Issue 67 October 2017

What's Happening in Pensions

IN THIS ISSUE:

- **Pension protection levy:** The PPF has published a joint policy statement and consultation on the draft 2018/19 pension protection levy determination and associated documents. It is also consulting on new standard form contingent asset agreements. Existing contingent asset agreements, for example guarantees or charges, do not need to be amended in order to be recognised for the PPF levy year 2018/19 but may need to be amended in order to be recognised for the PPF levy year 2019/20 and thereafter.

- **VAT on insurers' investment fees:** HMRC has announced that from 1 January 2018 it is discontinuing its policy of allowing insurers to treat their supplies of certain pension fund management services (supplies to schemes that are not SIFs) as VAT exempt insurance. This is expected to affect some DB pension schemes.

- **Anti-money laundering regulations:** HMRC is requiring trusts (including pension schemes) that first became liable to pay income tax on their own account and/or capital gains tax in 2016/17, and are not already registered for self-assessment, to register with them by 5 December 2017 under the new anti-money laundering regulations. New record-keeping requirements under the regulations also apply to all trust-based pension schemes.

- **Retrospective equalisation amendments:** The Court of Appeal is asking the European Court to rule definitively on whether EU law prohibits a scheme from equalising pension ages by levelling down benefits (ie, to age 65 for men and women) in respect of service before the date of the amending deed, in circumstances where the retrospective amendments would otherwise be valid under the rules of the scheme and UK law.

- **RPI and CPI:** BT and the BT Pension Scheme trustees have made an application to the High Court in relation to a possible switch from RPI to CPI as the basis for pension increases. The Court is asked to consider whether the language of the scheme's indexation rules allows such a switch.

- **Lifetime allowance:** HMRC has announced the launch of its lifetime allowance look-up service for scheme administrators.

- **TPR/FCA guide for employers and trustees:** The Pensions Regulator and FCA have jointly published a new "Guide for Employers and Trustees on providing support with financial matters without needing to be subject to regulation".

- **Finance Bill:** The new Finance Bill revives the government's proposals for the reduction of the money purchase annual allowance and the improvement of the income tax exemption for employer-arranged pensions advice, to take effect for the current and future tax years.

- **Investment consultancy market:** The FCA has referred the pensions investment consultancy market (including fiduciary management and master trust offerings) to the Competition and Markets Authority.

- **Pensions Regulator – scheme governance:** The Pensions Regulator has launched a new campaign, "21st Century Trusteeship – raising the standards of governance". Targeted emails will direct trustees, scheme managers, employers and advisers to a new page on the Regulator's website describing clear standards that the Regulator expects schemes to meet.

- **DC investment transaction costs:** The FCA has published a policy statement to require firms managing funds for DC workplace pension schemes to disclose administration charges and transaction costs, on request, to trustees or governance bodies using a standard approach.

- **Pension scams:** The government has published draft provisions for a 2018 Finance Bill covering the proposed new power for HMRC to refuse to register a scheme, and a power to de-register an existing scheme, where the scheme is an unauthorised master trust or has a dormant employer.

- **Pension freedoms inquiry:** Parliament's Work and Pensions select committee has launched a new inquiry into whether and how far the pension freedom and choice reforms are achieving their objectives and whether policy changes are required.

Pension protection levy

The PPF **has published** a joint **policy statement** and consultation on the **draft 2018/19 pension protection levy determination** and associated documents. The consultation closes at 5pm on 1 November 2017.

The PPF proposes that most of the changes proposed in March 2017 for the new triennium (see **WHiP Issue 64**) will be implemented. Headline proposals are as follows:

- The overall levy estimate will be reduced by 10%, with two-thirds of schemes expected to see a levy reduction and SMEs expected to be particular beneficiaries. Some very large employers' schemes could, however, see significant increases.

- The PPF will be introducing new standard form contingent asset agreements (on which the PPF **is consulting** until 21 November 2017). There are significant changes proposed, especially in respect of the fixed cap option for guarantees and charges. The PPF will not require existing contingent asset agreements (including any new ones executed before the current standard forms are formally replaced) to be amended or re-executed in order to qualify for re-certification for the 2018/19 PPF levy year. It will, however, probably require changes to be made to existing agreements for the 2019/2020 PPF levy year and thereafter.

