

[CONTACT US](#) |

[DOWNLOAD](#) |

[FORWARD](#) |

[WEBSITE](#)

### In This Issue

Government to move ahead with key proposals on strengthening the Regulator's powers

FCA, Regulator and TPAS publish joint protocol

PPF publishes further update on impact of *Hampshire* court ruling on PPF compensation calculations

PPF sets compensation cap and levy ceiling for 2019/20

Draft new automatic enrolment earnings figures published

GMP conversion and equalisation guidance published by HMRC

Legal training from the Baker McKenzie team

21st Century Trusteeship panel event with the Regulator on 26 March

### Good News

***We, the Baker McKenzie Pensions team, are proud to announce that we have been shortlisted for Pensions Law Firm of the Year 2019 by Pensions Age.***

### Government to move ahead with key proposals on strengthening the Regulator's powers

The Department for Work and Pensions ("DWP") has published its response to the consultation on Protecting Defined Benefit Pension Schemes (the "Response"). This forms part of the work being undertaken by the Government and the Pensions Regulator (the "Regulator") to reform the defined benefit ("DB") regulatory framework in light of high profile corporate collapses such as BHS and Carillion. It follows on from the Government's Green and White Papers on Protecting DB Pension Schemes.

Overall, the Response does not include any great surprises, with the Government confirming that it will progress the bulk of the proposals which it had consulted on over the summer, including the introduction of two new criminal offences and bigger fines for those who seek to evade their DB pension obligations, increased oversight of corporate transactions by the Regulator and changes to the current anti-avoidance regime.

The Response provides some further detail of how some of the key proposals will be implemented, although much of the detail will not emerge until further consultation has been undertaken, Regulatory Codes of Practice and Guidance have been updated and the necessary legislation has been passed. It is possible that we may see draft legislation later this year, Parliamentary time allowing, although the Government has not committed to a firm timetable for when the proposals will be introduced. In the meantime, the Regulator is continuing to implement its "*quicker, clearer, tougher*" approach to DB regulation and engage earlier and more proactively with schemes - particularly in a DB, but also in a

defined contribution, context.

The proposals will be of interest to both trustees and sponsoring employers of DB schemes as well as those who are involved more widely in corporate planning within a group containing a UK DB scheme. Further details of the key proposals being taken forward are provided below.

- **Increasing the Regulator's oversight of corporate transactions**

The Government has confirmed that it will progress a number of measures aimed at giving the Regulator increased visibility of corporate transactions (and take the opportunity to engage with trustees and sponsoring employers as part of that process):

- o **introduction of new Declaration of Intent**

- **what will the new declaration have to include?** The declaration is intended to provide an explanation of the transaction (where a requirement is triggered - see below) together with confirmation that the trustee board has been consulted and how any detriment to the scheme is to be mitigated. The declaration will be given to the trustee board and the Regulator. The Response does not provide any more detail on what the specific content requirements for the declaration will be - the Government has said that it will be considering this further and that guidance will be provided, in due course, in an updated Notifiable Events Code of Practice
- **who will give the declaration?** No more detail has been provided on who will be obliged to give the declaration beyond restating the position set out in the consultation that it will be given by the transaction's "corporate planners"
- **which transactions will trigger a requirement to provide a declaration?** The Government is proposing that three scenarios will give rise to a requirement to provide the new declaration: (i) the sale of a controlling interest in a sponsoring employer (an existing notifiable event); (ii) the sale of a material proportion of the business or assets of a sponsoring employer which has funding responsibility for at least 20% of the scheme's liabilities (this will be one of the "new" notifiable events – see below); and (iii) granting of security over debt to give it priority over debt to the pension scheme
- **when will the declaration need to be given?** The Government has indicated that it will adopt a flexible approach to determining at what point of a transaction the declaration of intent will need to be provided so that individual circumstances of transactions can be taken into account, but it is not yet clear what the detailed timing requirements will be. The Government has said that it "*has no plans to legislate to specify when the sponsoring employer should share the declaration of intent*"

- o **introduction of two new Notifiable Events**

- the Government has confirmed that it intends to introduce two new notifiable events: First, the sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% scheme's liability (thereby increasing the risk that asset as well as share sales will trigger a requirement to notify in the future). Secondly, the granting of security on a debt to give it priority over debt owed to scheme
- timing for notification – the Government had indicated in the consultation that it wanted to bring forward the timing of notifiable events to give the Regulator more advanced warning of corporate transactions, proposing that the requirement should be triggered at the point heads of terms had been agreed - the Government is still supportive of earlier notification and has said it is going to look at this further, but appears to have taken on board concerns that this would not work in practice given that heads of terms are not always agreed as part of a transaction
- the Government has decided not to progress a number of other new notifiable events which had been proposed (e.g. significant change in personnel on an employer's board)

