

# The Pensions Brief

At a glance...

## Issues affecting all schemes

### 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

▲ Action required

▲ Follow development and keep under review

## 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



## 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. The Ombudsman has submitted a copy of his determination to the Pensions Regulator so that the Regulator can consider whether to appoint an independent trustee to the scheme.

*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

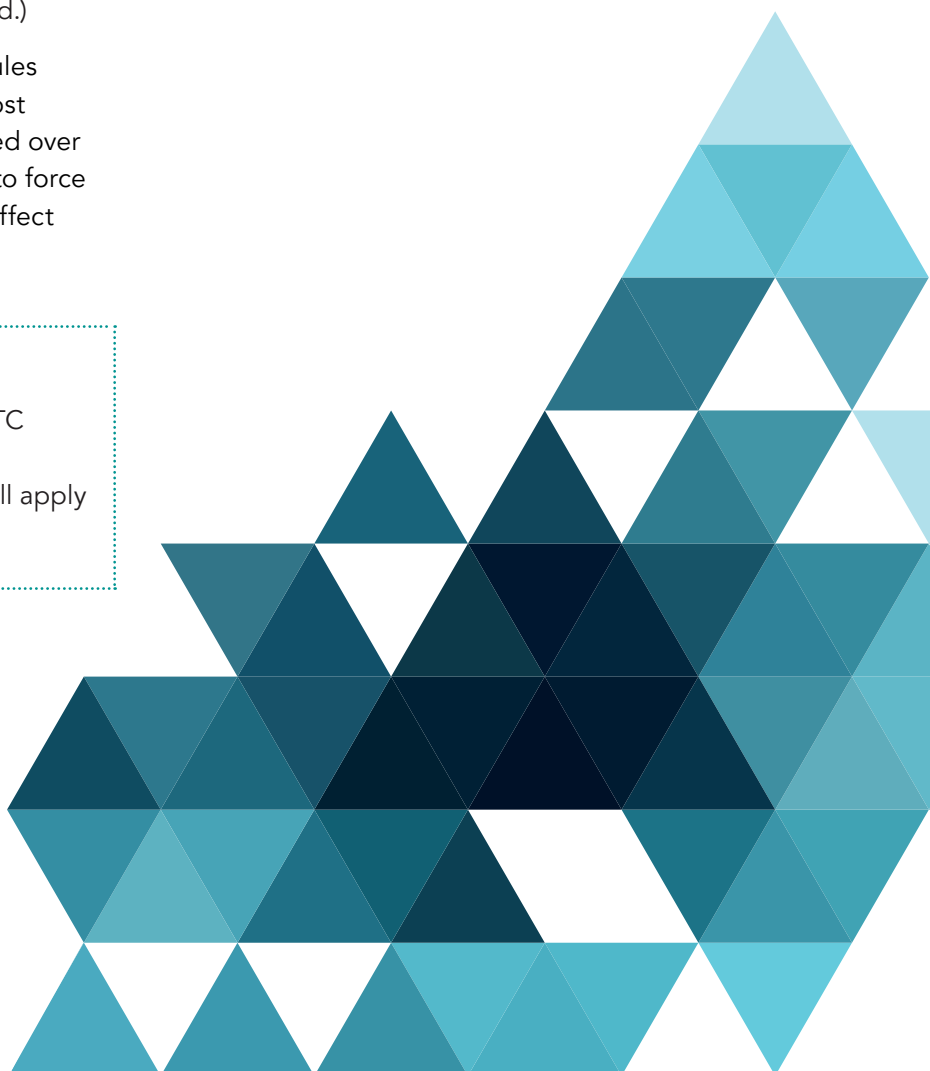
Trustees of schemes holding uncleared OTC derivatives should take advice to confirm whether the initial margin requirements will apply to them.

### 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

### Employer Perspectives – news and views on employment and pensions issues

Visit the blog at [employerperspectives.com](http://employerperspectives.com) and [subscribe to blog updates via email](#).