- Trustees certifying type A contingent assets (guarantees) will be required to have obtained a report, with specified content, from a professional adviser if the guarantee will secure a levy reduction of £100,000 or more. (This replaces the original proposal which would have required a report where the trustees certify a "realisable recovery amount" of £100 million or more.) The report concerns the ability of the guarantor to pay the sum certified as the realisable recovery amount.

VAT on insurers' investment fees

HMRC has issued a **Brief** to announce that from 1 January 2018 it is discontinuing its policy of allowing insurers to treat their supplies of non-SIF (special investment fund) pension fund management services as VAT exempt insurance. This is expected to affect some DB pension schemes.

HMRC says that the great majority of pension fund management services provided by insurers are supplied to DC pension funds and therefore qualify for the SIFs VAT exemption following the 2014 *ATP* case (see **WHiP Issue 45**) (and HMRC accepts that they have always qualified). Such "management services" include (among other things) investment management and integral fund administration.

The European Court ruled in 2013 in the *Wheels* case (see **WHiP Issue 38**) that DB pension schemes are not SIFs. It therefore seems that insurers will charge VAT on pension fund management services they provide to DB pension schemes from 1 January.

We are currently waiting for news from HMRC on whether current VAT practices in relation to fees for services to DB pension schemes can continue beyond HMRC's current cut-off date, 31 December 2017.

Anti-money laundering regulations

HMRC is requiring trusts, including trust-based pension schemes, that first became liable to pay income tax on their own account and/or capital gains tax in 2016/17, and are not already registered for self-assessment, to register with them under **The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017**. The originally announced deadline was 5 October but HMRC later **announced** that the deadline was effectively put back to 5 December (for this year only). Most schemes do not pay income tax or capital gains tax and so do not need to register by this deadline. (Income tax paid in respect of benefits and Finance Act 2004 tax charges do not count for this purpose.)

The first registration deadline for all other schemes that already pay one or more of various taxes (including – which is not uncommon – stamp duty reserve tax or stamp duty land tax (or its Scottish equivalent)) is 31 January 2018.

Very brief **HMRC guidance** has been issued but more is expected, especially with regard to the information that HMRC will require from pension schemes.

The regulations already require trustees to keep certain records of beneficiaries, potential beneficiaries and others, and to disclose information on request to certain parties with whom they deal and to various law enforcement authorities.

Retrospective equalisation amendments

In ***Safeway Limited v Newton and Safeway Pension Trustees Limited***, the Court of Appeal is asking the European Court to rule on whether EU law prohibits a scheme with an amendment power expressly allowing retrospective amendments from equalising pension ages at 65, ie, levelling down benefits, for service before the date of the amending deed.

In September 1991, following the European Court's 1990 *Barber* decision but before the clarification in the *Coloroll* and other cases in 1994, Safeway issued an announcement saying that pension ages would be equalised at 65 for men and women. Before that, they were 60 for women and 65 for men. The change was confirmed by another announcement on 1 December 1991 but the scheme rules were not amended until a deed was executed on 2 May 1996.

The scheme's amendment power required amendments to be made by supplemental deed but allowed amendments to take effect "*from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effect as the case may be*".

All of the relevant events took place before section 67 Pensions Act 1995 (which would otherwise prevent adverse retrospective amendments) was in force.

In the High Court, Warren J had held that the rules were not amended until the deed was executed and that, following the European Court's decision in *Smith v Avdel Systems Limited (1994)*, EU law prohibited the scheme amendment power from being used to equalise normal pension ages at 65 for service before the date of the deed of amendment (see **WHiP Issue 57**).

The Court of Appeal decided as follows:

- It upheld Warren J's decision that the scheme amendment power required an amendment to be made by deed and that the rules were not amended until the deed had been executed.

- The European Court had concluded in *Smith v Avdel Systems Limited* that "*Article 119 of the Treaty precludes an occupational scheme ... from retrospectively raising the retirement age for women in relation to periods of service completed between 17 May 1990 and the date of entry into force of the measures by which equality is achieved in the scheme in question*". Its judgment did not, however, refer to the scheme's amendment power and the Court of Appeal concluded that there is doubt about whether the European Court took into account the possibility of a retrospective amendment power.

