 2016 – topic to be confirmed

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.

- **Annual Pensions Forum**

19 April 2016

Our Annual Pensions Forum takes a look back at some of the key developments over the last 12 months and looks forward to expected developments in the coming year.

Please speak to your usual contact in the Pensions Group if you have any questions on any of the issues in this Bulletin.

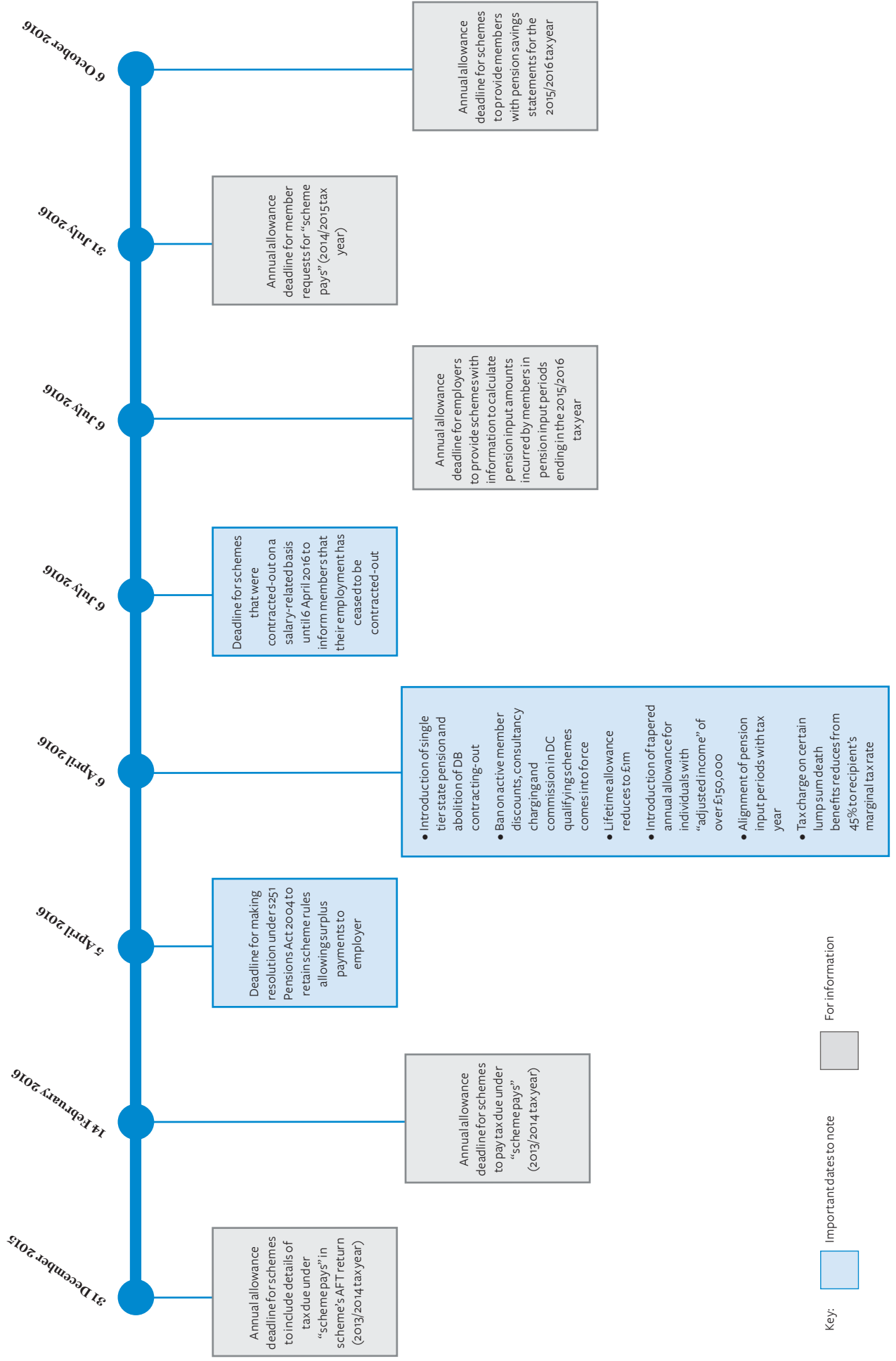
Ian Wright

Partner, London

E: iwright@mayerbrown.com

T: +44 20 3130 3417

Dates to note over the next 12 months



About Mayer Brown

Mayer Brown is a global legal services provider advising clients across the Americas, Asia and Europe. Our geographic strength means we can offer local market knowledge combined with global reach. 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 and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2015 The Mayer Brown Practices. All rights reserved.