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June 2020

The Pensions Brief

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Issues affecting all schemes

Update to Pensions Regulator's COVID-19 guidance

During June, the Pensions Regulator (the "**Regulator**") updated various pieces of guidance that it had produced to help trustees and sponsoring employers deal with COVID-19.

Changes were made to the Regulator's guidance for sponsoring employers on automatic enrolment and DC pension contributions to reflect the fact that:

- the Coronavirus Job Retention Scheme ("**CJRS**") will end on 31 October 2020, and that the proportion of an employee's salary that the employer will be able to claim under the CJRS will reduce to a maximum of 70% (or £2,187.50) in September 2020, and 60% (or £1,875) in October 2020;
- from 1 July 2020, employees that have been furloughed will be able to work part-time for their employer. The money that employees will receive under the CJRS will be pro-rated in accordance with the part-time hours that each employee works, and pension contributions should be paid on the total amount of money received by the employee (for example, if an employee earned £1,000 a month from working and was due £500 furlough pay, then pension contributions should be made based on the total amount - £1,500); and
- from 1 August 2020, employers will no longer be able to claim the statutory minimum automatic enrolment pension contribution on an employee's furlough pay.

In addition to this, the guidance for trustees on scheme administration was updated to:

- reiterate the importance of all scheme members (especially those who are deemed to be vulnerable) having the ability to contact the scheme administrator;
- state that trustees should continue working with their administrator to agree a "plan for delivery", focusing on which tasks should be prioritised, and ensuring that any non-critical demands and/or queries that trustees would normally direct towards the administrator are limited; and
- re-emphasise the need for trustees and administrators to do their best in ensuring that members do not fall victim to pension scams.

Finally, the trustee guidance on reporting duties and enforcement activities was updated to reflect that the trustee reporting requirements which the Regulator paused at the start of COVID-19 will resume as usual on 1 July 2020. The only exception to this is that providers will continue to have 150 days (rather than the standard 90 days) in which to report late payments of contributions (other than deficit repair contributions) – although the Regulator will review this easement again at the end of September.

It is expected that further updates will follow as Government support is slowly withdrawn, and further easements from the Regulator come to an end.

Actions

Trustees (and sponsoring employers) should consider the updates to the guidance. In particular, they should be aware that the easements around reporting are ending.

Pensions Ombudsman Determination - Norton Motorcycles

SG was the sole trustee (the "**Trustee**") of three schemes, being the Commando 2012 Pension Scheme, Donington MC Pension Scheme and Dominator 2012 Pension Scheme (together the "**Schemes**"). The Trustee was also the sole director of the Schemes' principal employer.

Members were encouraged to transfer into the Schemes as an opportunity to invest in the Norton Motorcycles business with the incentive of a tax-free commission on completion of their transfer. The Trustee invested all of the members' assets in preference share capital in Norton Motorcycle Holdings Limited, of which the Trustee was the sole director and shareholder. This decision was taken without the Trustee having obtained investment advice.

Complaints were brought by several members and the current trustee of the Schemes.

After extensive investigation, the Pensions Ombudsman found that although the Schemes had not been set up for an improper purpose, the Trustee had acted in breach of duty. For example the Trustee:

- acted dishonestly;
- breached the duty to avoid conflicts of interest, not to profit and to act with prudence; and
- breached the statutory knowledge and understanding duty.

The Pensions Ombudsman also found that there had been maladministration on the part of the Schemes' administrator, which lacked the necessary knowledge or experience to administer the Schemes.

The Pensions Ombudsman directed:

- the Trustee to pay back the amount of money that was lost by investing in Norton Motorcycle Holdings Limited, less any money already recovered, plus interest; and
- the Trustee and administrator to pay distress and inconvenience compensation in respect of the maladministration.

Actions

None required. This determination highlights the importance of good pension scheme governance and ensuring that trustees comply with their statutory and trust duties.

Dominator 2012 Pension Scheme (Dominator Scheme), Donington MC Pension Scheme (Donington MC Scheme) and Commando 2012 Pension Scheme (Commando Scheme) (collectively, the Schemes) (CAS-30918-M4P3)

Pensions Regulator publishes Corporate Plan 2020-2021

On 29 June, the Pensions Regulator (the "**Regulator**") published its Corporate Plan 2020-2021. The Corporate Plan sets out the Regulator's priorities for the year ahead and takes account of COVID-19. The Regulator notes that it responded flexibly, pragmatically, swiftly and decisively to support members and those running pension schemes in response to the COVID-19 pandemic and while this is important, its priority is still protecting members and their savings. The Regulator will do this through regulatory interventions, using its powers (including its new powers), and continuing to build strong relationships with schemes. It emphasises the importance of continuing to improve governance, fighting against pension scams, supporting schemes in implementing their long-term funding strategies (including ensuring that they receive the contributions they are legally entitled to) and supporting UK businesses in protecting the interests of savers (recognising that the best support for pension schemes is a strong and solvent employer).

