

## Pensions and Employment: Pensions Bulletin

23 June 2016 / Issue 9

Legal and regulatory developments in pensions

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There is no Employment Update this week

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## I. Watch list

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Reduction in annual allowance for high income individuals <b>Note:</b> Up to £80,000 annual allowance for tax year ending 5th April, 2016	Applies for tax years starting on or after 6th April, 2016	<a href="#">Summer Budget 2015 Supplement</a>
2.	Severance payments and tapered annual allowance pitfall	From 6th April, 2016	<a href="#">Pensions Bulletin 16/06</a>
3.	Reduction in Lifetime Allowance from £1.25 million to £1 million	6th April, 2016	<a href="#">Pensions Bulletin 15/19</a>
4.	Members who intend to apply for Fixed Protection 2016 (“FP 2016”) must have stopped accruing benefits	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>

No.	Topic	Deadline	Further information/action
5.	Abolition of DB contracting-out: practicalities	6th April, 2016	<p><a href="#">Pensions Bulletin 15/16</a></p> <p>5.1 Employers to notify affected employees of change in contracted-out status “at the earliest opportunity” and in any event by 6th May, 2016.</p> <p>5.2 Schemes to notify affected members before, or as soon as possible after, 6th April, 2016 and in any event by 6th July, 2016.</p> <p>5.3 Change template contracts of employment for new joiners to remove references to contracted-out employment.</p> <p>5.4 Update, where applicable, pensions section of employee handbook to cover consequences of contracting-out ending.</p>

No.	Topic	Deadline	Further information/action
6.	Abolition of DB contracting-out: Rule amendments needed  Note: Statutory power to amend, retrospective to 6th April, 2016, expires on 5th April, 2017	6th April, 2016	<p>If your scheme was contracted-out on 6th April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5th April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6th April, 2016 to prevent the inadvertent addition of an additional underpin to the accrued GMPs of those active members. See further <a href="#">Pensions Bulletin 16/03</a></p>
7.	Abolition of DB contracting-out: Compliance with auto-enrolment requirements	6th April, 2016	<p>If employer is using COSR as a “qualifying scheme” for auto-enrolment purposes, scheme will need to satisfy either:</p> <ul style="list-style-type: none"> <li>• “test scheme standard”, or</li> <li>• alternative “cost of accruals” quality test</li> </ul> <p>if it is to continue as a “qualifying scheme”.</p> <p><a href="#">Pensions Bulletin 16/05</a></p>

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No.	Topic	Deadline	Further information/ action
8.	Requirement to provide risk warnings when member provided with means of accessing DC benefits	6th April, 2016	<a href="#">Pensions Bulletin 16/04</a>
9.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6th April, 2016	<a href="#">Pensions Bulletin 16/03</a>
10.	Ban on member-borne commissions in DC schemes used for auto-enrolment	6th July, 2016 at the latest	DC scheme trustees must notify “service providers” if the scheme is being used as a “qualifying scheme” for auto-enrolment purposes. <a href="#">Pensions Bulletin 16/04</a>
11.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	For example employers with a March 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016. Publication available to clients on request from usual pensions contact.

No.	Topic	Deadline	Further information/ action
12.	First Chair’s annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6th July, 2015)	For example, schemes with a 31st December year end must submit statement by 31st July, 2016.  Client note dated June, 2015 available from <a href="#">Lynsey Richards</a> .
13.	DC Code of Practice 13 on governance and administration takes effect	18th June, 2016	Schemes must familiarise themselves with the revised Code. <a href="#">Pensions Bulletin 16/07</a>
14.	“Brexit”	Referendum on 23rd June, 2016	Consider potential impact on pension schemes. <a href="#">Client publications</a> available on Slaughter and May website
15.	Data protection: New Regulation	25th May, 2018	<a href="#">Pensions Bulletin 16/05</a>

## New Law

### II. Banking and Financial Services Act 2016 provisions in force

#### A. Overview

A number of provisions regarding pensions in the Banking and Financial Services Act 2016 (the ‘Act’) will come into force on 6th July, 2016.

