DLA PIPER

PENSIONS NEWS

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IN THIS ISSUE

INTRODUCTION

Welcome to DLA Piper's Pensions News publication in which we report on recent developments in pensions legislation, guidance and case law, as well as keeping you up to speed on what to look out for in the coming months.

This edition brings you the developments from October 2013 including the following.

- **Automatic enrolment:** amendments to make technical improvements to the legislation which come into force on 1 November 2013 and 1 April 2014; a brief guide for trustees; and the outcome of DWP research about the experience of large employers in implementing the reforms.
- **The Pensions Regulator:** the Regulator's updated DC regulatory strategy; two consultations (on independent assurance reporting for master trusts and on the compliance and enforcement policy for DC schemes); and a Statement on double counting where ongoing contributions are treated as paying section 75 debts.
- **PPF:** the PPF's latest Annual Report and Accounts and an update on progress with its long-term funding strategy.
- **DWP:** two consultations: on charges in DC schemes; and on consequential amendments to the legislation relating to a change in the statutory definition of money purchase benefits.
- **Legislation:** the consolidated version of the Disclosure Regulations which come into force on 6 April 2014; and updates on the Pensions Bill and Finance Bill.
- **Case law:** the High Court's ruling that nine suspected pension liberation schemes meet the statutory definition of an occupational pension scheme; a CJEU judgment on age-related pension contributions; and two cases on the construction of pension scheme documents.
- **HM Treasury:** the new Fair Deal guidance which changes the form of pension protection to be provided following a transfer from the public sector to an independent contractor.
- **HMRC:** changes to registration and transfer processes designed to help combat pension liberation.
- **Other news:** the publication of the Law Commission's consultation on fiduciary duties of investment intermediaries and an update on work by the Department for Communities and Local Government in relation to LGPS.

If you would like to know more about any of the items featured in this edition of Pensions News or how they might affect you, please get in touch with your usual DLA Piper pensions contact or contact Cathryn Everest. Contact details can be found on page 31.

AUTOMATIC ENROLMENT

AMENDMENTS TO LEGISLATION

Introduction

In the March edition of Pensions News, we reported on a consultation by the DWP on technical improvements to the automatic enrolment legislation. In October, the response to that consultation was issued and the final form of amending regulations was made, with some changes coming into force on 1 November 2013 and some on 1 April 2014. A brief summary of the main changes is set out below.

Amendments coming into force on 1 November 2013

- The introduction of an alternative pay reference period, aligned with the relevant tax period, which can be used to assess whether a worker's earnings reach the threshold required for automatic enrolment. Employers can continue to use the existing definition if they prefer.
- Amendments to the definition of pay reference periods for assessing scheme quality so that employers can use the same period as they use for assessing whether the worker is eligible for automatic enrolment. If they wish, employers can continue to use the period currently in the legislation which is essentially an annual period ending on the day before each anniversary of the employer's staging date.
- The extended deadline for paying initial contributions to the scheme will now apply in respect of all new joiners, not just those with a statutory right to opt out. The deadline itself has also been amended which means that contributions deducted in the first three months of membership must reach the scheme by the 19th day of the fourth month (or by the 22nd where made by electronic means).
- Amendments to make it clear that schemes can customise opt out notices.
- Changes to the test scheme standard used to assess scheme quality for DB schemes that are not contracted-out to take account of future changes to state pension age.

Amendments coming into force on 1 April 2014

- The joining window for those who are automatically enrolled or re-enrolled will be extended from one month to six weeks. It is important to note that this is a deadline not a target and is intended for cases, such as workers with fluctuating and unpredictable earnings, where it is not possible to make the assessment of the worker and automatically enrol them within the one month period.
- The periods for providing information to those with the right to opt-in and for making arrangements to enrol non-eligible jobholders following a request will also be extended to six weeks.
- Extensions are also made to time limits for issuing postponement notices and for registering information with the Pensions Regulator.

Issues still being considered

- The proposal in the March consultation to exclude from automatic enrolment those who ceased membership of a qualifying scheme in the 12 months prior to becoming an eligible jobholder has not been included in the final form of the regulations. However, the DWP is considering whether this issue might be addressed by use of the more general power (currently in the Pensions Bill) to make exceptions. The issue of exceptions from the duties is still being considered more generally and a consultation is expected in the autumn.
- The DWP is also keen to work with interested stakeholders to explore two other matters: the issue of better alignment of contractual enrolment and automatic enrolment processes; and the options for simplifying the quality requirement for DB schemes.

Further information

You can read more about the amendments to the legislation in our Pensions Alert issued on 29 October 2013.

These flexibilities are welcome. Employers who have already reached their staging date should consider whether to adapt their processes to take account of them. In practice, it may be easier for employers who have not yet implemented the reforms to take advantage of them.

GUIDE FOR TRUSTEES

In October, the Pensions Regulator published "*A quick guide to automatic enrolment*", a publication aimed at trustees.

The document notes that while the new duties apply to employers, trustees have an important role to play and, if they are contacted by the scheme employer for example about whether the scheme is a suitable vehicle to be used for automatic enrolment, trustees should be able to provide the right information.

As well as looking at the statutory requirements to be an automatic enrolment scheme, the guide states that if the employer is exploring the possibility of using the scheme for automatic enrolment, the trustees should consider factors including:

- the impact on the scheme of potential new members (for example, on quality of service) and any additional resources needed to accommodate them;
- who will pay for any additional costs arising from the increase in membership; and
- whether the scheme can accommodate a potentially rapid and significant increase in administration and governance requirements.

The guide states that if amendments are proposed to be made to the scheme it should be considered whether existing members will need to be consulted.

The Regulator also refers to its draft Code of Practice for DC schemes and states that trustees should take this opportunity to check the scheme is well run, offers value for money and protects workers' retirement savings.

If a scheme is to be used for automatic enrolment of new members, a full check of the scheme's rules will need to be completed to ascertain whether any amendments are required.

Even if an existing scheme is not being used for the automatic enrolment of new members, but the employer plans to rely on membership of the scheme as evidence that no duties arise in respect of existing members, the employer will need to be satisfied that the scheme meets the criteria to be a qualifying scheme.

DWP RESEARCH

In October the DWP published a report on the results of qualitative research it completed with large employers designed to evaluate their experiences of automatic enrolment including the process of preparing, selecting a scheme, procedural, administrative and communications challenges and opt out rates.

The research consisted of 50 qualitative depth interviews with employers who had staging dates during the first seven months of automatic enrolment and administrative data provided by these employers as well as qualitative depth interviews with 17 workers who had chosen to opt out of these employers' schemes.

The report sets out the following five key points of advice for others implementing automatic enrolment that have arisen from the research.

- Begin preparations far in advance of the staging date, with the report stating that every employer interviewed reported that preparations had taken longer than they originally anticipated.
- Include employee data cleansing in the preparations. It is noted that assessing whether or not a worker is an eligible jobholder can become a burden if the data required is incomplete or not up to date.
- Avoid overburdening workers with information.
- Keep the approach simple, streamlining and simplifying processes and communications wherever possible.
- Take opportunities to learn from other employers.

Other findings of the research include the following.

- The vast majority of employers started concrete preparations for implementing the reforms at least a year in advance and, in some cases, this was closer to two years.
- The vast majority of employers chose to enrol only eligible jobholders, although a small minority chose to automatically enrol other groups of workers.
- Where employers were automatically enrolling new groups of workers for the first time, the majority decided to set default contributions at the minimum level required under the legislation. However, the vast majority of schemes in place prior to the introduction of the reforms also offered higher levels of matched contributions and these employers usually continued to offer matched contributions.

Looking ahead, the DWP plans to publish a separate report in late 2013 with findings from all 50 interviews with workers from these organisation.

STAGING DATES – MEDIUM EMPLOYERS

On 17 October the Regulator issued a press release in relation to the upcoming staging dates for medium sized employers.

- More than 5,000 employers will be subject to the duties and by now medium sized employers should have plans in place for implementation of the reforms;
- The Regulator recommends that employers with an April 2014 staging date should by now have identified suitable pension and software providers and any outside help that may be needed, have started checking which of their workers will need to be automatically enrolled and started communicating with them about the reforms.
- Lessons learned from larger employers show the importance of being certain that the pension provider can provide what is needed and that payroll systems are compatible.

THE PENSIONS REGULATOR

STRATEGY FOR REGULATING DC SCHEMES

On 2 October the Regulator published its "*Strategy for regulating defined contribution pension schemes*" which replaces its February 2012 strategy document.

DC principles and quality features

The new strategy document sets out the six DC principles (first published in December 2011) that are said to sit at the heart of the Regulator's DC regulatory framework and also contains a link to the page on the Regulator's website where the final form of the 31 underlying quality features can be found. The Regulator states that it expects to see these features present in all DC schemes.

By way of reminder, the six DC principles are as follows.

- *Essential characteristics* – schemes are designed to be durable, fair and deliver good outcomes for members.
- *Establishing governance* – a comprehensive scheme governance framework is established at set up, with clear accountabilities and responsibilities agreed and made transparent.
- *People* – those who are accountable for scheme decisions and activity understand their duties and are fit and proper to carry them out.
- *Ongoing governance and monitoring* – schemes benefit from effective governance and monitoring through their full lifecycle.
- *Administration* – schemes are well administered with timely, accurate and comprehensive processes and records.
- *Communications to members* – these are designed and delivered to ensure members are able to make informed decisions about their retirement savings.

Strategy for occupational schemes

The strategy shows that the Regulator intends to follow its usual approach of 'educate, enable and enforce'.