- **New criminal offences and £1 million civil fines**

The Government has confirmed it will take forward two of the criminal offences it had proposed in the consultation. It will, however, drop the proposal to introduce criminal liability for failure to comply with the notifiable events regime. This will be welcome news to trustees, who, if the proposal had been progressed, could have been exposed to potential criminal liability. It remains to be seen how much of a deterrent potential criminal liability will have on directors seeking to evade their pension obligations. The Government has, however, acknowledged that the impact of the new criminal offences "*should be limited for the vast majority of responsible employers*"

- o **new criminal offence of deliberate or reckless behaviour in relation to the pension scheme:** the Response provides some further detail on the penalties which will be attached to the new offence - a maximum 7-year custodial term and/or an unlimited fines, which is consistent with similar offences in fraud/financial services legislation. In addition, the new civil fine of up to £1 million could also be imposed
- o **new criminal offence for failure to comply with a contribution notice:** the Response confirms that the sanction will be an unlimited fine (with the possibility of an additional or alternative civil fine of up to £1 million)

- **Changes to the anti-avoidance regime**

The Government has confirmed that it will take forward almost all of the consultation proposals aimed at strengthening, clarifying and improving the Regulator's anti-avoidance powers

- o **Contribution Notices:** the Government will take forward changes to the current tests which must be met before the Regulator can impose a contribution notice (including the reasonableness test and the material detriment test). It will also make changes to the date at which the cap on the level of a contribution notice is calculated. The Government will continue to consider whether to include a mechanism for uprating the value of a contribution notice
- o **Financial Support Directions:** the Government will extend the scope of the regime to encompass controlling shareholders of a sponsoring employer (who are individuals) and to broaden the scope of FSD enforcement activity (although it is not, as suggested in the consultation, going to change the regime such that individual directors could have become the target of a FSD). It will progress work to "streamline" the FSD process, moving to a single stage approach under which the FSD would create a specific and enforceable obligation on the target. It will rename FSDs as Financial Support Notices. It also plans to amend the definition of "insufficiently resourced", as well as tightening up the forms of financial support which can be put in place. Notably, however, the Government is not planning to extend the current two-year "look back" period "at this time", although it says that it will continue to work with the Regulator on any potential changes

- **Voluntary clearance:** the Government has confirmed that the Regulator will be reviewing the current Guidance on clearance

***Given the impact of the proposals on corporate planning, and potential liability of those associated with DB schemes once the proposals are implemented, trustees and sponsoring employers should maintain a watching brief as the proposals are progressed.***

***In light of the Regulator's more proactive approach, sponsoring employers should continue to consider the impact of corporate activity on DB pension schemes (and any relevant mitigation) carefully, seeking advice where necessary.***

***Trustees and sponsoring employers should also note the continued scrutiny of dividend payments versus deficit repair contributions. Although the Response contains no significant new developments on this point, it emphasises that this will continue to be an area of focus for the Regulator.***

The full Response can be viewed [here](#). For further details of the background to the Response, please see our [March 2018](#) and [July 2018](#) Updates.

## **FCA, Pensions Regulator and TPAS publish joint protocol**

The Financial Conduct Authority ("FCA"), the Regulator and the Pensions Advisory Service ("TPAS") have agreed and published a protocol to help pension scheme trustees ensure that their members are adequately and fully informed when considering transferring their DB pensions.

The protocol sets out how the three relevant organisations will share information with each other in this area, what type of communications will be sent to trustees, reminding them of their obligations in relation to potential transfers, and how such communications will be circulated and logged. In addition, the protocol attaches template letters containing information that should be sent to members by scheme administrators where a relevant transfer is in contemplation.

The protocol was agreed prior to the formal creation of the new Single Financial Guidance Body ("SFGB") that now incorporates TPAS (please see our [January 2019 Update](#) for more information), and so the protocol notes that the SFGB will be closely involved in this initiative.

A copy of the protocol can be viewed [here](#).

[<<back to top](#)

## **PPF publishes further update on impact of *Hampshire* court ruling on PPF compensation calculations**

The Pension Protection Fund ("PPF") has published a [further update](#) in relation to its approach to calculating compensation following the CJEU's ruling in *Hampshire* that pension scheme members should receive at least 50% of the value of their accrued benefits if their employer becomes insolvent.