The provisions concern:

- advice about transferring or otherwise dealing with annuity payments,
- the use of appointed representatives to provide advice on conversions or transfers of pension benefits, and
- early exit pension charges in contract-based schemes.

#### B. Advice about transferring or otherwise dealing with annuity payments

The Act requires consumers with a higher value annuity to receive financial advice before making the decision to sell their annuity income stream. This will be done by extending the scope of the Pension Wise service. The requirement to obtain

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advice relates to people with a ‘relevant interest’ in a ‘relevant annuity’. Regulations defining those terms are already in force (please see our [Pensions Bulletin 16/08](#)).

**Comment (1):** The Act does not explain what sort of value the annuity would need to have in order for the financial advice requirement to be triggered. Instead, reference is made to regulations specifying criteria based on the proportion of the individual’s financial resources represented by the payments under the annuity, or the value of the annuity.

**Comment (2):** Since 6th April, 2015 members wishing to transfer benefits other than money purchase or cash balance benefits (safeguarded benefits) to a flexible benefits arrangement (or to convert them into flexible benefits within the scheme) must receive independent advice if the transfer value (before any reduction for under-funding) exceeds £30,000. It may be that a similar threshold could be imposed in relation to the guidance requirement applying to the sale of annuity income streams.

### C. Use of appointed representatives to provide advice on conversions or transfers of pension benefits

The Act extends eligibility to advise on the conversion or transfer of safeguarded benefits to appointed representatives of authorised financial advisers.

**Comment:** When an appointed representative of an authorised financial adviser gives advice, the directly authorised firm takes responsibility for the quality of the advice and compliance with FCA rules. Most financial advisers are appointed representatives with a contract to provide services on behalf of their principal, who will be an authorised financial adviser regulated by the FCA. The amendment therefore makes more workable the requirement to advise on the conversion or transfer of safeguarded rights.

### D. Early exit pension charges in contract-based schemes

The Act paves the way for restrictions on early exit pension charges in contract-based schemes.

**Comment:** The Treasury announced its intention to end excessive charges applied by contract-based schemes in its [19th January](#),

[2016 press release](#). The idea behind introducing a charges cap is to make individuals feel more able to access the pension freedoms introduced in April, 2015. Our [Pensions Bulletin 16/08](#) covers the FCA consultation on a cap, as well as the DWP’s consultation in relation to trust-based occupational pension schemes.

## Tax

### III. Pensions Tax Manual updated

#### A. Overview

Pensions Tax Manual (“PTM”) was updated on 13th May, 2016 to include guidance on the tapered annual allowance and statutory scheme pays.

#### B. What the update includes

The update to the PTM includes guidance that, to qualify for statutory scheme pays, among other things, the individual’s pension savings for the tax year in the scheme in question must exceed £40,000. This means that the tapered annual allowance is ignored for these purposes.

The full list of updates to the PTM is available [here](#).

**Comment:** Schemes are required to comply with what the legislation says, rather than the contents of the PTM. It is worth noting, however, that the PTM has not yet been updated for:

- the reduction to the lifetime allowance and the new fixed and individual protections 2016, introduced under the Budget Resolution process and expected to be given permanent statutory effect by the Finance Bill 2016, and
- a recent change to the reporting requirements under the Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2016. This change, deals with the requirement to provide a pension savings statement for the 2015/16 tax year. The change reflects the fact that, for annual allowance purposes, this is split into two: the pre-alignment tax year (6th April, 2015 to 8th July, 2015) and the post-alignment tax year (9th July, 2015 to 5th April, 2016). The scheme administrator will only be required to provide a pension savings statement to the member if the pension input amount exceeds £80,000 for the whole of the tax year 2015-16 or if the pension input amount for the post-alignment tax year exceeds £40,000.

## Cases

### IV. Non-resident fund required to pay withholding tax

#### A. Overview

A recent case (heard on 2nd June, 2016) before the European Court of Justice (CJEU) ruled that the different tax treatment by Sweden of resident pension funds and non-resident pension funds did not breach the Treaty on the Functioning of the European Union (TFEU).