The Regulator has previously stated that it was considering introducing a 'comply or explain' approach to the DC quality features and it develops this idea in the strategy. The Regulator states that it is asking trustees to assess their schemes and produce a governance statement explaining the extent to which the scheme has embedded the 31 quality features. This statement should be made available to members and employers, for example, by publishing it in the annual report and accounts or on the scheme's website.

The Regulator will be publishing an assessment template to support ongoing assessment of schemes against the quality features and an example template of a governance statement.

Whilst governance statements are voluntary, the Regulator states that it expects trustees and the industry to fully embrace this 'comply or explain' approach.

The Regulator states that master trusts will also be expected to obtain independent assurance to further demonstrate the presence of governance and administration standards. As reported later in this newsletter, a consultation was issued in October in relation to this assurance framework.

Strategy for work-based schemes

The Regulator will continue to work closely with employers, providers and the Financial Conduct Authority to ensure consistent quality standards and protection of members across all work-based DC pension arrangements.

For example, the Regulator will:

- work with employers by providing information to enable and support them to select a good quality scheme;

- work with providers by encouraging them to use product and investment governance committees to ensure their work-based personal pension products are suitable for the target market; and
- work with the FCA to ensure regulation is joined up.

Measuring the impact of the strategy

The Regulator's plans for measuring the impact of the strategy include the following.

- Annual surveys and governance statements to measure the degree to which the DC quality features are being embedded in schemes.
- Analysing data drawn from scheme returns to assess changes in the DC landscape.

Trustees should in particular note the points in the strategy about producing governance statements. The strategy does not expressly set out the timing requirements for these new governance statements – whilst the Regulator states that it is asking trustees to complete these, it also notes that it will be publishing an assessment template and a governance statement template but neither have yet been published. We are asking the Regulator for confirmation on timing.

CONSULTATION ON DC COMPLIANCE

Alongside the DC regulatory strategy, the Regulator published its draft compliance and enforcement policy. A summary of some of the key points of the draft policy are set out below.

The scope of the policy

- Whilst the regulatory strategy covers trust-based and contract-based schemes, the compliance and enforcement policy is limited to occupational DC trust-based schemes with two or more members.
- The policy applies to schemes offering money purchase benefits including AVCs under occupational DB schemes and money purchase sections in hybrid schemes and schemes offering money purchase benefits with a DB underpin.
- The policy does ***not*** apply to employers' automatic enrolment duties which are covered instead by the Regulator's automatic enrolment compliance and enforcement policy issued in June 2012.

Identifying risk

The Regulator plans to target its resources and activities at the risks that pose the greatest threat to good outcomes for members. Using its risk and proportionality framework, the Regulator has identified four core risk areas for DC schemes: poor governance standards; poor investment governance and decision-making; poor administration practices; and fraud.

Monitoring DC provision

The Regulator explains that its monitoring activity to identify DC schemes which do not comply with their legal obligations is broadly split into reactive and proactive work.

- Reactive work includes assessing reports made under the legal obligation to report materially significant breaches of the law.
- Proactive engagement takes place through an ongoing programme of thematic reviews. The stages of thematic reviews are said to be selecting a sample of schemes; making pre review contact; making an initial request for information and progressing the more in depth stage of the review. The possible outcomes range from no action being required to opening a case investigation.

Investigations

Where there are grounds to believe (whether from a thematic review or a reactive report) that a breach of trustee duties or other legal requirements has occurred and it is appropriate in line with the Regulator's risk-based approach to do so, the matter will be considered for further investigation.

The Regulator's preference is that any information required for the investigation will be provided on a voluntary basis, but where it is not, the Regulator will consider using its statutory information gathering powers.

Making enforcement decisions

Having completed an investigation, the Regulator will consider whether to take any enforcement action. Whilst each case will turn on its own facts and therefore it is not possible to provide an exhaustive or prescriptive list, the Regulator does provide some general examples to give a broad indication of the types of factors it may consider. These include the following:

- the number of members affected;
- the extent to which there is a systemic problem;
- the financial impact on members;
- the severity and duration of the breach;
- the degree to which practices relating to the breach are inconsistent with the Regulator's DC Code; and
- the conduct of the trustees once the breach has been brought to their attention.

The draft policy includes two illustrative examples of breaches, the relevant DC principles and underlying features, factors relevant to an enforcement decision and potential enforcement options.

The policy is in draft form at this stage although the consultation closed on 31 October 2013. We will report again when the final form is published. The key task for trustees is to ensure that they have adequate governance processes in place to prevent non-compliance occurring.

CONSULTATION ON MASTER TRUST ASSURANCE

We mentioned above (Strategy for regulating DC schemes) that the Regulator will expect master trusts to obtain independent assurance to further demonstrate the presence of governance and administration standards. On 16 October, the Institute of Chartered Accountants in England and Wales (ICAEW) published a consultation document, produced in partnership with the Pensions Regulator, about assurance reporting for master trusts.

Definition of master trusts

A master trust is defined as "*an occupational trust-based pension scheme established by declaration of trust which is or has been promoted to provide benefits to employers which are not connected and where each employer group is not included in a separate section with its own trustees. For this purpose, employers are connected if they are part of the same group of companies (including partially owned subsidiaries and joint ventures)*".

Control objectives

The consultation document sets out a series of control objectives by reference to which schemes can be assessed. These objectives are based, where possible, on the Regulator's DC quality features and have been framed to focus on the protection of members' interests. The document includes a summary listing the Regulator's 31 DC quality features and providing cross-references to identify which control objectives are relevant to each.

For example, the Regulator's quality feature that "*trustees will understand their duties and be fit and proper to carry them out*" is reflected in the following draft control objectives:

- "*Trustees maintain a documented policy which outlines the requirements of trustees in terms of being fit and proper*"; and
- "*Trustees are only appointed where the trustee board has assessed and concluded that the individual is fit and proper … and continuing suitability of all trustee appointments is formally reviewed and monitored*".

There are four quality features which are not included in the control objectives because they are considered to be either too subjective or dependent on the nature of the scheme for independent assurance to be practical. These are the quality features relating to: sufficient time and resources being made available for maintaining governance; trustees acting in the best interests of all beneficiaries; schemes offering flexible contribution structures allowing members the option to pay more;

and trustees supporting employers in understanding their responsibilities for providing accurate and timely information to scheme advisers and service providers.

The reports

Under the proposals:

- trustees will prepare a report setting out their responsibilities and the control procedures in place to support the control objectives and their conclusion on the description, design and operating effectiveness of the control procedures; and
- an independent assurance report will be provided which will conclude on the fairness of the description and the design and operating effectiveness of the control procedures.

Example paragraphs from an illustrative trustees' report and a pro forma practitioners' assurance report are provided in the consultation document.

The ICAEW states that it is not intended that the provision of a report by the trustees or an independent assurance report should be mandatory. However, it is noted that master trusts may find it advantageous to provide such a report to potential and existing customers. In an accompanying press release, the Pensions Regulator states that it encourages employers to select master trusts that have obtained independent assurance.

Timing of reports

It is suggested that in the first year of implementation, transitional arrangements will be in place so that a report can be obtained covering the arrangements at a point in time. All further reports will then cover the arrangements over the period of assessment, which is expected to be one year.

Next steps

The consultation seeks comments on the draft control objectives and the related guidance and closes on 16 December 2013. It is planned that final guidance will be published in the spring of 2014.

DOUBLE COUNTING

On 25 October the Regulator issued a Statement on Double Counting aimed at trustees and employers of multi-employer DB schemes and their advisers, although it is noted that it will also be of interest to trustees of other DB schemes.

The Regulator states that it has issued the Statement because it has become increasingly apparent that some trustees and employers consider that a payment under a Schedule of Contributions can settle a section 75 debt or vice versa. In the accompanying press release, the Regulator states that it is dealing with a number of cases where section 75 debt repayments and recovery plan payments have been double counted which it states is contrary to legislation. However, the Regulator does not give examples of the form of the double counting in these cases.

The risks of double counting

The Regulator states that the risks of double counting include: that it could leave a section 75 debt unpaid with a detrimental impact on member security; a risk of ineligibility of the scheme for the PPF if the double counting amounts to an agreement to reduce the section 75 debt; and the trustees could have failed to act in accordance with their fiduciary duties to act in the best interests of members.

A suggested approach for trustees

The Regulator suggests that trustees approach their considerations in the following two stages.

Firstly, they should assess the impact of an employer departure and deal with the section 75 debt. Points made here include that if the trustees reasonably believe that payment of the full section 75 debt is not necessary or possible, instead of seeking to double count with scheme funding payments, the trustee may consider the statutory mechanisms for dealing with section 75 debts.

Secondly, they should assess the net impact of the employer departure and consider ongoing funding. Points made here include that trustees need to consider whether the investment strategy and funding plans are still appropriate considering any increase in assets (resulting from payment of the section 75 debt or other mitigation) and any deterioration in covenant.

The Regulator states that, when considering these stages, trustees will often need to engage independent advisers to ensure all relevant considerations are taken into account.

The Regulator's approach to the issue

If the Regulator becomes aware of attempted double counting, it will raise this with the trustees and expect it to be addressed and, if it is not, may consider the use of its powers. The Regulator also states that attempts to double count are reportable matters and some may also be notifiable events.

The status of the Statement

The Statement is said to apply equally to past occurrences of double counting.

The Regulator says that the Statement does not represent a shift in its stance. It notes that the Statement should be read in conjunction with the relevant legislation and its guidance on multi-employer scheme departures, clearance and monitoring employer support, its DB funding Code of Practice and its Statement on statutory employers. It also states that the Statement does not override the legislation or provide a definitive interpretation and trustees should seek their own legal advice.

If a section 75 debt is triggered, trustees should seek advice to ensure that double counting is avoided.

