

# Pensions and Employment: Pensions Bulletin

Legal and regulatory developments in pensions

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For details of our work in the pensions and employment field [click here](#).

For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Rebecca Hardy](#). To unsubscribe [click here](#).

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## 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, with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Information to retiring DC members about the guidance guarantee	6th April, 2015	Template information available on request
2.	Information to transferring DB members about the requirement for independent financial advice	6th April, 2015	<a href="#">Pensions Bulletin 15/09</a>
3.	Requirement to check that independent financial advice received before effecting DB transfers	6th April, 2015	<a href="#">Pensions Bulletin 15/11</a> <b>Action point:</b> Check transfer-out provisions in scheme rules. They will require amendment if they give members the right to transfer without taking independent financial advice
4.	New governance requirements for occupational schemes which have money purchase benefits in them (unless limited to AVCs)	6th April, 2015	Client note dated 24th February, 2015 (updated 2nd April, 2015) available from <a href="#">Lynsey Richards</a>  Note additional requirements for "relevant multi-employer schemes" – see <a href="#">Pensions Bulletin 15/08</a>

5.	Cap on charges in default fund for auto-enrolment qualifying schemes	6th April, 2015	Client note dated 24th February, 2015 (updated 2nd April, 2015 to reflect exemption from charge cap for AVCs) – <a href="#">Pensions Bulletin 15/06</a> available from <a href="#">Lynsey Richards</a>
6.	Abolition of refund of contributions for members of occupational schemes with at least 30 days' pensionable service who are just provided with money purchase benefits and who start pensionable service after 30th September, 2015	1st October, 2015	<a href="#">Pensions Bulletin 15/09</a> <b>Action point:</b> Scheme rules should have been amended where necessary to remove right to refund of contributions where member has at least 30 days' qualifying service but less than 2 years' qualifying service
7.	VAT recovery changes	31st December, 2016	<a href="#">Pensions Bulletin 15/17</a>
8.	Reduction in annual allowance for high income individuals <b>Note:</b> Up to £80,000 annual allowance for tax year ending 6th April, 2016	6th April, 2016	<a href="#">Summer Budget 2015 Supplement</a>
9.	Reduction in Lifetime Allowance from £1.25 million to £1 million	6th April, 2016	<a href="#">Pensions Bulletin 15/05</a>
10.	Members who intend to apply for Fixed Protection 2016 ("FP 2016") must stop accruing benefits	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>  Think about communicating 6th April, 2016 reduction in LTA and possible protections highlighting necessity of ceasing accrual for FP 2016  As with FP 2012 and FP 2014, schemes may wish to add protective provisions to their trust deed and rules to prevent inadvertent loss of FP 2016. Please contact the person you usually deal with at Slaughter and May if you would like to add a protective provision to your scheme. The Deed of Amendment would need to be in place before 6th April, 2016
11.	Abolition of DB contracting-out: managing additional costs	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>  Checklist available to clients on request. Planning for this should be well developed by now.
12.	Abolition of DB contracting-out: practicalities	6th April, 2016	<a href="#">Pensions Bulletin 15/16</a>  Checklist available to clients on request. Planning for this should be well developed by now.  Employers to notify affected employees of change in contracting-out status by 6th May, 2016.  Schemes to notify affected members by 6th July, 2016.  Change template contracts of employment for new joiners to remove references to contracted-out employment.

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13.	Prohibition on Active Member Discounts in auto-enrolment qualifying schemes	6th April, 2016	<a href="#">Pensions Bulletin 14/16</a>
14.	<b>Ban on member-borne commissions</b>	<b>6th April, 2016</b>	<a href="#">This Pensions Bulletin</a>
15.	Proposed ban on corporate directors	1st October, 2016	<a href="#">Pensions Bulletin 15/07</a>
	<b>Note:</b> Unclear whether exemption will be available for independent corporate directors of trustee companies		
16.	Automatic transfers of DC pots of £10,000 or less	Postponed indefinitely	<a href="#">Pensions Bulletin 15/17</a>
17.	Registration for Individual Protection 2014	Before 6th April, 2017	<a href="#">Pensions Bulletin 14/12</a>

## New Law

### Banning member-borne commissions in auto-enrolment “qualifying schemes”: DWP consultation

#### A. Overview

1. On 28th October, 2015, the DWP published a consultation on how to implement the ban on member-borne commission payments in DC qualifying schemes due to take place on 6th April, 2016.
2. The DWP notes that designing regulations to effect the ban will be complex. In particular, trustees may be one step removed from negotiations and agreements in relation to member-borne commission payments between “service providers” and advisers.
3. By “service providers” are meant bundled pension providers, third party administrators or asset managers who are providing services directly to trustees of a qualifying scheme. The phrase does not include those providing legal, auditing or actuarial services to trustees.