#### B. Facts

A Dutch pension fund complained that it had to pay withholding tax (WHT) on Swedish dividends. The fund argued this breached the principle of free movement of capital under the TFEU. Funds resident in Sweden were charged tax on their total income, based on their assets (less liabilities), to which a standard yield rate was applied.

#### C. Decision

The CJEU decided that resident and non-resident funds were not comparable so the TFEU was not breached. This was because the aim of the

Swedish legislation was to tax funds irrespective of the economic climate surrounding various kinds of assets. Sweden did not have power to achieve that aim in respect of foreign funds.

Case C-252/14 [Pensioenfonds Metaal en Techniek v Skatteverket](#)

**Comment:** PensionsEurope (an organisation representing national associations of pension funds and other workplace pension institutions) recently called for the removal of withholding tax refund barriers to cross-border investment in the EU.

Pension funds are still often penalised when investing in other EU member states, because foreign countries do not reciprocally recognise their “pension fund” status, and therefore, their right to WHT refunds.

Also, the complexity of the WHT procedures and different national approaches pose significant and expensive burdens to pension funds. Often, the problem stems from the different terminology used in member states to categorise terms such as “pension fund”, “public body” or “statutory”, for example.

## Points in Practice

### V. Pensions Ombudsman Service changes

#### A. Overview

The Pensions Ombudsman service has **announced** that it has started to publish opinions issued by its adjudicators.

It has also said that it will anonymise all new decisions.

#### B. Adjudicator opinions

Adjudicator opinions are now published on the decisions section of the website if:

- they are appealed to the Pensions Ombudsman or Deputy Ombudsman; or
- are considered to be of interest.

**Comment:** The aim of this measure is transparency and accountability. It will be interesting to see whether past adjudicator opinions will be referred to by parties in future complaints. It seems unlikely that the status of those opinions will be recognised as persuasive. However, the Ombudsman service will be

keen to avoid any assertions of inconsistency, between opinions or between opinions and Ombudsman decisions.

#### C. Anonymised decisions

1. All new published decisions will be anonymised. The name of the person making the complaint as well as any other identifying personal data are now removed, unless such data is essential for understanding the decision.
2. In certain cases, the Ombudsman may decide not to anonymise the decision. The press release examples are:
  - where the case is a particularly notable one with wider public interest implications;
  - where a precedent is being set; or
  - where the name of the complainant is relevant to the claim, such as a claim to a pension entitlement where the policy cannot be found or has been allocated to someone else.

3. A party to the complaint may ask the Ombudsman to not anonymise a decision. Before taking the step of not anonymising a decision, the Ombudsman will ask all parties for their comments.

**Comment:** The press release refers to anonymisation as a reflection of the prevailing approach in disputes towards the increased protection of personal information. Some of the information about a complainant's personal circumstances in past determinations can be vital to the Ombudsman's ruling but publicising that information could be distressing for the complainant involved. Advisers and members of the public reading Ombudsman decisions will only need to know the name of the scheme and the circumstances of the case.

### VI. Scheme funding statistics

#### A. Overview

The Pensions Regulator has published its **2016 annual funding statistics** for defined benefit (DB) and hybrid schemes. The data is sourced from valuations, recovery plans and scheme returns.

The update is based on Tranche 9 schemes (with effective valuation dates falling from 22nd September, 2013 to 21st September, 2014 inclusive).

References below to Tranche 6 schemes are to schemes with valuation dates between 22nd September, 2010 and 21st September, 2011.

## B. Key findings

The key findings of the annual funding statistics document are:

1. Almost a third of schemes have brought forward their recovery plan end dates or left them unchanged. However, just over a third of schemes have extended their recovery plan end dates by more than 3 years.
2. The median recovery plan length is 7 years. Tranche 9 recovery plans exceed those of Tranche 6 by 2 years (based on a median calculation).
3. Average annual deficit reduction contributions amount to 2% of liabilities in Tranche 9 (the figure was 2.4% in Tranche 6).