SECTION 89 REPORT

Under section 89 of the Pensions Act 2004, the Pensions Regulator can publish a report on the consideration it has given to exercising its functions in a particular case and the results of that consideration.

On 22 October, the Pensions Regulator published a report in relation to MF Global. The report notes that the Regulator:

- had drafted a warning notice alerting directly affected parties that the Determinations Panel may be asked, in due course, to consider whether to issue a Financial Support Direction to MF Global UK Limited (**"MFGUK"**) in relation to the MF Global UK Pension Fund; and
- had intended to issue this warning notice on or before 30 October 2013.

However, the trustees and the special administrators of MFGUK (who were both aware of the Regulator's investigation and intention to issue a warning notice) had entered into discussions parallel to the Regulator's investigation and on 16 October announced they had reached a settlement.

As a result of this settlement, a significant payment was made into the scheme and the trustees were able to secure a buy-out with an insurer meaning that the scheme will wind up outside of the PPF and members will receive benefits broadly equivalent in value to those they had been promised before MFGUK went into administration.

The Regulator states that:

- it therefore considers that it would not now be appropriate to issue the warning notice;
- it encourages directly affected parties to potential enforcement action to explore whether the matter might be resolved without formal regulatory action; and
- this case shows the Regulator's moral hazard powers can prove influential in bringing about a settlement.

PENSION PROTECTION FUND

ANNUAL REPORT AND ACCOUNTS AND FUNDING STRATEGY UPDATE

On 29 October the PPF published its Annual Report and Accounts for 2012/13 and its "Long-Term Funding Strategy Update".

Annual Report and Accounts

Key points in the Report include the following.

- By 31 March 2013, the PPF's funding level was 109.6% (an increase from 106.9% as at 31 March 2012) with a surplus of £1.8 billion.
- While the number of new claims on the PPF (with 'claims' meaning the deficits that are brought into the PPF when scheme sponsors suffer insolvency) during the year was not significantly higher than average, the value of the claims was at a record level of £1.0 billion. (This compares to £471 million in the year to 31 March 2012.)
- The PPF's investment strategy continued to deliver strong returns and the overall return for the year was 11.1%.
- By 31 March 2013 over 172,000 members had transferred to the PPF, up from almost 128,000 the previous year.
- By 31 March 2013, the PPF was supporting 223 schemes in the assessment period.
- The PPF put one scheme through an accelerated assessment process with the result that its 300 members were transferred into the PPF in a record six months. The PPF is currently looking at ways it can use this accelerated process with other appropriate schemes.
- In relation to the levy:
  - there was a fall in the level of contingent assets and certified deficit reduction contributions and because of that the PPF collected about 15% more for the levy than its original £550 million estimate;
  - 98% of uncontested levies were collected by 31 December 2012; and
  - 70 review decisions were issued during 2012/13 in relation to levy appeals (compared to 99 the previous year) – the levy was concluded to have been correct in 36 cases and in the remaining 34 cases the PPF agreed with some or all of the scheme's appeal.

Funding Strategy Update

This update relates to the target the PPF set itself in 2010 to achieve self-sufficiency by 2030. For these purposes, self-sufficiency means having a level of assets that is 10% in excess of PPF liabilities with the 10% margin intended to give protection against unexpected longevity increases and future claims on the PPF. At that time, the PPF Board stated that it would be comfortable if the probability of achieving this was above 80%, although the PPF notes in the update that it would like the level to rise towards 100% by 2030.

The first update on the target was published in November 2011 giving a probability of success of 87% as at 31 March 2011 but this fell to 84% as at 31 March 2012.

In the latest update, the probability of success as at 31 March 2013 was 87%.

Some of the assumptions for the PPF's modelling have been adjusted (for example, to anticipate the change to the PPF compensation cap) but the PPF believes that, at this stage, it would be premature to make adjustments to reflect any future change in scheme funding as a result of the new statutory objective for the Pensions Regulator currently in the Pensions Bill. It also notes that other changes could potentially be required in the future, for example, if the holistic balance sheet approach to funding is introduced or as a result of the possible introduction of defined ambition schemes.

The PPF also states that it believes that its funding strategy continues to be appropriate but notes that due to economic uncertainty, it needs to keep its funding targets under close and constant scrutiny.

DEPARTMENT FOR WORK AND PENSIONS

CONSULTATION ON CHARGES

Background

Pension charges have increasingly been in the spotlight over recent months with regulations introduced in September 2013 banning consultancy charges in automatic enrolment schemes and the OFT's Report published in September referring to market failures and making recommendations about legacy schemes with high charges, improving transparency and banning active member discounts.

The Government had previously announced that it would be publishing a consultation on pension charges and on 30 October that consultation was issued looking at whether further action is needed to improve transparency and whether a cap should be introduced.

The consultation starts by setting out why charges matter and explaining the problems with the market, referring to the findings of the OFT report. The DWP provides figures demonstrating the impact of different charging levels – one example given is that an individual who saves throughout their working life into a scheme with a 0.5% annual management charge (AMC) could lose 13% of their pension pot from charges but this could rise to 24% with an AMC of 1%.

The DWP reports that whilst charges appear to have fallen in recent years, there is some concern that some providers are loss-leading to capture larger, more profitable employers and it is considered unlikely that these trends provide a good indication of the deals which will be available to small and medium sized employers (SMEs) when they start to reach their staging dates from April 2014.

Transparency

The DWP states that it will be exploring the following options to improve disclosure and asks consultation questions including whether further action is required by the Government and, if so, which of the options should be introduced or whether there are any other options.

- *Mandating disclosure to members* – the DWP states that whilst there are currently some FCA requirements on contract-based schemes to provide illustrations showing the effect of charges, there is no requirement on trust-based schemes and the DWP could widen the disclosure requirements on trustees, providers and scheme managers to include consistent disclosure of costs and charges.
- *Standardising disclosure to employers* – there are two options within this which could be considered either as standalone options or in conjunction: (i) the DWP could publish its own code of conduct on disclosure to employers at the point of sale; or (ii) the DWP could mandate disclosure to employers on an ongoing basis once a scheme is up and running and specify a standardised format.
- *Disclosure of transaction costs* – the DWP is considering whether it would be useful for this information to be disclosed to DC members and employers or just to trustees or governance committees acting on their behalf.
- *Public comparison* – the DWP is also considering whether there is a role for greater publication of charges to support comparison and decision making.

However, more generally, the consultation reports the challenges to using information alone to correct a poorly functioning market, for example, it may not affect the way employers behave.

Charge Cap

The DWP's main objective with a charge cap would be to protect people in the default funds of DC schemes which are qualifying schemes and therefore the proposals relate to these types of fund.

The DWP proposes a series of charge structures but for the purpose of the consultation focuses discussion on the level of a cap in terms of funds under management. The DWP seeks feedback on the following options, although noting that a cap could be set somewhere between these levels depending on the evidence received.

- *A charge cap of 1% of funds under management.* This reflects the current stakeholder pension cap for certain scheme members.
- *A lower charge cap of 0.75% of funds under management.* This is said to reflect the charging levels already being achieved by many schemes.
- *A two-tier 'comply or explain' cap.* Under this option, there would be a standard cap of 0.75% of funds under management and a higher cap of 1% would be available to employers who reported to the Pensions Regulator why the scheme charges in excess of 0.75%.

The DWP also states that it proposes to specify a broad, all-encompassing definition of the different charging elements to mitigate any actions to elude a cap. However, one consultation question asks whether any specific services need to be excluded from the cap to avoid constraining innovation.

In terms of timing, the proposal is that any cap would need to be implemented by April 2014 when SMEs start to reach their staging dates. Whilst it is thought that very few employers who stage prior to April 2014 would need to revise their pension provision to meet such a cap, in order to provide sufficient time for any changes that are required, it is proposed to wait until April 2015 to extend the cap for employers who staged between October 2012 and March 2014.

The consultation questions address issues including the proposals on timing, which of the three options is most appropriate and how employers and providers will respond to a cap, for example, whether there is any evidence that charges will be levelled-up.

Differential charging

In relation to the issue of differential treatment of active and deferred members, the DWP states that it proposes to include deferred members of DC qualifying schemes in the scope of any cap and that it will also consult on banning active member discounts. The DWP seeks views on what the impact would be of a ban on active member discounts and whether any transitional arrangements would be needed.

Consultancy charges and adviser commissions

The consultation also raises questions about:

- the impact of extending the current ban on consultancy charges to all qualifying schemes; and
- the impact of banning adviser commission charges from all qualifying schemes (they were banned from all new GPPs from 1 January 2013).

Next steps

The consultation closes on 28 November 2013. The DWP states that it will follow the consultation with Government proposals on both charges and scheme quality.

Whilst at this stage, these are only proposals, the consultation provides a reminder of the increasing emphasis on charges that provide value for money and therefore employers should consider checking the position in relation to any existing charges. Employers who have not yet chosen a scheme for automatic enrolment should also remember to include charges as a factor to take into consideration when selecting a scheme.

CONSULTATION ON MONEY PURCHASE BENEFITS

On 31 October the DWP issued a consultation on draft regulations setting out transitional, supplementary and consequential amendments to legislation in relation to a clarification of the statutory definition of money purchase benefits due to come into force in April 2014.

The consultation states that schemes providing benefits treated as money purchase which have any of the following features may be affected by the clarification of the statutory definition:

- a guarantee in the accumulation phase such as a promise of an amount linked to salary or a guaranteed interest rate;
- a pension in payment by the scheme derived from money purchase benefits or cash balance benefits unless this is backed by a matching insurance policy.

The DWP anticipates that most schemes affected will be hybrid schemes.

