TRAVERS SMITH

What's happening in Pensions

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Pension protection levy

2011/12

The Pension Protection Fund has added FAQs and a guide booklet to its website in relation to the issue of invoices for the 2011/12 pension protection levy. Invoicing started on 1 September 2011.

Press release:
http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=232

2012/13

The PPF has published a consultation on the 2012/13 pension protection levy, together with various draft documents including the levy determination paper and the contingent assets appendix. The levy estimate is £550 million, which is lower than in any previous year.

Press release:
http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=234

There are some important new requirements and rule changes proposed, including the following:

- When certifying or recertifying guarantees, trustees will be required to certify (on Exchange) that the guarantor(s) could be expected to meet in full their commitment under the guarantee if then called upon so to do. Guarantors may now include companies that are not "associates" for the purposes of the Insolvency Act 1986, if the PPF is satisfied that there is a sufficiently strong connection.
- Dun & Bradstreet failure scores of 1 to 100 will be grouped into ten bands. Levy rates will then vary depending on the band rather than the specific failure score. A consequence of this is that credit for a "Type A" guarantee will be given only if the guarantor is in a higher band than the scheme's sponsoring employer. If the score is better but in the same band, there will be no credit given.
- The new formula will give more weight to a scheme's funding level and will for the first time take account of investment risk, these being matters that are more in the levy payers' control.
- To increase stability, underfunding and insolvency risks will be averaged over the previous five years and one year respectively, so that temporary changes in the scheme's funding level or an employer's insolvency risk score will not disproportionately affect the scheme's levy bill.
- Barring exceptional circumstances, levy rules will be fixed for three years at a time.

5pm on 30 March 2012 will be the key deadline for providing information, certifying and recertifying contingent assets, making deficit reduction contributions, and completing full block transfers.

The consultation closes on 2 November 2011.

Employer debt regulations

Amendments to the employer debt regulations, originally intended to take effect from 1 October 2011, are now planned to take effect from an unspecified date in December 2011. These include the new "flexible apportionment arrangements" and extended grace periods. Please see our briefing note **"Changes to the employer debt legislation"** for details. The final form of the amendments has not yet been published.

DWP statement:
http://www.dwp.gov.uk/docs/statement-of-new-regulation-dwp-2011.pdf

Identifying a scheme's statutory employer(s)

The Pensions Regulator has launched an online module to help trustees of DB schemes identify their scheme's statutory employer(s). Starting in November 2011, trustees will be required to name the scheme's statutory employer(s) in their annual scheme return forms (see **WHiP Issue 28**). These can be different for different statutory purposes: the Regulator is still working on the content of the new section of the form so we do not yet know what will need to be declared. The answers will very often not be obvious, so trustees should be thinking about this now and taking advice if appropriate.

Press release:
http://www.thepensionsregulator.gov.uk/press/pn11-21.aspx

Pensions Bill

A provisional date of 18 October 2011 has been set for the Pensions Bill's report stage and third reading in the House of Commons. It then returns to the House of Lords for final consideration before (if it is passed) receiving Royal Assent.

Pensions Bill:
http://services.parliament.uk/bills/2010-11/pensionshl.html

The Bill contains (among other things) provisions on the following.

- The use by private sector occupational pension schemes of CPI instead of RPI as the measure of price inflation for revaluation and pension increase purposes. Please see our briefing note **"Use of CPI instead of RPI"** and **WHiP Issue 27** for details.
- The need (or otherwise) for notices and trustee resolutions in relation to payments to employers. Please see our briefing note **"Payments to employers: new Pensions Bill"** for details.
- State pension age changes. Please see **WHiP Issue 22** for background. Concerns had been voiced about approximately 330,000 women who would be particularly badly affected by provisions in the Bill to raise their state pension age to 66. For example, women born in March 1954 (who are currently aged 57) would see their state pension age rise from 64 to 66. The government has therefore announced that it intends to amend the Bill to cap the increase for women at a maximum of 18 months. Men's and women's state pension age would now rise to 66 by October 2020 rather than April 2020. It has also been reported that state pension age will rise to 67 by 2026, ten years earlier than under current legislation.
- Modifications to the automatic enrolment regime.