4. About 40% of schemes have seen a reduction in their deficit or have remained or moved into surplus.

**Comment (1):** Figures appearing in a statistical report will not alter a scheme's funding decisions. But an awareness of the wider trends provides some context for those running pension schemes and may urge trustees to question their own scheme's experience. The statistics here are looking at a point in time almost 2 years ago, however.

**Comment (2):** The Regulator's annual funding statement sets out its expectations for schemes undertaking valuations between 22nd September, 2015 and 21st September, 2016 (please see [Pensions Bulletin 16/07](#)).

The annual funding statement recognised that most schemes will see higher deficits but most employers would be likely to be able to maintain or increase contributions.

The statement noted that dividends had increased at a faster rate than deficit reduction contributions. The prospect of larger deficits also means that trustees will be expected to review their recovery plan.

## VII. Pensions Dashboard

### A. Overview

The [ABI White Paper](#) about a Pensions Dashboard has been published.

The Pensions Dashboard is designed to give people an overview of all their pension savings.

### B. Aims and implementation of the Dashboard

1. The Dashboard has four principal aims:
  - 1.1 alert individuals to their pension savings and urge those with inadequate amounts to increase those savings;
  - 1.2 help savers locate lost pension pots;
  - 1.3 inform savers' decisions on retirement planning; and
  - 1.4 support the development of automated financial advice.
2. The Government has already promised to ensure that a Pensions Dashboard is launched 'by 2019' (this is stated in the Budget for 2016).

3. The White Paper recommends a ‘single destination model’ at first. This would be a single interface accessible through one source. That model would, however, be capable of being available through approved industry websites, such as pension providers, banks and financial advisers.
4. The White Paper also recommends a single Pension Finder Service but designed with the possibility in mind that it may be used to support other models, such as multiple Dashboards.
5. The timing would be based around phased delivery, with the aim of going ‘live’ in 2019. The initial phase would include the State pension and some public sector schemes, as well as auto-enrolment DC providers. Work on regulation and the legal framework, and other aspects of the launch such as marketing and testing, would start in 2017.
6. The governance structure could include industry representatives, with input from consumer bodies. This could be done through an existing organisation or through a new body.

### C. Monitoring data provision

The White Paper says that, if legislation requires firms and schemes to submit data, the FCA and Pensions Regulator may need to monitor schemes to ensure that they are submitting data. They would also take action in the event of errors. The Paper notes that the existence of the Dashboard and any requirement to submit information to it may expose other regulatory concerns, if there are cases of poor or non-compliant management of data.

**Comment (1):** It seems likely that a regulation-making power will be introduced to compel schemes to engage with a Dashboard so that it can work. An example of this approach is the Incentive Exercises Code. The Code is voluntary but backed up by the 7-year power to make regulations banning those exercises (set out in Section 34 of the Pensions Act 2014).

**Comment (2):** Trustees should note that the Dashboard will present another reason for the need to make sure that their scheme data is being well maintained.

### VIII. Guide to medically underwritten bulk annuities

1. A working group of industry specialists has published a [guide](#) to help trustees understand the use of medical underwriting in bulk de-risking solutions for DB schemes.
2. The aim of the guide is to enable trustees and other industry professionals to understand the concept and process of medical underwriting.
3. The guide has been put together with help from insurers, consultants, legal advisers, data collectors and trustees. The Society of Pension Professionals has reviewed the guide.

**Comment (1):** The guide has been issued in recognition of the significant increase in the number of medically underwritten bulk annuity transactions. Around 20% of all bulk annuity transactions in 2015 were medically underwritten.

**Comment (2):** Medically underwritten transactions provide the insurer with health data in relation to as many members as possible or a group of members with large pensions (known as ‘top slicing’). The data is typically collected via questionnaires but other methods include phone



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interviews and GP reports. Even if the health data relates to fewer than half of the membership, the cost of the transaction can be significantly lower. This is because insurers will assume members are at the healthy end of the spectrum in the absence of any health data.

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If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn [jonathan.fenn@slaughterandmay.com](mailto:jonathan.fenn@slaughterandmay.com) or your usual Slaughter and May adviser.

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