As reported in our [November 2018 Update](#) and our [January 2019 Update](#), the PPF has already issued two publications on this topic. The reason for the latest update is due to new court proceedings having been started against the PPF which seek to challenge, among other things, the PPF's intended approach to calculating increases due to members as a result of the *Hampshire* court ruling.

The PPF has decided that it will continue with its plans to pay increases to affected members, notwithstanding the current court proceedings. However, the PPF has stated that it currently intends to limit the size of arrears payments so that it can avoid the risk of having to recover overpayments at a later date from members should the court decide that a different approach to increases must be taken.

The PPF has also published an [FAQ document](#) setting out its intended approach to reviewing relevant compensation payments.

[<<back to top](#)

## **PPF sets compensation cap and levy ceiling for 2019/20**

The [Pension Protection Fund and Occupational Pension Schemes \(Levy Ceiling and Compensation Cap\) Order 2019](#) was laid before Parliament on 4 February 2019 to set the PPF compensation cap and levy ceiling.

With effect from 1 April 2019, the compensation cap will rise to £40,020.34 to reflect the increase in the general level of earnings. The 90% level of compensation that applies for members of schemes entering the PPF who are below their scheme's normal pension age will therefore equal £36,018.31.

The order also confirms that for the financial year beginning on 1 April 2019, the overall PPF levy ceiling will rise to £1,058,176,617.

[<<back to top](#)

## **Draft new automatic enrolment earnings figures published**

Draft new automatic enrolment figures were published on 16 January to amend qualifying earnings bands with effect from 6 April 2019.

From 6 April 2019, the lower threshold of the qualifying earnings band will increase from £6,032 to £6,136 for a 12-month pay reference period, and the upper band will increase from £46,350 to £50,000.

The new figures are set out in the [Automatic Enrolment \(Earnings Trigger and Qualifying Earnings Band\) Order 2019](#), and will need to be approved by Parliament before coming into force.

[<<back to top](#)

## **GMP conversion and equalisation guidance published by HMRC**

On 23 January 2019, HM Revenue and Customs ("HMRC") published [guidance](#) in relation to the possible conversion of Guaranteed Minimum Pensions ("GMPs") into other scheme benefits, and the related equalisation of those pensions to remove certain inequalities.

The guidance notes that GMP conversion offers a means by which a scheme can convert its GMPs into other scheme benefits, which is a process which should create administrative "easements". The guidance also notes that a methodology to achieve conversion is available (as set out in the [Government's consultation paper response of March 2017](#)), but that there are other available methods, and that legal advice on the process should be taken. However, the guidance does not directly refer to the *Lloyds* court hearings in relation to equalisation of GMPs (see our [October 2018](#) and [December 2018](#) Updates for more information), and so is likely to be of limited value at this stage to trustees considering this particular option.

[<<back to top](#)

## **Legal training from the Baker McKenzie team**

We have produced a new pensions [training programme brochure](#) which contains information on the various areas of legal training that we can offer to our clients, as well as the dates for our upcoming events in 2019. ***Several of our sessions are aimed at trustees, but many may also be relevant to employer clients.*** Please contact your usual Baker McKenzie contact for more information.

[<<back to top](#)

## **21st Century Trusteeship panel event with the Pensions Regulator on 26 March**

We are hosting a panel event on 26 March on the topic of 21st Century Trusteeship and good governance. We are expecting a lively debate, and David Fairs, who is the Executive Director of Regulatory Policy, Analysis and Advice at the Pensions Regulator will be taking part and sharing his insights into current and future strategy in this area. Other panellist include: Susan Hoare, Retirement Practice Partner of Aon, James Colegrave, Senior Consultant of Willis Towers Watson and Chantal Thompson, Pensions Partner of Baker McKenzie.

***This event is of interest to both professional and non-professional trustees, pensions managers and in-house pensions specialists. If you are interested in attending please get in touch with [kate.bullard@bakermckenzie.com](mailto:kate.bullard@bakermckenzie.com).***

[<<back to top](#)

## Contact us

If you wish to discuss any of these issues further, please contact your usual Baker McKenzie lawyer.

[Jeanette Holland](#)   [Robert West](#)   [Arron Slocombe](#)   [Chantal Thompson](#)   [Jonathan Sharp](#)

Editor: [Tracey Perrett](#)



Disclaimer - This newsletter is for information purposes only. Its contents do not constitute legal advice and should not be regarded as a substitute for detailed advice in individual cases.

Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This communication has been prepared for the general information of clients and professional associates of Baker & McKenzie. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

[Privacy Policy](#)

© 2019 Baker McKenzie