  The Court of Appeal therefore held that EU law as it applies in this case is not clear. In other words, the Court of Appeal is not sure what the European Court would say, if it were to consider all the arguments, in a case where there is a clear retrospective power of amendment: would it really say that the advantaged class – women – have their benefits for the *Barber* "window period" upgraded from defeasible (ie, subject to reduction or removal by a retrospective amendment power) to indefeasible (ie, incapable of being reduced or removed) rights?. It has therefore referred to the European Court the question whether the *Smith v Avdel Systems Limited* decision establishes a principle which would turn defeasible rights into indefeasible rights.

- The Court of Appeal says in passing that it is "undoubted" (subject to what overriding EU law requires), that a suitably drafted amendment power could have been validly used to reduce benefits retrospectively under UK law at that time. (Section 67 now prevents retrospective levelling down.)

- It was also argued that section 62 of the Pensions Act 1995 (which wrote an equal treatment rule into schemes from 1 January 1996) had equalised pension ages at 60 and the amendment made by the May 1996 deed was therefore only to raise both men's and women's pension ages from 60 to 65. Accordingly, only domestic law questions of retrospective amendment arose, not EU law questions of equalisation. Warren J had dismissed that argument, holding that section 62 could not put Safeway in a better position than if the equalisation were achieved by a rule amendment. The Court of Appeal has deferred a decision on this point until after the European Court has ruled.

RPI and CPI

BT and the BT Pension Scheme trustees have made an application to the High Court in relation to a possible switch from RPI to CPI as the basis for pension increases. The Court is asked to consider the language of the scheme's increase rules.

The BT Pension Scheme's revaluation index switched automatically from RPI to CPI in 2010 when the method for calculating public sector scheme increases was changed (see **WHiP Issue 20**). This also happened for increases to pensions in payment ("indexation") in sections A and B of the scheme, but not section C.

Section C has two indexation rules. One of them appears to require increases in line with RPI unless that index "ceases to be published or becomes inappropriate"; the other may allow RPI to be replaced if it has been "so amended as to invalidate it as a continuous basis". The questions for the High Court are (very broadly) whether RPI has become inappropriate/invalidated or not; who is to decide that; and on what basis. Up to approximately 80,000 Section C members are reportedly affected.

Another question put to the Court suggests that the scheme rules were amended by replacing them completely in 2016 and asks whether it is possible now to switch away from RPI only if it has "become inappropriate" since then. In other words, because the relevant rules were re-adopted in 2016, is it too late now to point to occurrences before 2016 as a reason for switching?

Lifetime allowance

HMRC has **announced** the launch of its **lifetime allowance look-up service** for scheme administrators. This enables pension scheme administrators to check the protection status of a member, if the member has first given them a "protection notification number" and a "scheme administrator reference number". Members can obtain these numbers through the "view it online" link in HMRC's guide: "**Pension schemes: protect your lifetime allowance**".

TPR/FCA guide for employers and trustees

The Pensions Regulator and FCA have jointly published a short new "**Guide for Employers and Trustees on providing support with financial matters without needing to be subject to regulation**". This will sit alongside the FCA's existing guide "**Promoting pensions to employees – A guide for employers**". The new guide derives from the FCA's recent Financial Advice Market Review.

Finance Bill

As expected, the new **Finance Bill** revives the government's proposals for:

- the reduction of the money purchase annual allowance from £10,000 to £4,000; and
- the improvement of the income tax exemption for employer-arranged pensions advice, including an increase from £150 to £500 and no requirement for the cost of the advice to be within that limit.

Both of these provisions are intended to take effect for the current (2017/18) and future tax years.

Investment consultancy market

The FCA **has referred** the pensions investment consultancy market (including fiduciary management and master trust offerings) to the Competition and Markets Authority (CMA). See our briefing note **FCA Asset Management Market Study – Final report and consultation** for the FCA's findings and reasons for proposing the referral.

The CMA has a new web page for the investigation. It has issued a **press release**, **case overview** and **issues statement**, the last of which sets out the scope of the investigation.

The press release includes the following:

"*As set out in the FCA's terms of reference, the investigation covers investment consultancy services, which provide advice to institutional investors (mainly pension funds) and employers on their pension schemes; and fiduciary management services, where the provider makes and implements decisions for the investor (for example, to select a fund in which to invest).*

...