Background to the draft regulations

In July 2011 a Supreme Court judgment was issued (in the case of *Houldsworth v Bridge Trustees Limited*) concerning the Imperial Home Décor Scheme which concluded that the following benefits were money purchase benefits:

- benefits subject to a guaranteed interest rate; and
- money purchase benefits which had been converted into a scheme pension.

This conclusion was not in line with the Government's view that the term 'money purchase benefits' should only refer to benefits where there is no risk of a funding deficit. If the term is not limited in this way, there is a risk that schemes in which a deficit could arise could be regarded as money purchase schemes and therefore not eligible for entry to the PPF. Immediately following this judgment, on 27 July 2011 the Government therefore announced that it would be introducing primary legislation to clarify the definition of money purchase benefits.

This amendment to the legislation was included in the Pensions Act 2011. This makes it clear that a money purchase benefit is one, the rate or amount of which is calculated solely by reference to assets which must necessarily suffice for the purposes of the provision of the benefit or, if the benefit is a pension in payment, its provision is secured by an annuity contract or insurance policy made or taken out with an insurer. That is, money purchase benefits are those in respect of which a funding deficit cannot arise. This amendment has not yet been brought into force although it is intended that it will be in April 2014 with retrospective effect from 1 January 1997.

The DWP's proposals

There may be some schemes which treated benefits affected by this clarification as defined benefits (in line with the Government's view of the way the legislation operated) but the Supreme Court judgment would mean they were in fact money purchase benefits. The clarification to the definition in the Pensions Act 2011 therefore has retrospective effect to 1 January 1997 in order to validate those past actions.

Conversely, there may be schemes which believed that some or all of the benefits they provided were money purchase benefits but the amendment to the legislation clarifies that they are in fact defined benefits. The Government recognises that the retrospective nature of the amendment could therefore mean past actions in respect of these schemes were not correct, but in some cases it will not be practical or appropriate for schemes to revisit decisions. The draft regulations therefore propose transitional and supplementary provisions, many of which are intended to provide easements from the retrospective nature of the amendment until July 2011 when the Government made its announcement. Broadly speaking, these provisions operate as follows.

- By giving schemes time to comply with the amended definition and meet the necessary legal and funding requirements attached to non-money purchase benefits.

- For example, where the clarification means that a scheme has to obtain an actuarial valuation for the first time, the requirement will be to obtain an initial valuation within 15 months of the effective date, which must be within 12 months of the change to the legislation in April 2014. This will place such schemes in the same position as a newly established scheme.

- By balancing protection for members with minimising the impact on schemes by ensuring that in most circumstances past decisions will not have to be revisited.
  - For example, trustees will not have to revisit employer debt events which occurred on or before 27 July 2011, although they will be required to re-open those which occurred between 28 July 2011 and April 2014 unless particular conditions apply.
  - As noted above, the significance of 27 July 2011 is that it was the date the Government announced that the legislation would be changed and the DWP therefore takes the view that for cases after that date, trustees should have been aware of the proposed change to the legislation and should not have acted on the basis that the benefits would continue to be money purchase.

The draft regulations also include consequential provisions to ensure other pensions legislation is aligned with the amended definition of money purchase benefits.

The draft regulations cover the following subject areas and the consultation explains the provisions in respect of each in turn: winding-up; employer debt; revaluation, indexation and preservation; transfers; payment of surplus funds to employers; scheme administration; the Pension Protection Fund; scheme funding; the Financial Assistance Scheme; equality; pension sharing on divorce; cross-border schemes; disclosure; and underpin and top-up benefits.

In order not to interfere with the Supreme Court judgment in respect of the benefits provided by the Imperial Home Décor Scheme, the DWP proposes to exclude that scheme from the scope of the amendments.

As part of the consultation, the DWP will also be hosting a number of stakeholder forums in November. The consultation closes on 12 December 2013.

This is a complex issue and schemes affected by the clarification to the definition of money purchase benefits will need to consider their position carefully in order to check whether there are any past decisions that will need to be revisited and to ensure that the legislation is being applied correctly going forward.

LEGISLATION

DISCLOSURE REGULATIONS

In the February and July editions of Pensions News we reported on proposals to consolidate, harmonise and simplify the disclosure requirements for occupational and personal pension schemes into one set of regulations. The final form of the regulations was published on 31 October although in order to give schemes time to make any changes needed to comply with the new regulations, they will not come into force until 6 April 2014.

The structure of the regulations has been simplified with the aim of making them easier to understand. Changes made to the requirements, which are largely permissive, include the following.

- The removal of some of the requirements in relation to personal pension schemes where they would duplicate Financial Conduct Authority rules.
- Amendments to some of the basic information that has to be provided as a matter of course to prospective and new members, for example, to remove the requirement to provide detailed information about transfers, to add a brief statement about the nature of money purchase benefits (where applicable) and to clarify that the information about TPAS, the Pensions Ombudsman and the Regulator should include an electronic address at which each may be contacted.
- Introducing new requirements for schemes using "lifestyling" which is defined as "*an investment strategy that aims progressively to reduce the potential for significant variation caused by market conditions in the value of the member's rights*". The requirements are that specified information must be provided (i) as part of the basic scheme information given automatically to new members or on request and (ii) again between 5 and 15 years before the member's retirement date (unless it has been given in the previous 12 months as part of the basic scheme information).
- Amendments to simplify the benefit statements provided on request to DB members such as allowing schemes to calculate benefits by reference to the most appropriate retirement date.
- Amendments in relation to benefit statements for money purchase members so that the issue of the first statement is optional for the scheme where no contributions have been credited or, for occupational pension schemes, the member is in the automatic enrolment opt out period.
- Enabling some flexibility in Statutory Money Purchase Illustrations so that they can take more personalised assumptions into account, for example, in relation to when future contributions can be assumed.
- Amending the provisions in relation to disclosure by use of a website: (i) to ensure that the drafting reflects the original policy intention; and (ii) to add to the requirements that must be met before trustees can disclose by website without sending a postal notification, so that the final communication issued before the exemption applies explains that no further notifications will be given.
- The extension of the option to use electronic communications (e-mail or website) to certain other legislative provisions which require disclosure.

We would expect trustees to welcome the measures that provide simplification and flexibility and it is useful that the final form of the regulations has been published several months in advance of them coming into force so that schemes can now prepare for the 6 April 2014 deadline.

PENSIONS NEWS

AN UPDATE ON THE PENSIONS BILL

In the May edition of Pensions News we reported that the Pensions Bill had been laid before Parliament. The Bill continues to progress through Parliament and on 22 October, the DWP issued a Briefing Paper on amendments proposed by the Government, including the following.

- The introduction of a wide power to allow regulations to be made to limit or prohibit charges and to impose governance and administration standards for schemes specified in regulations. Previously the Bill had contained powers in these areas but they were specifically in relation to qualifying schemes or automatic transfer schemes. Because the new power is wider, it is also proposed that these previously proposed powers be removed because they will no longer be necessary.
- Minor technical amendments to the power that will allow employers (without trustee consent) to adjust their scheme design to offset additional National Insurance costs as a result of the abolition of contracting-out. For example, an amendment so that the scheme changes can apply to all active members and an amendment so that new members can be enrolled into the scheme under the adjusted scheme design.
- An amendment to the provisions that abolish short service refunds for money purchase schemes. This adds a requirement to the provisions on entitlement to short service benefit for the member to have at least 30 days' qualifying service. The DWP states that this is intended to provide broad parity of treatment between those who are contract-joined into an occupational pension scheme and those contract-joined into a personal pension scheme (with a 30 day cooling period) and those who are automatically enrolled (with a one month opt out right).

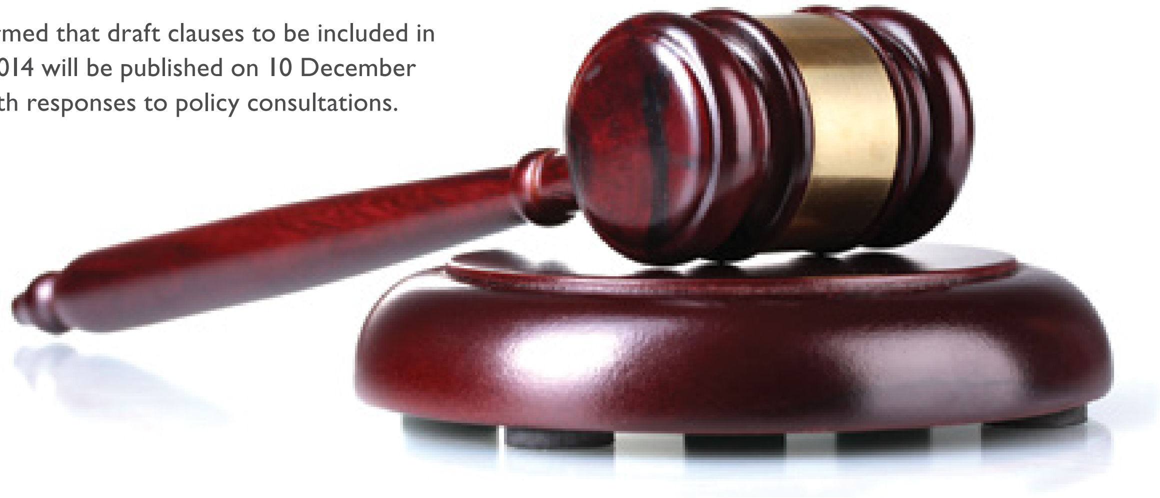
In a one-off evidence session before the Work and Pensions Select Committee on 23 October, the Minister for Pensions reported that it is hoped that the Bill will receive Royal Assent by Easter 2014.