DWP announcement:
http://www.dwp.gov.uk/newsroom/press-releases/2011/oct-2011/dwp119-11.shtml

The Bill may also be amended to include an amendment to the definition of "money purchase benefits", following the Supreme Court's decision in *Houldsworth v Bridge Trustees Limited*. Please see **WHiP Issue 28** for the background to this.

Finance Act 2011: guidance and forms

Registered pension schemes

HMRC has updated the Registered Pension Schemes Manual (RPSM) to include more than 700 pages of guidance on aspects of the Finance Act 2011 relating to registered pension schemes, including the changes to the annual allowance, lifetime allowance and flexible drawdown.

Registered Pension Schemes Manual:
http://www.hmrc.gov.uk/manuals/rpsmmanual/index.htm

HMRC has published its 49th Newsletter. It covers:

HMRC Newsletter 49:
http://www.hmrc.gov.uk/pensionschemes/newsletter49.pdf

- the new RPSM pages (see above);
- plans to improve guidance on trivial commutation;
- drawdown pension tables for pensions paid to children under age 23; and
- scheme administrator responsibilities regarding flexible drawdown (if offered).

On flexible drawdown, HMRC says that a member's declaration that he or she meets the minimum income requirement (MIR) should not in itself be enough to satisfy trustees that he or she does so. It expects trustees to decide what further enquiries they need to make and to keep an audit trail. It adds: "*As a minimum, it would be reasonable for scheme administrators to ask members for a description of the particular source they* *wish to count towards the MIR, to state which category of income each source used in the MIR declaration falls under and why the member believes this to be the case*". Even with this, HMRC says, further enquiries might still be necessary.

HMRC has also published:

- Form APSS315, for trustees to report flexible drawdown payments made in the tax year 2011/12. The deadline for submission is 31 January 2013. For later tax years, the online event report form must be used.
- Form APSS227, by which individuals can apply for fixed protection against the lifetime allowance charge. The deadline for submission is 5 April 2012.

Form APSS315:
http://search2.hmrc.gov.uk/kb5/hmrc/forms/view.page?record=vLWvN6UKOH4&formId=4082

Form APSS227:
http://search2.hmrc.gov.uk/kb5/hmrc/forms/view.page?formid=4083&record=VZp7BA-5tmM

Disguised remuneration

HMRC has published more than 200 pages of draft guidance on the disguised remuneration provisions of the Finance Act 2011, affecting EFRBSs (among other things). These are non-registered retirement benefit schemes, and therefore operate outside the framework of annual and lifetime allowances. This draft guidance replaces the previously published FAQs (see **WHiP Issues 25**, **26** and **28**) and will ultimately make its way into the Employment Income Manual.

Draft guidance:
http://www.hmrc.gov.uk/budget-updates/march2011/disguised-remuneration.pdf

Commutation of small pensions

In his speech to the Liberal Democrat party conference, Steve Webb confirmed that there will be a consultation later this year on combining small pension pots. It appears possible that the rules on the commutation of small pensions may change. This could be one way of encouraging members to pool their small DC pension pots. Short service refunds from DC schemes are also under review (see **WHiP Issue 28**): the Government is concerned about the different treatment of occupational pension schemes (where contribution refunds may be possible for members with less than two years' service) and contract-based schemes (where they are not).

Steve Webb's speech:
http://www.libdems.org.uk/speeches_detail.aspx?title=Steve_Webb%e2%80%99s_speech_to_Liberal_Democrat_Autumn_Conference&pPK=061d76b7-8f51-43f6-b6fd-9d1b197822ab

Alleged misleading pension increase promise

In *Dollond v Trustees of the BTG Pension Fund*, the High Court considered a member's appeal of a Pensions Ombudsman determination. The member claimed that he had been misled to expect pension increases on his GMP.

Scheme member literature had said that "*All* pensions on becoming payable will be subject to annual increases…". When Mr Dollond reached state pension age, however, no increase was payable on the GMP because his GMP exceeded his SERPS pension.

Mr Dollond argued that he had decided not to commute any pension for a tax free lump sum because he thought it was all going to be indexed in retirement. He would now, he estimated, pay more than £14,000 more tax than he would otherwise have done. The High Court rejected his appeals on all counts, supporting the Ombudsman's findings as follows.