The issues statement sets out a structure for the investigation, outlining potential issues and possible remedies to put in place if competition problems are found. We have grouped these in the following areas:

- *whether difficulties in customers' ability to assess, compare and switch investment consultants mean investment consultants have little incentive to compete for customers*
- *whether conflicts of interest on the part of investment consultants reduce the quality and/or value for money of services provided to customers*
- *whether barriers to entry and expansion mean there are fewer challengers to put pressure on the established investment consultants to be competitive – which leads to worse outcomes for customers*"

The statutory deadline for completing the investigation is 13 March 2019. An administrative timetable will be published in due course.

Pensions Regulator – scheme governance

The Pensions Regulator **has launched** a new campaign to protect workplace pension savers by driving up the standards of governance across pension schemes. The campaign, called "21st Century Trusteeship – raising the standards of governance", outlines how those involved in running schemes can take action to meet expected standards and what action the Regulator will take if they do not improve.

Targeted emails will direct trustees, scheme managers, employers and advisers to a new page on the Regulator's website where they will find specific and relevant content that sets out clear standards that the Regulator expects schemes to meet. They will also be signposted to supporting resources, including guidance within the Regulator's codes of practice and practical tools.

The campaign will focus initially on emphasising the fundamental importance of good governance. As it progresses, extra content will be added to the website, covering key governance themes including:

- *clear roles and responsibilities*
- *clear purpose and strategy*
- *competence and integrity*
- *upskilling and training*
- *managing advisers and providers*
- *managing conflicts of interest*
- *managing risk*
- *meetings and decision-making*

- *value for members*

DC investment transaction costs

Commencement regulations have brought into force the provisions requiring the government and FCA to mandate the disclosure of information by firms about their investment transaction costs and fees in DC schemes used for automatic enrolment.

The FCA has published a **policy statement** on standardising the disclosure of such costs and fees. This requires firms managing funds for DC workplace pension schemes to disclose, on request, administration charges and transaction costs to the trustees or governance bodies of those schemes, using a standard approach. The new rules take effect from 3 January 2018.

The government will next consult on regulations on the onward disclosure of such charges to occupational pension scheme members. Subject to that, the FCA intends to consult in the second quarter of 2018 on similar proposals for disclosure to members in workplace personal pension schemes.

Pension scams

The government has published **draft provisions** for a 2018 Finance Bill covering the proposed new power for HMRC to refuse to register a scheme, and a power to de-register an existing scheme, where the scheme is an unauthorised master trust or has a dormant employer. A **policy paper** and **explanatory note** have also been published. As previously announced (see **WHiP Issue 66**), this legislation is intended to help combat pension scams.

The provisions regarding schemes with dormant companies would take effect from 6 April 2018. The provisions regarding unauthorised master trusts would take effect when the law requiring master trusts to be authorised takes effect, likely to be late 2018 or early 2019 (see **WHiP Issue 64**).

Pension freedoms inquiry

The Work and Pensions select committee **has launched** a new inquiry into whether and how far the pension freedom and choice reforms are achieving their objectives and whether policy changes are required.

The Committee will consider the following questions:

- *What are people doing with their pension pots and are those decisions consistent with their objectives? Is there adequate monitoring of the decisions being made?*
- *Are people taking proportionate advice and guidance and if not, why not? Are people adjusting behaviour in response to advice and guidance?*
- *To what extent will pensions dashboards enable consumers to make more informed decisions about their retirement savings? What are the remaining obstacles to their creation and success and how should those obstacles be overcome?*
- *Is Pension Wise working? If not, how should it be reformed? Are there any implications for the proposed creation of a new single public financial guidance body?*

- *Are there persistent gaps in the advice and guidance market and what might fill them? Is automated advice and guidance filling gaps as expected?*
- *Is there evidence of product market competition resulting in cheaper, clearer or a wider products for consumers? Are people switching from their pension provider in accessing their pots? Is an adequate annuity market being sustained?*
- *Are the Government and Financial Conduct Authority taking adequate steps to prevent scamming and mis-selling?*
- *Are the freedom and choice reforms part of a coherent retirement saving strategy? To what extent is it complimentary to or undermined by other policies?*

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If you wish to discuss any points arising from this note, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Susie Daykin, Daniel Gerring, David James, Dan Naylor, Paul Stannard and Philip Stear.

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