AN UPDATE ON THE FINANCE BILL

It has been confirmed that draft clauses to be included in the Finance Bill 2014 will be published on 10 December 2013 together with responses to policy consultations.

The consultation on the draft clauses for the Bill will be open until 4 February 2014.

When HMRC published the consultation on individual protection from changes to the lifetime allowance, it stated that a response to the consultation would be published in the autumn and that legislation in relation to this would be included in the Finance Bill 2014.



CASE LAW

PENSION LIBERATION

In the July edition of Pensions News, we reported that the Pensions Regulator had announced that it was to be a party to High Court proceedings to ascertain the legal status of some schemes suspected of being involved in pension liberation. The outcome of that case was published on 21 October 2013 with the court concluding that, on the basis of the construction of the scheme documents, the schemes are occupational pension schemes.

Background

The case concerned nine schemes. The claimant in respect of one scheme was Pi Consulting (Trustee Services) Ltd which had been appointed as independent trustee of the scheme by the Regulator. The claimant in respect of the other eight schemes was Dalriada Trustees Ltd which had been appointed as independent trustee of those schemes by the Regulator – whilst the circumstances in respect of the eight schemes are not identical, for the purposes of the case, one scheme was considered as representative of all eight schemes.

The claimants argued that the schemes are occupational pension schemes and, in order to ensure that both sides of the argument were represented, the Regulator argued that they were not.

The independent trustees had been appointed under the Regulator's powers relating to occupational pension schemes. However, given the doubts raised about whether the schemes are in fact occupational pension schemes, they were subsequently appointed as trustees pursuant to the inherent jurisdiction of the court.

Scope of the case

It is important to note that the parties agreed that, at this stage, the court would not be asked to resolve the question of whether the deeds and rules in relation to the schemes were shams. The court therefore approached the case on the assumption that the deeds and rules were genuine. However, it was left open to the Regulator, if so advised, to contend at a later date that the schemes were shams.

The criteria to be an occupational pension scheme

In order to meet the definition of an occupational pension scheme in section 1 of the Pension Schemes Act 1993 (PSA 1993), there are two sets of criteria the scheme must meet.

- The scheme must be established: (i) for the purpose of providing benefits to or in respect of people with service in employments of a particular description; or (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people. This was referred to by the court as the "purpose issue".
- The scheme must be established by a person who falls within section 1(2) of the PSA 1993. The relevant category for these purposes is that where people in employments of the description for whom the scheme is established are employed by someone, the scheme must be established by a person who employs such people. This was referred to by the court as the "founder issue".

On the basis of the construction of the schemes' documents, the court concluded that both of these requirements were satisfied.

The Regulator's and the DWP's reaction

The Regulator published a press release on the date the judgment was issued welcoming the legal clarity it provided and stating that it would help inform its wider strategy. The Regulator noted that the conclusion means that a number of powers are available to it in respect of such schemes and the actions taken in relation to these particular schemes, including the appointment of the independent trustees, still stands.

Later in the same week, during a one-off evidence session before the Work and Pensions Select Committee, the Minister for Pensions reported that the Regulator has

27 open cases in relation to pension liberation which it believes are processing about £185 million worth of scheme money. The Minister also reported that the Regulator thinks that the total figure of scheme money over a number of years is about £420 million.

At the same evidence session, the DWP's Strategy Director for Private Pensions said that the judgment raises questions about the definition of occupational pension schemes which the DWP will be looking at carefully.

Whilst the outcome of the case is good news in the sense that it means the Regulator can take action against these schemes using the powers it has in relation to occupational pension schemes, it does not help trustees with the dilemma of what to do where a member has a statutory right to a transfer but the trustees suspect the receiving scheme may be involved with pension liberation.

However, on the same day that the judgment was issued, HMRC announced changes to some of its processes to try and help combat pension liberation. Further details are set out in the HMRC section of this newsletter.

AGE-RELATED CONTRIBUTIONS

The Court of Justice of the European Union (CJEU) has recently issued a judgment in a case concerning age-related contributions to defined contribution pension schemes and whether they breach the European Directive for equal treatment in employment and occupation.

The referral was made to the CJEU by the Danish national courts in a case concerning a scheme stemming from the employees' contracts of employment under which the member and employer contributions increased according to the member's age as follows:

- for those aged under 35, member contributions are 3% and employer contributions are 6%;
- for those aged 35 to 44, member contributions are 4% and employer contributions are 8%; and
- for those aged over 45, member contributions are 5% and employer contributions are 10%.

The CJEU's considerations included whether it was possible for the age-related contributions to fall within the exception in the Directive whereby a difference in treatment on the grounds of age does not constitute discrimination if, within the context of national law, it is objectively justified (that is, if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary).

The CJEU made the following points about this case.

- Aims such as those stated in relation to the age-related contributions may be regarded as legitimate aims. These aims were:
  - to provide a means for all employees to build up reasonable retirement savings by: (i) enabling older workers who enter service at a later stage in their working life to build up such savings over a relatively short contribution period; and (ii) including young workers in the scheme at an early stage while making it possible for them to have a larger proportion of their wages at their disposal; and
  - to reflect the need to cover the risks of death, incapacity and serious illness, the cost of which increases with age.
- In the circumstances, it does not appear unreasonable to regard the age-related contributions as enabling these aims to be achieved.

Ultimately the CJEU concluded that the European Directive does not preclude an occupational pension scheme under which an employer pays, as part of pay, pension contributions which increase with age, provided the difference in treatment is appropriate and necessary to achieve a legitimate aim, which is for the national court to establish.

The CJEU stated that it was for the national court to establish: (i) whether the age-related contributions are appropriate for attaining the aims pursued and genuinely reflect a concern to achieve those aims in a consistent and systematic manner; and (ii) do not go beyond what is necessary to achieve the aims. In relation to (ii), the CJEU stated that the national court must include in its considerations whether the detriment is off-set by the benefits of the scheme, in particular, weighing up that the member in this case (who was under age 35) benefited from the scheme in receiving contributions and the fact that the lower level of employer contributions corresponded to the member also paying lower contributions.

Regulations made under the Equality Act 2010 provide that age-related contributions to occupational DC schemes are exempt from being unlawful discrimination if the aim in setting the different rates is to equalise, or make more nearly equal, the amount of age related benefit in respect of comparable aggregate periods of pensionable service to which members of different ages, who are otherwise in a comparable situation, will become entitled. There is a similar exemption for personal pension schemes. Where schemes wish to rely on this exemption, detailed actuarial advice may be taken to demonstrate that the different rates will equalise benefits or make them more nearly equal.

The aims which were seen as legitimate in this case appear to be broader than the exemption under the Equality Act because whilst they recognise the shorter period of membership of older workers, they do not refer to the benefits being equalised or made more nearly equal. Schemes with age-related contributions could therefore, where appropriate, consider the issue of objective justification instead of the exemption in the Equality Act. In order to prove objective justification, schemes will need to evidence a legitimate aim and that the rules in question are a proportionate means of achieving that aim.

CONSTRUCTION OF SCHEME DOCUMENTS

Two High Court judgments (given by the same judge) were published in October in relation to the construction (i.e. legal interpretation) of pension scheme documents, in particular, whether these principles can be used to overcome problems with drafting. In one case, the principles of construction were able to achieve the outcome sought but, in the other case, it was not possible.

Amendments to reflect equalisation

In the first case, whilst the decision was originally given in June 2013, the judgment was not published until October.

This case concerned the ICM Computer Group Pension and Life Assurance Scheme and amendments set out in a letter dated 20 February 1997 (signed by the trustees and on behalf of the company) (**"Letter"**) to equalise Normal Retirement Age (NRA) for male and female members at age 65 from 1 March 1997.

Under the scheme's amendment power, the Letter was a legitimate means by which to make an amendment. The problem was that the Letter set out what NRA was for pensionable service up to and including 28 February 1997 but did not expressly go on to state what it would be for pensionable service on and after 1 March 1997.

The employers of the scheme sought summary judgment declaring that the NRA was 65 for pensionable service from 1 March 1997. The defendants to the application were the scheme trustees, who were neutral, and a representative beneficiary who did not oppose the application.

The court noted the legal principles applicable to the construction of pension scheme documents, including that, the question is what meaning would be conveyed to a reasonable reader of the document who had all the background knowledge which would have been reasonably available to the parties in the situation they were in at the date of the document. It was also stated that, if it is determined that something has gone wrong with the language of the document and it is clear from the admissible background evidence what the intended meaning is, there is no conceptual limit to the correction that can be made as part of the process of construction.

In this case, the requested summary judgment was granted with the court's reasoning including the following.

- It is clear that there was an attempt to deal with the issue of NRA for the past and future within the Letter.
- There would have been no need to include the reference to 28 February 1997 (which simply reflected what the position already was up to that date) if it was not intended that the position would be different thereafter.
- The other provisions of the Letter (which addressed matters such as the calculation of widower's pensions and the termination date of Long Term Disability Insurance) are consistent with an NRD of 65 for post 1 March 1997 pensionable service.
- The Letter makes reference to an earlier decision of the trustees in which there was an express reference to the intention to equalise NRA at age 65.
- It is clear that something had gone wrong with the language of the Letter and that is what a reasonable reader would have concluded. Furthermore, a reasonable reader looking at the Letter with the background knowledge of the case law on equalisation would be able to see what the Letter meant.
- This case is therefore a matter of construction and not a matter of rectification because rectification involves changing the meaning of a document to align it with the intended meaning. It is therefore possible to add the words needed to give the Letter the meaning that a reasonable reader would have concluded that it had.