Actions

For noting.

Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 received royal assent on 25 June. The Act is intended to help companies navigate through the COVID-19 pandemic and introduces some new insolvency measures more generally to increase the chances of companies continuing as a going concern.

The key changes the Act introduces are set out below.

- Until 30 September 2020, the wrongful trading rules are suspended where the worsening of the creditors' position is due to COVID-19.
- The use of a winding-up petition between 27 April 2020 and 30 September 2020 is prohibited where a company has suffered financial difficulties due to COVID-19.
- Certain corporate governance requirements (such as the deadline for filing accounts) have been relaxed until 30 September 2020.
- A new moratorium has been introduced which is a period of 20 business days (although this period can be extended) in which a struggling company is granted payment holidays on most forms of debt, and is protected from legal action.
- A new restructuring plan process has been introduced where, if a company has encountered financial difficulties that affect its ability to carry on business as a going concern, it can agree a compromise with its creditors, with the aim of helping it to continue as a going concern.
- There has been a widening of the restrictions on insolvency termination clauses so suppliers of goods and services will generally have to continue to comply with their contracts with an employer provided they continue to be paid for the goods and services supplied during the moratorium.

Neither the moratorium nor the restructuring plan will be qualifying insolvency events under the Pensions Act 2004, meaning sponsoring employers of eligible schemes who use these new mechanisms will not trigger a Pension Protection Fund ("**PPF**") assessment period although both the Pensions Regulator and the PPF must be notified of a moratorium or restructuring plan. In addition, if a company is an employer of an eligible pension scheme and the trustee is a creditor of that company:

- the PPF will be able to bring a challenge against a moratorium arrangement on behalf of the trustee in accordance with insolvency rules; and
- where a compromise or arrangement is proposed in respect of that company, the Act makes provision for Regulations to be passed which would allow the PPF to exercise the trustee's rights as creditor.

Action

If a sponsoring employer is being detrimentally impacted by COVID-19, the trustees should familiarise themselves with the new insolvency procedures and corporate governance relaxations introduced by the Act.

Issues affecting DB schemes

PPF compensation cap

On the 22 June 2020, the Administrative Court ruled that the cap on compensation payable by the Pension Protection Fund ("**PPF**") is unlawful on the grounds of age discrimination, and that correcting this through a one-off payment is acceptable.

By way of background, the PPF's compensation is paid to members of an eligible pension scheme so that:

- members who have reached their normal retirement age ("**NRA**") at the point at which their scheme's statutory employer suffers a qualifying insolvency event (triggering an assessment period) receive their full benefits;
- members in receipt of an ill health pension or dependants/relatives of a member in receipt of a survivor's pension as at the date the assessment period is triggered receive their full benefits; and
- members who have not reached their NRA as at the date the assessment period is triggered receive 90% of their full benefits, subject to the PPF compensation cap. This cap is reviewed every year and is currently set at just below £41,500 for members who are age 65.

The Court ruled that:

- PPF compensation is unlawful on the grounds of age discrimination; and
- correcting this through a one-off payment is acceptable provided that, over their lifetime, each individual (which includes members and survivors) receives at least 50% on a cumulative basis of the actual value of benefits that the relevant scheme would have provided (this includes a pension and survivor's pension under the relevant scheme rules).

The PPF will be working with the DWP to understand how the Government will respond to this ruling.

Actions

None required.

Hughes and the Board of the Pension Protection Fund [2020] EWHC 1598 (Admin)

FCA to ban contingent charging for advice on transfers from DB schemes

The Financial Conduct Authority ("**FCA**") has published new rules and guidance on pension transfer advice. The rules ban the use of contingent charging by financial advisers who are advising members on transferring out of a defined benefit ("**DB**") pension scheme. In a contingent charging arrangement, advisers only get paid if the person that they are advising proceeds with the transfer, and the FCA has identified this as problematic, due to conflicts of interest and it not rewarding advisers who correctly advise a member that it is in his/her best interest to remain in his/her current DB pension scheme.

The ban on contingent charging will come into force on 1 October 2020.

Actions

Trustees should continue to remain vigilant when they receive transfer requests, and conduct the appropriate due diligence.