- There was no claim under contract law. The scheme rules allowed benefits to be changed and nothing in the scheme literature even suggested that the basic entitlement under the scheme rules would be overridden by any external contract.
- There was no estoppel claim. There was no unambiguous statement that the scheme would pay increases on the GMP if the state did not and relevant detrimental reliance had not been shown. Here, the judge quoted the Court of Appeal in *Steria v Hutchison*: pension scheme booklets (particularly those that include provisions about the trust deed overriding them) are by their nature a précis of the scheme benefits which will appear inaccurate if read as a definitive description. Estoppel claims based on statements in booklets are therefore difficult.
- There was no maladministration by the trustees in failing specifically to cover this situation in the scheme literature.

Pensions Ombudsman: "late" payment of transfer value

Determination:
http://www.pensions-ombudsman.org.uk/determinations/docs/2011/jul/81625.doc

Ms J W Jones claimed that she had suffered loss because her husband's request for a transfer from the Tyco Holding (UK) Ltd CARE Pension Scheme to an annuity policy was delayed by the scheme administrators.

Her husband died before the transfer process was completed and she suffered financial loss. She received only a refund of £1,922.58 contributions and a spouse's pension of £926.95 pa. If the transfer to the annuity provider had gone through before the member died, a pension commencement lump sum of £7,587.50 would have been paid together with a pension of £1,360.20 pa, guaranteed for five years, and a spouse's pension of £680.10 pa.

The administrators had all the information they required to process the transfer by 25 September 2009. Due to staff illness, however, the scheme trustees were not sent the documentation (for two trustees' signature) until 14 October. Ms Jones' husband died on 9 October 2009. There had also been earlier delays in requesting missing information, though these did not seem to have a great bearing on the decision.

The transfer would have taken place well within the statutory six month period, but the Deputy Pensions Ombudsman considered this irrelevant. She found maladministration and directed that the administrators pay to Ms Jones:

- £150 for distress caused by their administrative delays; and
- the sum (if any) produced by deducting, from £30,050 (the transfer value that was never paid, representing the capital value of the scheme benefits), the £1,922.58 refund of contributions and the capital cost (based on an annuity quotation to be obtained by the administrators from a recognised pension provider) of the £926.63 pa spouse's pension.

It is surprising that the Deputy Ombudsman concluded there had been maladministration, given that the transfer documentation needed two trustees' signatures and the delay was very short. Also, it appears that she has made a substantial award of damages based purely on a finding of maladministration, which seems to run counter to guidance previously given by the Courts to the effect that such awards should not normally exceed around £1,000.

Automatic enrolment: NEST

The NEST trustee has published the terms of its employer admission agreement and a determination of the information and assurances it needs from employers who wish to participate in NEST.

NEST documents:
http://www.nestpensions.org.uk/schemeweb/NestPublicWeb/faces/public/portal/pages/guides.xhtml?aud=employer&dc=document

VAT on fund management services

The First Tier Tribunal has formulated the questions to be referred to the European Court in the *Wheels (Ford) CIF* case, regarding VAT charged on fund management services provided to DB occupational pension schemes and common investment funds. Please see **WHiP Issues 3** and **9** for background.

Case report:
http://www.bailii.org/uk/cases/UKFTT/TC/2011/TC01381.html

Cohabitating couples

The Government does not intend to take forward the Law Commission's 2007 recommendations for the reform of cohabitation law in the current parliamentary term. The Law Commission had recommended (among other things) that pension sharing and earmarking (attachment) orders should be available in some circumstances when a relationship of a cohabiting couple breaks down.

The Law Commission has expressed disappointment.

Government statement:
http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110906/wmstext/110906m0001.htm#11090644000005

Law Commission statement:
http://www.justice.gov.uk/lawcommission/docs/20110906_Statement_on_Govt_response.pdf

Contracted-out schemes: guidance booklets

New versions of contracted-out guidance booklets CA14C (for salary-related schemes) and CA14E (for mixed benefit schemes) have been published.

Contracted-out guidance booklets:
http://www.hmrc.gov.uk/pensionschemes/contracted-out-guidance.htm

This and previous issues of WHiP can be found on our website. See: www.traverssmith.com/?pid=24&level=2&eid=17.

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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: Paul Stannard, Peter Esam, Philip Stear and Andrew Block.

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