Deed of Adherence and new benefit category

The second case concerned a Deed of Adherence to the Honda Group – UK Pension Scheme for Honda of the UK Manufacturing Limited (**"HUM"**).

The scheme's principal employer and HUM sought a declaration that, on a true construction of the Deed of Adherence, HUM's employees who were admitted to the scheme on or after 1 August 1986 were entitled to benefits set out in an announcement. These benefits were less generous than those provided for in the scheme rules at the time the Deed of Adherence was entered into, for example, in requiring member contributions, in respect of death benefits and in respect of pension increases. In this case, the claim was contested by a representative beneficiary.

The rules were subsequently amended to set out the less generous benefits for HUM members from 10 December 1998. It was therefore the period from 1 August 1986 to 9 December 1998 in respect of which the employers sought to rely on the argument that the wording of the Deed of Adherence meant that the less generous benefits applied.

It was estimated that the additional cost of providing HUM members with the standard scheme benefits for this period is around £47 million on the statutory ongoing funding basis and around £70 million on a discontinuance basis.

The phrase under consideration is that the Deed of Adherence states that the principal employer, with the trustees' consent, "*hereby extends the benefits of the Scheme*" to all eligible employees and directors of HUM with effect from 1 August 1986.

The employers' claim failed, with the court's conclusions including the following.

- The reasonable person taking into account all of the background knowledge which would reasonably have been available to the parties at the time the Deed of Adherence was executed would have taken the words to be a reference to the advantages of access to the scheme and being able to accrue benefits under it and not to any particular benefit scale.
- The reference to "*extends*" indicates an intention to make an existing state of affairs available and not to create a new category of benefits. Had it been intended to create a new category of benefits, the wording

would have been very different and would at least have referred to and attached a copy of the announcement setting out the less generous benefits.

- This construction is consistent with the relevant background which suggests that it was appreciated that a number of steps would need to be taken to give effect to the new HUM category of benefits and that the purpose of the Deed of Adherence was simply for HUM to participate in the scheme.
- The employers' claim that the Deed of Adherence was also a deed of amendment introducing the new benefit category "*requires too much of the construction process*".

It is interesting to see how the courts approach the issue of construction and the different results that this can lead to and that there are limits to the use of construction to overcome problems with scheme documents.

HM TREASURY

FAIR DEAL

In the November 2012 edition of Pensions News, we reported on a response to consultation and a further consultation issued in relation to proposed changes to the Fair Deal guidance.

On 4 October, the response to that further consultation was published along with the final form of the new guidance.

Introduction

The Fair Deal policy is non-statutory guidance which provides protection of pension rights for staff who are, or have been, compulsorily transferred out of the public sector to an independent provider of public services.

It applies to TUPE transfers from central government departments and agencies, the NHS, schools (including academies) and any other parts of the public sector under the control of Government Ministers where staff are eligible to be members of a public service pension scheme. It also applies on second generation and subsequent transfers.

The guidance is not mandatory although, in our experience, the majority of contracting authorities require it to be followed by contractors.

The change of approach

Prior to the changes, Fair Deal required the pension protection to take the form of the contractor providing transferring employees with a broadly comparable scheme for future service and allowing bulk transfers to be made to that scheme.

Following a finding of the Independent Public Service Pensions Commission that this created a barrier to plurality of public service provision, it was decided that changes would be made.

The new guidance therefore states that the protection will be provided by the contractor participating in the relevant public service pension scheme with transferring staff able to remain in that scheme for so long as they remain employed wholly or mainly in the provision of the services.

Contractors will therefore have to enter into participation agreements with the relevant public service pension scheme authority. The guidance states that contributions payable to the public service scheme by the contractor will normally be at the same level as those paid by the other scheme employers.

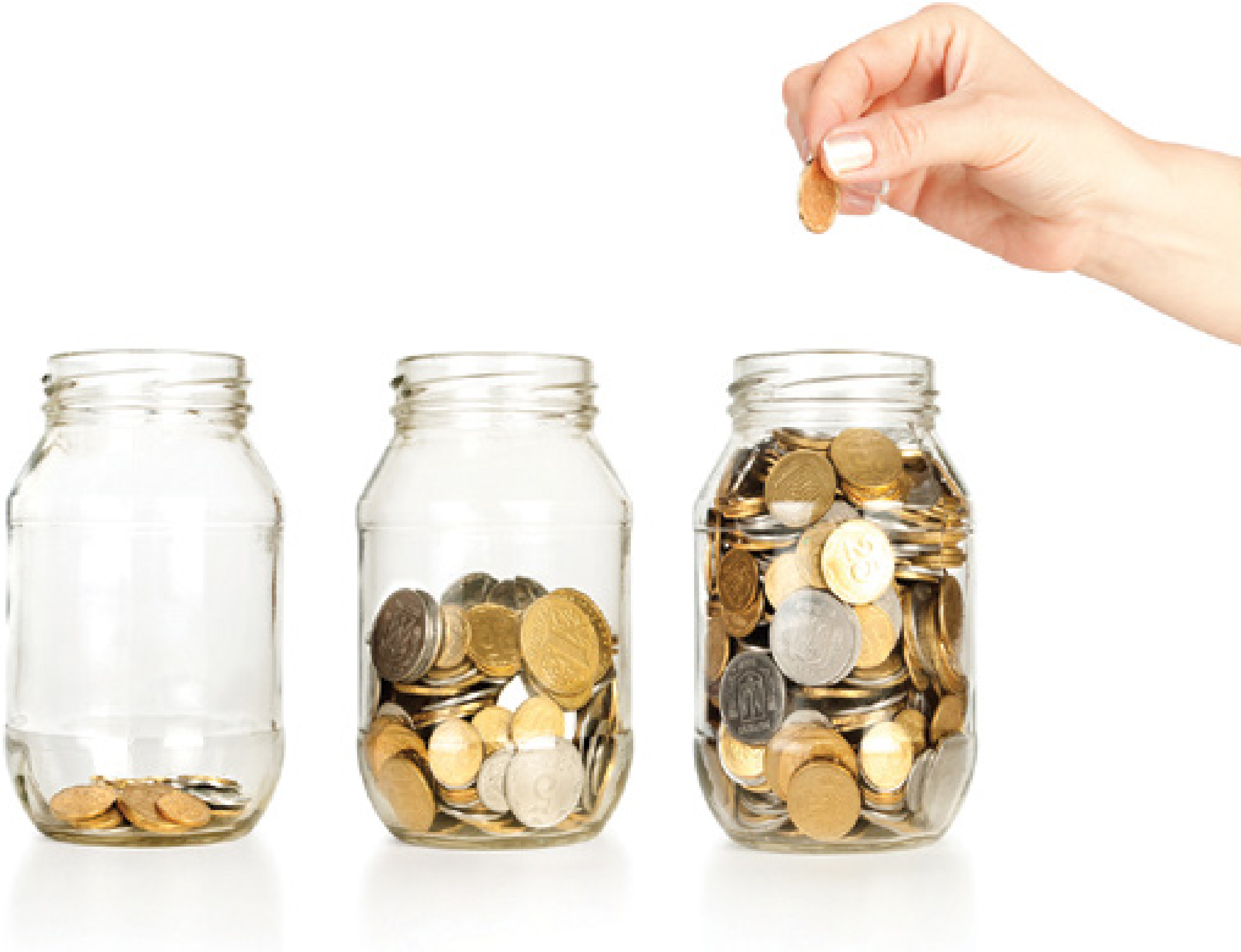
Re-tenders should also be on the basis that the contractor should participate in the relevant public service pension scheme, with staff able to transfer past service back into it.

However, where this approach could result in an inequality of treatment between bidders (for example, because the incumbent contractor faces a section 75 debt if the staff move from its broadly comparable scheme) which is contrary to procurement law, the incumbent contractor may be permitted to bid on the basis of providing a broadly comparable scheme.

Timing

The new version of the Fair Deal guidance took immediate effect when it was published. However, the guidance provides that where a procurement exercise was already at an advanced stage, it should be considered whether it would be "*legitimate and desirable*" to adjust the terms of the procurement to take account of the new guidance. It goes on to state that there is no requirement for a procurement at an advanced stage to be terminated or delayed in order to apply this new guidance.

In addition, because the new guidance requires participation by the contractor in the public service scheme and the continued membership of the transferring staff, if the relevant scheme has not yet made any changes needed to permit this, the previous Fair Deal policy will continue to apply. However, the new guidance must be followed in all cases from April 2015.



Amendments to public service schemes

A recent House of Commons Library Note reported that amendments were made to the Principal Civil Service Pension Scheme (PCSPS) on 9 October to enable the new Fair Deal guidance to be implemented and also reported on work that is being undertaken in respect of the NHS Pension Scheme and the Teachers' Pension Scheme in relation to implementation.

Further information

You can read more about the new guidance in our Pensions Alert issued on 10 October.

HMRC

PENSION LIBERATION

As reported in the 'case law' section of this newsletter, on 21 October, HMRC announced changes to its processes to combat pension liberation.

Registration

When somebody wants to register a new scheme with HMRC, the system used to be 'process now, check later' with registration confirmed automatically on successful submission of an online application.

Since 21 October this has no longer been the case. Instead, when an application for registration is submitted, a message will be received confirming that the submission has been successful but at this point the scheme will ***not*** be registered. This means that any contributions received before the scheme is registered will not qualify for tax relief and any transfers received from other registered schemes will be unauthorised payments.

This new process will allow HMRC to conduct detailed risk assessment activity before making a decision on whether or not to register a scheme. HMRC notes that it may need to ask further questions or request additional information before deciding whether or not a scheme can be registered.