#### B. Proposals

1. The ban on commission will apply to all occupational pension schemes used as qualifying schemes for automatic enrolment. This will include any money purchase benefits offered by non-money purchase schemes, including AVCs, even where these are the only money purchase benefits in a scheme.
2. Unlike the charge cap that took effect on 6th April, 2015, the ban will apply to all money purchase arrangements within a scheme, not just the default arrangement.
3. Trustees will continue to be able to use member-borne charges to pay for advice that they need, or are legally required to obtain, to run the scheme effectively (the example given is the requirement for trustees to seek professional advice when deciding on an investment strategy). But employers will not be allowed to use member-borne charges to pay for any advice or service they obtain from an adviser.
4. Since commission arrangements typically involve the service provider making the commission payment to the adviser and recovering this by a member-borne charge, there is not a direct flow of funds from the scheme to the adviser. Trustees are not normally involved in agreeing the commission arrangements and may be unaware

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that commission is being charged in existing qualifying schemes. The paper explores whether the duty to ensure compliance with the ban should be imposed on trustees (“**Option A**”) or service providers (“**Option B**”).

- 5. In the event it is decided that trustees should be responsible for implementing the ban (i.e. Option A is chosen), the DWP suggests that trustees would be under a duty to ensure that members are not charged for the cost of commission payments to advisers in relation to **new** commission arrangements (i.e. those entered into after the ban comes into effect). Trustees will be required to use their “best endeavours” to remove any existing member-borne commission arrangements.
- 6. Trustees will need to contact their service provider to establish whether the scheme contains member-borne commission and, if so, negotiate its removal. Where contractual barriers or early exit fees mean that such changes are not possible or do not represent value for money, trustees will be required to notify the Pensions Regulator, outlining the steps they have taken in order to demonstrate that, despite their best endeavours, they have been unable to remove the member-borne commission.

- 7. The ban will apply to:
  - current employees of a given employer who has at least one employee using the scheme as a qualifying scheme for automatic enrolment, and
  - former employees of that employer who made a contribution to the scheme before the date the ban comes into effect.
- 8. The ban will also apply to members accessing decumulation products offered in qualifying schemes.
- 9. Consistent with the approach adopted in relation to the 6th April, 2015 charge cap, members may choose to access and pay for advice: members will have to make an active choice and advisers will not be able to use a tick-box format for members to opt in or out of advice or services. The agreement should be set out in writing and should not be a condition of joining or remaining a member of the scheme.
- 10. It is proposed that the Regulator will be responsible for enforcing the commission ban.

*C. Next steps*

- 1. There will be a phased approach to implementation: regulations will ban new member-borne commission arrangements from 6th April, 2016 (or the employer’s staging date if later).
- 2. A further consultation will be held, and draft regulations published, to implement a ban on existing member-borne commission arrangements “later in 2016”.

The consultation, on which responses are invited by 27th November, 2015, is on the [Gov.uk website](#).

**Comment:** The key point for trustees is whether the duty to ensure compliance with the ban lies with the trustees or the service provider.

**Tax**

**Scope for increased VAT recovery: New HMRC bulletin**

A client briefing on HMRC’s latest VAT Brief (17/15 published on 26th October, 2015) is available to clients on request.

HMRC’s Brief 17/15 announced a 12-month extension in the transitional period (previously due to expire on

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31st December, 2015) in which sponsoring employers and pension scheme trustees can continue to apply the “70:30” treatment for recovery of VAT on pensions-related services.

The Brief also shows developments in HMRC’s thinking and indicates, in some respects, a slightly greater flexibility in relation to their proposed practice once the transitional period expires.

**Comment:** Extension of the transitional period is welcome. It nonetheless remains important for employers and pension trustees to consider what steps they will take to preserve VAT recovery on pensions-related services once HMRC’s new practice takes effect, and to do so sooner rather than later.

Please get in touch with your usual pensions contact at Slaughter and May for a copy of our client briefing.

### Taxation of pensions consultation: Update

In answer to a question in Parliament on 27th October, 2015, the Chancellor of the Exchequer said the Government intends to respond to its July 2015 consultation on the reform of pensions tax relief “*fully in the [2016] Budget*”. Commentators had been expecting an indication of the direction of travel in the Autumn Statement later this month but that appears no longer to be the case.

## Cases

### Construction of indexation rule: *Dutton v FDR Limited*

On 21st October, 2015, the High Court gave a judgment concerning construction of pension increase provisions in a scheme’s rules.

The issue was whether a 1991 deed of amendment reducing the rate of pension increases was effective where the power of amendment contained a restriction on amendments affecting accrued rights.

