The Pensions Brief

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**SCHEME AMENDMENTS**
Court of Appeal decision on the retrospective validation of ineffective scheme amendments

**BREACH OF TRUSTEE DUTIES**
Pensions Ombudsman determination on trustee liability for breach of statutory and trust law duties

**DEATH BENEFITS**
Deputy Pensions Ombudsman determination on procedural errors when distributing death benefits

**Issues affecting DB schemes**

**EMIR REFIT REGULATION**
EU regulation making changes to the EU legislation governing derivatives

**SCHEME VALUATIONS**
Upper Tribunal decision upholding fines issued to three trustees for failure to obtain triennial scheme valuations

⚠️ Action required
⚠️ Follow development and keep under review
Issues affecting all schemes

Scheme amendments – retrospective validation
The Court of Appeal has upheld an appeal against a High Court decision that amendments made to a pension scheme to introduce higher pension increases were valid despite a failure to observe the correct formalities. The High Court had decided that the amendments, although not valid at the time, had been validated by replacement rules introduced in 1993. The Court of Appeal held that this involved the re-writing of history to an impermissible extent. The 1993 rules, which purported to take effect from 1990, did not provide for the higher pension increases, but included various provisions whereby the higher pension increases could have been introduced by agreement between the employer and the trustees without the need for signatures. BIC UK Limited v Burgess and others [2019] EWCA Civ 806

Action
Trustees and employers should take care to ensure that scheme amendments are effective by following all the required formalities under the trust deed and rules and legislation.

Breach of statutory and trust law duties – trustee liability
The Pensions Ombudsman has directed two trustees to pay over £2 million to their scheme following actions on their part which amounted to breaches of their statutory investment duties and their trust law duties. The Ombudsman also held that the trustees’ actions amounted to pure maladministration and ordered the trustees to pay £5,000 to each of the 14 complainants in recognition of the exceptional level of distress and inconvenience suffered by the complainants. Mr L and others (PO-7292 and others)

Action
Trustees should ensure that they comply with their statutory and trust law duties and, if necessary, they should take professional advice on what those duties are and what they need to do to comply with them.
Distribution of death benefits – procedural failures

The Deputy Pensions Ombudsman has directed a scheme administrator to reconsider its decision on distribution of the death benefits payable under a member’s pension policy after the administrator decided to pay the benefit to the member’s partner rather than his widow (from whom he was separated). The Deputy Ombudsman concluded that the administrator had not made sufficient enquiries about the two women’s respective financial circumstances and the administrator’s stated reason for discounting the widow’s claim was inconsistent with the evidence before it. As such, there was a procedural error in the administrator’s decision-making which had caused the widow injustice. The Deputy Ombudsman also directed the administrator to pay £500 to the widow for the significant distress and inconvenience caused, rather than the £200 that the administrator had offered to pay.

Mrs D (PO-20255)

Action

Trustees should ensure that they follow a proper process when deciding on distribution of death benefits. In particular, they should ensure that they obtain sufficient evidence of the respective financial circumstances of each potential beneficiary and that they verify information received from a potential beneficiary about another potential beneficiary.
Issues affecting DB schemes

Derivatives – new EU regulation
The EMIR Refit Regulation has been adopted and will come into force on 17 June 2019. The Regulation amends the European Market Infrastructure Regulation (EMIR) which governs the use of derivatives in the EU. The Refit Regulation makes a range of changes to EMIR, the most important of which in the pension scheme context is an extension of the exemption for pension scheme arrangements from the clearing obligation under EMIR for a further two years (until 18 June 2021) (with the possibility of two further one year extensions). (The extension is also extended retrospectively to 17 August 2018 when the previous exemption expired.)

Schemes should also be aware that new rules under EMIR requiring counterparties to post "initial margin" in relation to their uncleared over the counter (OTC) derivatives will come into force in 2020. These changes are only likely to affect the very largest pension schemes.

Action
Trustees of schemes holding uncleared OTC derivatives should take advice to confirm whether the initial margin requirements will apply to them.

DB funding – failure to obtain scheme valuations
The Upper Tribunal has upheld fines issued by the Pensions Regulator to three trustees for failure to obtain two triennial scheme valuations as required under the Pensions Act 2004.

Action
Trustees should ensure that they obtain triennial scheme valuations and annual funding updates in the intervening two years.
Mayer Brown news

Upcoming events
All events take place at our offices at 201 Bishopsgate, London EC2M 3AF.

- **Trustee Foundation Course**
  17 September 2019
  10 December 2019

- **Trustee Building Blocks Classes**
  18 June 2019 – DC governance
  12 November 2019 – DB funding and investment

- **Annual Pensions Conference**
  2 October 2019

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

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Dates to note over the next 12 months

Key:

- **Important dates to note**
- **For information**

### 28 June 2019
PPF levy deadline for submission of full block transfer certificates

### 6 July 2019
Annual allowance deadline for employers to provide schemes with information to calculate pension input amounts incurred by members in pension input periods ending in the 2018/19 tax year

### 1 October 2019
- Removal of the actuarial certification option for DC bulk transfers without consent
- New requirements on the content of SIPs and the annual report and on disclosure come into force

### 6 October 2019
Annual allowance deadline for schemes to provide members with pension savings statements for the 2018/19 tax year

### 31 October 2019
Date of Brexit if the withdrawal agreement has not been ratified and a further extension has not been agreed

### 31 December 2019
Annual allowance deadline for schemes to include details of tax due under “scheme pays” in scheme’s AFT return (2017/18 tax year)

### 14 February 2020
Annual allowance deadline for schemes to pay tax due under “scheme pays” (2017/18 tax year)

### 31 July 2019
Annual allowance deadline for member requests for “scheme pays” (2017/18 tax year)
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