Transfers

When schemes are dealing with requests for transfers, they often ask HMRC to confirm the registration status of the receiving scheme as part of the checks they complete before making the transfer.

In order to help scheme administrators decide whether or not to make a transfer, since 21 October HMRC will only confirm the registration status of a scheme if:

- the scheme is registered; and
- HMRC does not hold information to suggest there is a significant risk of the scheme being set up to facilitate pension liberation or being used to do so.

HMRC also states that it will now respond to requests for confirmation of registration status without seeking consent from the receiving scheme.

If both of the conditions set out above do not apply, HMRC will respond setting out the conditions and explaining that one or both of them is not satisfied.

HMRC emphasises that asking it for confirmation should not be the only check that schemes carry out and they should make further checks to satisfy themselves before making a transfer.

Additional information

At the same time as announcing the changes to its processes, HMRC published two documents on pension liberation.

- A factsheet highlighting the tax consequences of pension liberation on savers.
- An update from HMRC and the Pensions Regulator about their work to combat pension liberation. This includes the following:
  - HMRC is proactively liaising with scheme administrators at an early stage and will not hesitate to de-register schemes where the rules are not adhered to;
  - a statement from the Regulator that "*Many firms are now blocking transfers they believe to be suspicious and we welcome the enthusiasm and willingness to tackle the problem that we've seen from the industry*";
  - a statement that the Regulator is involved in a number of ongoing High Court cases in a bid to disrupt the liberation models that pose the most risk; and
  - an update that the Regulator is working with the DWP to explore whether changes to legislation could help.

CHANGES TO THE RPSM

On 21 October HMRC announced that updates had been made to its Registered Pension Schemes Manual, some of which are to reflect the changes to the registration process referred to above.

Amendments are also made to reflect recent changes to the legislation such as those in relation to the age at which a bridging pension can be reduced and still be an authorised payment, the QROPS legislation and the maximum drawdown pension.

Other amendments to reword and clarify sections of the Manual were made at the same time, including:

- the addition of some further examples in relation to the operation of 'scheme pays'; and
- confirmation that if a member opts out of a scheme in circumstances where they are treated in law as never having been a member of the scheme, any payments made to the scheme are not contributions so their repayment will be neither an authorised nor an unauthorised payment and no tax charge will arise. The new wording appears to cover those who are automatically enrolled and opt out under the Pensions Act 2008 as well as those who are contractually enrolled and opt out under a legally binding rule of the scheme.

ANNUAL ALLOWANCE CHECKING TOOL

HMRC announced that it has a new online tool (the annual allowance checking tool) that can help individuals to check whether they may be affected by an annual allowance charge and need to complete a tax return, even if they have not received a pension savings statement from their scheme informing them that they have made contributions in excess of the annual allowance.

HMRC states that if an individual already knows that they need to calculate their annual allowance charge, they can instead use the pension savings annual allowance calculator.

Both tools can be accessed via HMRC's website.

OTHER NEWS

LAW COMMISSION CONSULTATION – FIDUCIARY DUTIES

Background

In the March edition of Pensions News, we reported that the Law Commission had published Terms of Reference for a review of the legal obligations arising from fiduciary duties in relation to investments and the considerations it is appropriate for trustees and other investment intermediaries to take into account. The Law Commission was asked to complete this review following the outcome of the Kay Review of Equity Markets and Long Term Decision Making.

In March the Law Commission stated that it expected to open a consultation by October 2013 and that consultation entitled "*Fiduciary Duties of Investment Intermediaries*" was published on 22 October. The consultation uses pensions as the example, looking at the investment market "*through the lens of pensions*".

Provisional conclusions and consultation questions

The Law Commission's provisional conclusions include the following with consultation questions asking respondents whether they agree.

- Trustees can take into account wider factors relevant to long-term investment performance where they would further the purpose of the power of investment. These can include environmental, social and governance factors relevant to financial returns. However, general ethical issues unrelated to risks, returns or the interests of beneficiaries may only be taken into account in limited circumstances (for example, a DB scheme set up by a religious group, charity or political organisation).
- The Law Commission's tentative view is that it is worth preserving the current flexibility of the law which gives trustees a wide discretion to invest as they see fit. The Law Commission also asks whether there are any specific areas which would benefit from statutory clarification.
- The law gives trustees considerable discretion to make their own decisions therefore permitting a sufficient diversity of strategy.
- Pressures on trustees such as the size of schemes leading to a lack of internal resources, periodic actuarial valuations and the need to show any deficit in the employer's company accounts are the cause of short-term investment strategies, not the law of fiduciary duties.
- The rules requiring contract-based pension providers to reassess the suitability of investment strategies over time should be clarified and strengthened.
- In relation to the OFT's recent agreement with the Association of British Insurers (as reported in the September edition of Pensions News) that Independent Governance Committees will be introduced that are embedded within insurance pension providers, the Law Commission's tentative view is that members of the committees should be subject to clear legal duties to act in the interests of members with a full indemnity provided to members of the committee by the provider.
- The law of fiduciary duties should not be reformed by statute and if there is a need for greater clarity in some areas, it would be better to deal with this by enacting specific duties rather than codifying the whole area of law.
- The Law Commission also notes that stakeholders expressed concern about the apparent lack of regulation of investment consultants and a consultation question is raised as to whether there is a need to review this regulation.

It is interesting to see the Law Commission's views on this issue, although at this stage they are stated to be provisional conclusions and remain subject to consultation. It is therefore not yet clear whether this review will ultimately result in any changes requiring action by trustees. The consultation closes on 22 January 2014 and the Law Commission plans to produce a report with recommendations to Government by June 2014.

LOCAL GOVERNMENT PENSION SCHEME

On 18 October the Department for Communities and Local Government (DCLG) issued an announcement stating that it will be seeking professional advice from financial markets experts to identify administrative savings in the management of local government pensions.

The DCLG states that figures published for the LGPS show that there is scope for reforms to improve performance and reduce investment management and administration overheads. The announcement goes on to state that the Government will commission an external organisation (such as a bank, actuarial firm or think tank) to develop specific advice on the potential for new savings and greater public accountability through increased pension fund collaboration. The work will focus on the following three possible options and proposals will be presented to the DCLG and Cabinet Office for consideration:

- a single national investment fund vehicle;
- a small number of closely aligned combined investment vehicles; or
- merging the 89 funds into a few larger funds.

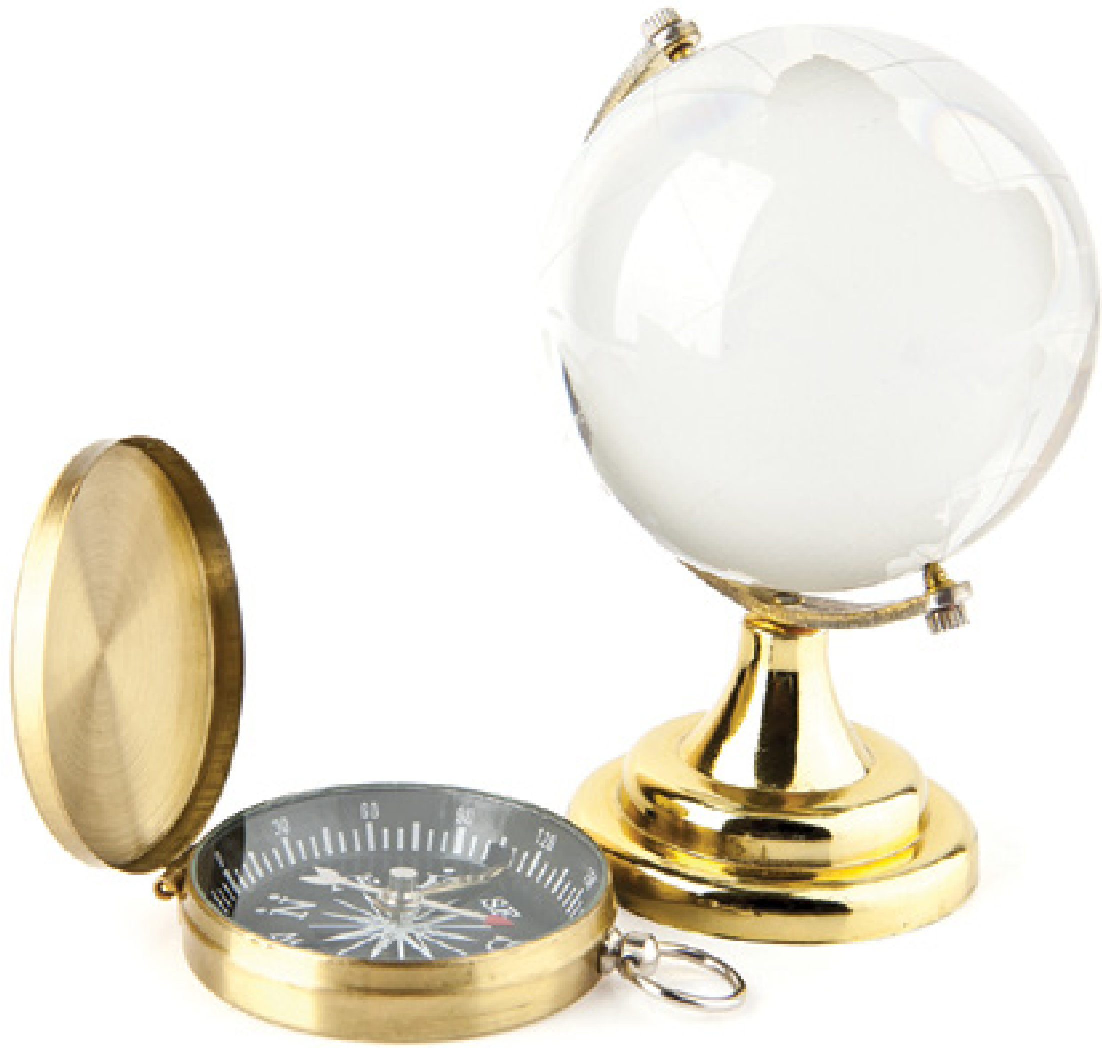
The announcement is said to follow a call for evidence into ways of improving investment returns and reducing deficits within the LGPS by increasing fund co-operation, transparency and accountability. The DCLG reports that the responses from that process are currently being analysed with a view to developing options for ministers to consider later in the year.