Pensions Regulator guidance on DB superfunds

The Pensions Regulator (the "**Regulator**") has released guidance on superfunds (DB pension schemes which act as consolidation vehicles). There are three separate guidance documents, for superfunds themselves and for ceding employers and trustees (i.e. those contemplating using a superfund).

The guidance precedes the introduction of a formal legal framework for superfunds and, whilst it is not legally binding, the Regulator has stated that it intends to regulate superfunds to ensure that members' benefits are protected. The Regulator also recognises that this is an evolving area and will therefore continue to develop its guidance.

Key messages from the guidance are outlined below.

- **Superfunds** will be expected to submit themselves to detailed initial assessment and ongoing supervision by the Regulator. The guidance sets out the Regulator's expectations as to funding (including specified assumptions for minimum technical provisions), investment, transfers-in and the capital buffer. The guidance also cover matters such as governance, fitness and propriety of key personnel and financial sustainability.
- **Ceding employers** will be expected to apply for clearance, since the Regulator views a transfer to a superfund as a "type A event".
- **Ceding trustees** will need to be satisfied that a transfer to a superfund is in members' best interests. The guidance lists issues and advice which the trustees will need to consider for this purpose. Trustees should be ready to share their conclusions with the Regulator. In the Regulator's view a transfer to a superfund is unlikely to be in members' best interests where there would otherwise be a reasonable prospect of a buy-out in the foreseeable future (e.g. the next five years).

Actions

If trustees are contemplating a transfer to a superfund, they should be mindful of this guidance.

Issues affecting DC schemes

FCA launches consultation on workplace pensions value for money

On the 24 June, the Financial Conduct Authority ("**FCA**") launched a consultation on proposals to make it easier for Independent Governance Committees ("**IGC**") and Governance Advisory Arrangements ("**GAA**") to compare pensions products. The FCA's aim is to promote the best value for money ("**VFM**") for members of personal pension schemes.

The consultation covers:

- whether clearer rules and guidance on how IGCs assess VFM are needed;
- a simple framework for the annual VFM assessment by IGCs including a definition of VFM;
- whether ICGs should be required to compare the selected pension provider with other options on the market; and
- whether pension providers should be obligated to offer VFM.

The consultation closes on 24 September 2020.

Actions

For noting.

DWP review of charge cap

The charge cap, applicable to default funds in pension schemes which are used for automatic enrolment purposes, was introduced in 2015 to improve value for money for members. The Government then reviewed the charge cap in 2017 and determined that it was working broadly as it was intended to and committed to review it again in 2020.

On 25 June, the DWP published a call for evidence on the 'Review of the Default Fund Charge Cap and Standardised Cost Disclosure'. This call for evidence is, in conjunction with a Pension Charges Survey, seeking views on the effectiveness of costs, charges and transparency measures in protecting member outcomes. In particular, it seeks views on:

- whether the level of the charge cap remains appropriate;
- whether other costs, such as the transaction costs, should be included in the charge cap;
- particular fee structures, such as structures which include a flat fee element; and
- options to widen the use and application of the charge cap.

The call for evidence is open for responses until 20 August 2020 and the Government expects to publish its proposals later this year.

Actions

For noting.

Mayer Brown news

Upcoming events

- **Trustee Foundation Course**

  15 September 2020

  8 December 2020

- **Trustee Building Blocks Classes**

  17 November 2020 – DB funding and investment

Due to the COVID-19 restrictions, our events will be hosted via telephone/video conference until further notice. We will provide further details nearer the time of each event.

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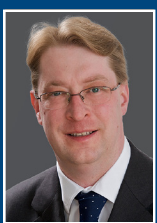
Please speak to your usual contact in the Pensions Group if you have any questions on any of the issues in this Brief.

For more information about the Pensions Group or this June Pensions Brief, please contact:



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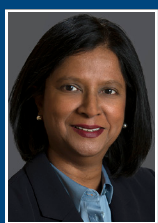

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Dates to note over the next 12 months

31 July 2020

Annual allowance deadline for member requests for "scheme pays" (2018/19 tax year).

21 August 2020

RPI consultation closes

2 September 2020

End of first part of tPR consultation on DB Funding Code.

1 October 2020

Further requirements on the content of the SIP and the annual report and on website disclosure come into force.

6 October 2020

Annual allowance deadline for schemes to provide members with pension savings statements for the 2019/20 tax year.

31 December 2020

Annual allowance deadline for schemes to include details of tax due under "scheme pays" in scheme's AFT return (2018/19 tax year).

31 January 2021

Send annual event report to HMRC.

Early 2021

Expected consultation on tPR's code of practice on trustee knowledge and understanding.

31 March 2021

Submit scheme returns.

Key:

- Important dates to note
- For information