Until they were amended by deed on 20th June, 1991, the trust deed and rules of the FDR Limited Pension Scheme (the “**Scheme**”) provided that pensions in payment should be increased each year at a fixed 3% rate. The amendment rule provided that amendments could not prejudice pensions in payment or members’ accrued rights.

The Scheme was amended in 1991 to provide that pensions should in future be increased by LPI, capped at 5% (i.e. the lesser of the increase in RPI and 5%). The scheme was subsequently administered on the basis that all pensions were increased by 5% LPI, whether referable to service before or after 1991.

The Scheme had 2,200 deferred members and 1,588 pensioner members, a large number of whom had accrued benefits in respect of service prior to June 1991. The potential increase in the scheme’s liabilities was between £5 million and £17 million depending on the effect of the 1991 deed.

The judge held that the effect of the proviso to the deed of amendment was that 5% LPI increases introduced by the 1991 deed of amendment were invalid to the extent they prejudicially affected the right to the existing 3% fixed rate increases in respect of benefits accrued in relation to service prior to the date of the amendment.

She confirmed the approach favoured by the trustees (which involved increasing the pre-1991 element of a pension in any given year by the greater of 3% and 5% LPI). This was the “most natural meaning” of the amended rule and was consistent with the effect of the proviso “*given the meaning it would convey to a reasonable person with all of the background knowledge available to the parties in 1991*”.

By contrast, she found the employer’s preferred construction (that increases to the pre-1991 element of the pension be calculated separately from the post-1991 element) to be “*unnatural... and not the meaning which would be conveyed to a reasonable person with all the knowledge and background*”.

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**Comment (1):** This is a pragmatic judgment which will cost the employer. Until 6th April, 1997, there was no statutory requirement to increase pensions in payment. For service between 6th April, 1997 and 5th April, 2005, the requirement was to increase by 5% LPI. For service from 6th April, 2005, the requirement was to increase by 2.5% LPI.

**Comment (2):** Like the Scheme in this case, many schemes that, pre-6th April, 1997, provided for lower fixed rate increases moved, in a period of high inflation, from their fixed rate to 5% LPI for all pensionable service but with no fixed rate underpin.

**Action point:** Schemes that made such a change should now check:

- that the power of amendment contained no restrictions preventing amendments affecting accrued rights; and
- if the amendment was made after 5th April, 1997, that the requirements of Section 67 of the Pensions Act 1995 were complied with.

## Points in Practice

### Pensions Regulator’s research on trustee knowledge and understanding

On 28th October, 2015, the Pensions Regulator published research on the “trustee landscape”, including the skills and knowledge of pension scheme trustees.

The survey covered 800 “trustee boards” of DC, DB and hybrid schemes (open, closed or in the process of winding up) with the aim of understanding their ability to (i) fulfil governance and administration roles and (ii) scrutinise the quality and value for money of their advisers, administrators and investment managers.

The phrase “trustee board” encompasses both corporate and individual trustees.

Headline findings include:

- larger schemes are more likely to be well-governed than small and medium schemes, with trustees of larger schemes more likely to have received training, having greater access to advisers, and being able to spend more time on their duties,
- in general, DB schemes are better governed than DC schemes,

- schemes with only professional trustees are more likely to be well-run, for example in their ability to assess the value for money of investment advisers. The majority of trustees rarely disagreed with their advisers,
- schemes used for automatic enrolment were more engaged with scheme governance, and offered more formal training to trustees,
- while trustees almost universally believed they had sufficient training opportunities, only half of schemes reported that any of their non-professional trustees had undertaken formal training in the last year,
- half of schemes report that all trustees met the Regulator’s minimum standards for knowledge. But 15% indicated that no trustees met them, or had not heard of the Regulator’s TKU Code of Practice,
- over 2/3rds of lay trustees and trustee boards in large schemes claimed to meet the standards set out in the Regulator’s TKU Code of Practice,
- on average, the amount of time spent by a trustee on trustee duties is 9 days for small schemes, 12 days for medium schemes and 16 days for large schemes, and

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- the greatest knowledge gap identified by trustees was around pensions investment; the lowest knowledge score overall was for knowledge of pensions law; and trustees reported their lowest levels of confidence in relation to their ability to assess the value for money of their external advice and services.

The report is on the [Pensions Regulator's website](#).

**Comment:** We can provide customised trustee training to clients on legal issues to help comply with the trustee knowledge and understanding requirements. Please get in touch with your usual pensions contact here for more information.

## Forthcoming events

### Pensions Law Update Seminar

Our next Pensions Law Update seminar takes place on Wednesday, 18th November, 2015, between 9.30am and 1.00pm. Invitations have been sent out separately.

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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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