### The View from Mayer Brown: UK Pensions Law Podcasts

Listen to or subscribe to The View from Mayer Brown UK Pensions Law Podcasts via iTunes here:



*Please note – subscribing above will only work on a device with iTunes installed. Alternatively, if you don't have iTunes, you can access the podcasts via our website.*

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

For more information about the Pensions Group, please contact:



*Ian Wright*

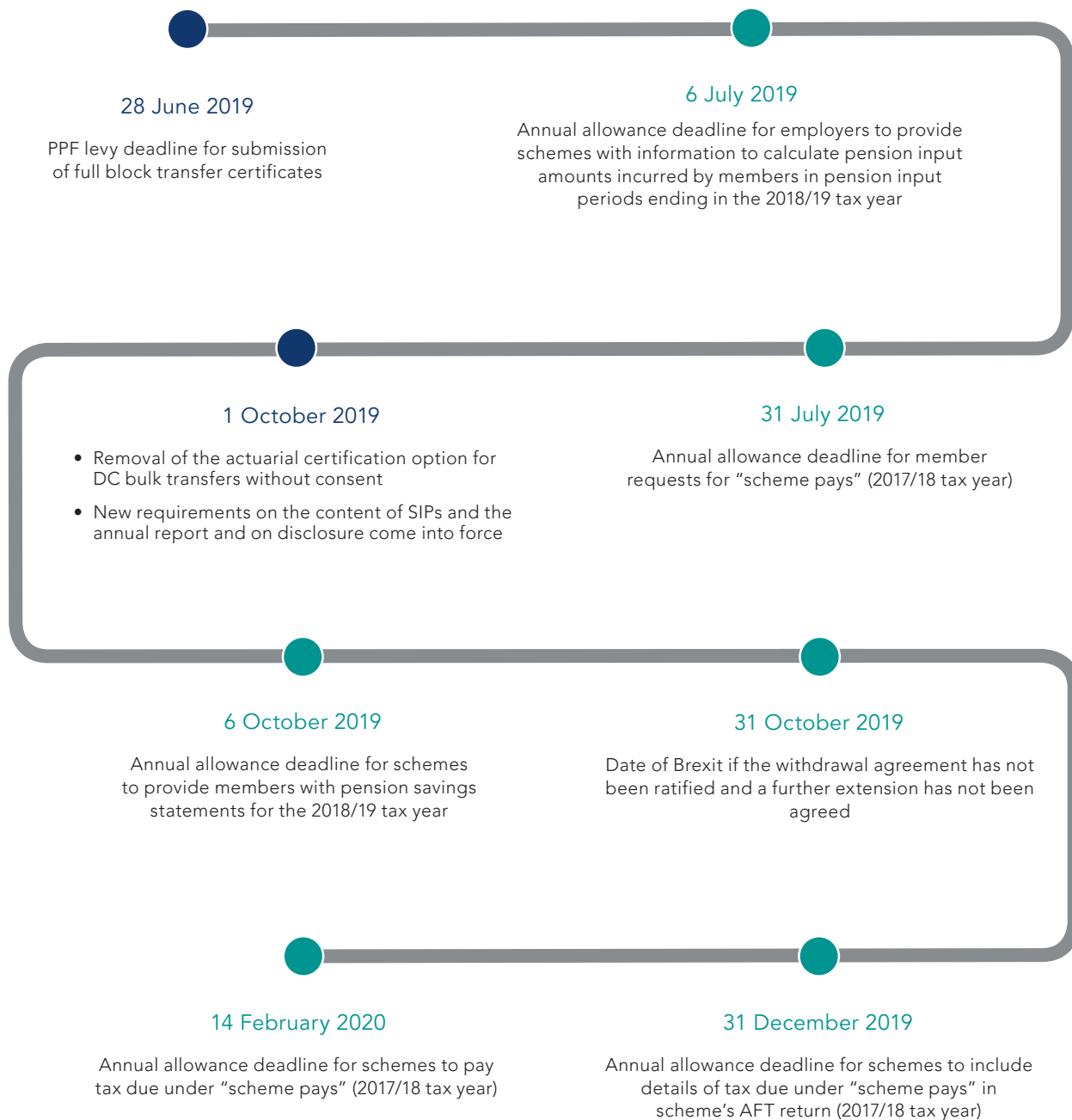
Co-Head of Pensions, London  
E: [iwright@mayerbrown.com](mailto:iwright@mayerbrown.com)  
T: +44 20 3130 3417



*Jay Doraisamy*

Co-Head of Pensions, London  
E: [jdoraisamy@mayerbrown.com](mailto:jdoraisamy@mayerbrown.com)  
T: +44 20 3130 3031

## Dates to note over the next 12 months



**Key:**

- Important dates to note
- For information

---

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our “one-firm” culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit [mayerbrown.com](http://mayerbrown.com) for comprehensive contact information for all Mayer Brown offices.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the “Mayer Brown Practices”) and non-legal service providers, which provide consultancy services (the “Mayer Brown Consultancies”). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. “Mayer Brown” and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2019 Mayer Brown. All rights reserved.

Attorney Advertising. Prior results do not guarantee a similar outcome.

Americas | Asia | Europe | Middle East

[mayerbrown.com](http://mayerbrown.com)