ON THE HORIZON

- **PPF levy.** The consultation on the levy for 2014/15 closed on 24 October 2013.
- **DC compliance and enforcement policy.** The consultation on the draft policy closed on 31 October 2013.
- **New statutory objective for the Pensions Regulator.** TPR's consultation on amendments to its Code of Practice on 'Funding defined benefits' and its regulatory approach to defined benefit schemes is expected to be published in the autumn.
- **Exceptions to automatic enrolment duties.** A consultation is due to be published in the autumn.
- **IORP Review.** Proposals to amend the IORP Directive in relation to governance and transparency are expected to be published in the autumn.
- **Personalised lifetime allowance.** A summary of responses to the consultation and updated draft legislation are expected to be published in the autumn.
- **Pension protection following TUPE transfer.** The consultation on amendments to this legislation closed on 5 April 2013. The changes were originally proposed to come into force on 1 October 2013 but the final form regulations and response to consultation are awaited.
- **Employer debt.** The consultation on amendments to the "restructuring provisions" closed on 7 June 2013. The changes were originally proposed to come into force on 1 October 2013 but the final form regulations and response to consultation are awaited.
- **DC Code.** The DC Code of Practice and accompanying guidance are expected to become effective in November 2013.
- **Finance Bill.** Draft clauses for the Finance Bill 2014 will be published for consultation on 10 December 2013 with the consultation closing on 4 February 2014.
- **DC charges and scheme quality.** The DWP's consultation on DC charges closes on 28 November 2013 and, following this consultation, the Government will publish proposals on charges and scheme quality.
- **Record-keeping.** An updated version of the Regulator's guidance is expected to be published in 2013 which will include a focus on "conditional data".
- **Public service schemes.** Later in the year, the Regulator will consult on a regulatory strategy and codes of practice for the public service schemes which fall within its remit under the Public Service Pensions Act 2013.
- **IORP solvency.** Further details of EIOPA's work programme on IORP solvency will be published later in 2013.
- **RPIJ.** The Office for National Statistics must report to the UK Statistics Authority by the end of 2013 on the implementation of specified enhancements to RPIJ so that it can be designated as a National Statistic.
- **PPF's insolvency risk provider.** New insolvency risk scores will be available in early 2014 and will be used for the 2015/16 levy year.
- **Simplification of automatic enrolment.** Some of the simplifications came into force on 1 November 2013 and the changes in relation to joining windows will come into force on 1 April 2014.
- **Disclosure regulations.** The new regulations will come into force on 6 April 2014.
- **Changes to the annual allowance and the lifetime allowance.** The lifetime allowance will be reduced to £1.25 million and the annual allowance to £40,000 for tax years 2014/15 onwards.
- **Money purchase definition.** Amendments to the definition of money purchase benefits are expected to come into force on 6 April 2014 with retrospective effect to 1 January 1997. Supporting regulations which provide some easements to the retrospective effect are also expected to come into force on 6 April 2014, with the consultation on these regulations closing on 12 December 2013.

PENSIONS NEWS

- **Pensions Bill.** The Minister for Pensions has stated that it is hoped that the Bill will receive Royal Assent by Easter 2014.
- **Equalisation for GMPs.** During the Parliamentary debate on the Pensions Bill, it was reported that guidance on GMP conversion (which will provide guidance on an alternative method by which schemes can equalise benefits including GMPs prior to conversion) is expected to be provided by spring 2014.
- **Master Trust Assurance Reporting.** The consultation on draft guidance on independent assurance reporting for master trusts closes on 16 December 2013 and final guidance is expected to be published in spring 2014.
- **Short service refunds.** It is intended that short service refunds will be withdrawn from money purchase schemes in 2014.
- **Fiduciary duty.** The Law Commission's consultation on fiduciary duties in relation to investments closes on 22 January 2014 and a report (containing recommendations) is expected to follow in June 2014.
- **State Pension.** The reform of state pension which would result in the end of contracting-out is proposed to take effect in April 2016.



CONTACT DETAILS

Cathryn Everest
Professional Support Lawyer, London
T +44 (0)20 7153 7116
cathryn.everest@dlapiper.com

David Wright
Partner, Liverpool
T +44 (0)151 237 4731
david.wright@dlapiper.com

Claire Bell
Partner, Manchester
T +44 (0)161 235 4551
claire.bell@dlapiper.com

Tamara Calvert
Partner, London
T +44 (0)20 7796 6702
tamara.calvert@dlapiper.com

Michael Cowley
Partner, London
T +44 (0)20 7796 6565
michael.cowley@dlapiper.com

David Farmer
Partner, London
T +44 (0)20 7796 6579
david.farmer@dlapiper.com

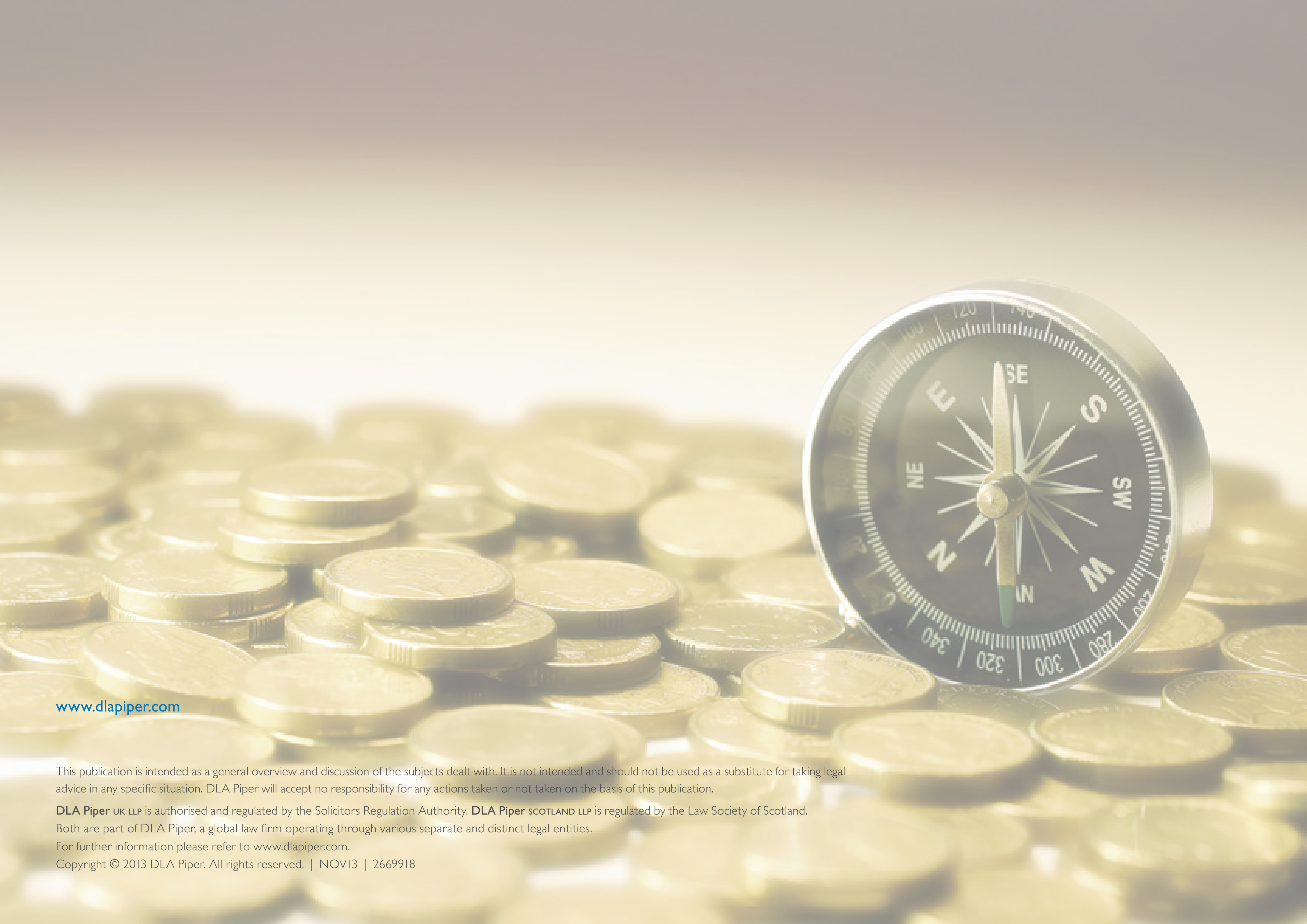
Jeremy Harris
Partner, Manchester
T +44 (0)161 235 4222
jeremy.harris@dlapiper.com

Vikki Massarano
Partner, Leeds
T +44 (0)113 369 2525
vikki.massarano@dlapiper.com

Ben Miller
Partner, Liverpool
T +44 (0)151 237 4749
ben.miller@dlapiper.com

Kate Payne
Partner, Leeds
T +44 (0)113 369 2635
kate.payne@dlapiper.com

Matthew Swynnerton
Partner, London
T +44 (0)20 7796 6143
matthew.swynnerton@dlapiper.com



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