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UK Pensions Update

March 2019

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Pensions Regulator issues Annual Funding Statement

The Annual Funding Statement for 2019 is particularly relevant to trustees and employers with valuation dates falling between 22 September 2018 and 21 September 2019. However, several aspects of the Statement are likely to be relevant to all trustees and employers of defined benefit ("DB") schemes and may well feature in the revised DB Funding Code (due out in draft this Summer).

The Pensions Regulator (the "Regulator") notes in its Statement that it has observed good practice among schemes which seek to set long-term funding targets ("LTFTs") and states that it now expects all schemes to follow similar practices and set LTFTs in the future. Trustees have been told that they should then be able to evidence how their shorter-term investment and funding strategies are aligned with the LTFT that has been set. When setting their strategies, the Regulator also urges trustees to focus on scheme maturity, given that the majority of schemes are now closed to new members. A large section of the Statement then contains various tables setting out the Regulator's expectations for key risks and actions for trustees to be aware of, categorised according to a combination of schemes' covenant strength, funding position and investment profile.

Further points raised in the Statement include parameters that are likely to be acceptable to the Regulator in relation to the level of dividend payments distributed by employers (which will depend on factors such as the level of deficit repair contributions owing to the pension scheme, the relevant scheme's recovery plan length and the employer's covenant position) and related commentary that the Regulator is intending to continue with its current interventionist approach of questioning trustees and employers about dividend payments (regardless of a scheme's employer covenant strength).

Finally, the Regulator notes in its Statement that it will be engaging with schemes ahead of 2019 valuations where it considers their existing recovery plans to be unacceptably long (the Regulator states in another section of the Statement that the median recovery plan length is 7 years, but that schemes with strong employer covenants would be expected to have recovery plan lengths which are "*significantly shorter*" than this).

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Brexit

At the time of writing, the exact timing of the UK's withdrawal from the EU, and the way in which this will be achieved, are unclear. You can stay up to date with the latest developments on Baker McKenzie's Brexit Blog.

The most recent statement issued by the Pensions Regulator, which we reported on in our January Update, can be found here.

Our publication, Brexit: the people implications, provides a summary of the impact of Brexit on employees, including on employees' pension scheme benefits, in both a deal and no deal scenario.

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Single Financial Guidance Body to be called Money and Advice Service

The Single Financial Guidance Body, which was established last year to bring together the Pensions Advisory Service, the Money Advice Service and PensionWise is being officially named the Money and Pension Service (MAPS). The new name will take effect from 6 April 2019.

You can find more detail on MAPS in our January 2019 and October 2018 Updates.

The new body has not yet provided guidance to trustees and administrators on how it should be signposted. Until that has happened, we recommend that trustees wait to update member booklets and other relevant member communications.

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2019 GMP revaluation and increase orders published

The Social Security Revaluation of Earnings Factor Order 2019 and the Guaranteed Minimum Pensions Increase Order 2019 have been published and will come into force on 6 April 2019. Increases are provided for of 2.8% and 2.4% respectively.

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Implementation of CMA's remedies on investment consultancy and fiduciary management services continues

The Competition and Markets Authority (CMA) has consulted on draft legislation which it is proposing to put in place in order to implement the CMA's remedies on the issues identified in its final report on the supply and acquisition of investment consultancy and fiduciary management services, which we reported on in our December Update.

The final Order is expected to come into force this Summer (the statutory deadline for the CMA to implement is 11 June 2019), although the CMA has provided no firm date for when this will be.

The Regulator has confirmed that it will be engaging with industry stakeholders and the CMA on the development of guidance to support trustees to comply with the new governance requirements and will look to consult on the guidance this summer. HMRC has also confirmed that it will be consulting on the CMA's recommendation for it to extend the FCA's regulatory perimeter to cover services provided by investment consultants. The full Government response to the CMA recommendations can be viewed here.

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Government publishes its response to consultation on delivering Collective Defined Contribution Pension Schemes

The Department for Work and Pensions (the "DWP")'s response to its consultation on delivering Collective Defined Contribution ("CDC") Pension Schemes can be viewed here. Please see our November 2018 Update for more information on the original consultation.

The Response provides a detailed description of how it intends to fit CDC schemes into the current pensions landscape, for example, on matters such as trustee duties, tax treatment and automatic enrolment requirements. It also considers the specific requirements that will attach to CDC schemes, such as the authorisation process by the Regulator, investment requirements, member communications and other structural issues such as suitable wind-up triggers and funding buffers. Perhaps most significantly, the Response confirms that CDC schemes will be treated as money purchase arrangements for the purposes of pensions legislation (with relevant modifications), and the Government has confirmed that the scheme-specific funding regime and statutory employer debt regime will not apply to them. Areas that are still under consideration by the Government include the question of whether members transferring from a CDC arrangement would need to take financial advice on a transfer and also how a CDC scheme specific cap and charges regime might operate.

The Response notes that the Government's priority is to legislate for CDC schemes that are to be set up by single or associated employers, but that it will aim to legislate in a way that can quickly accommodate other models of CDC if appropriate in the future. The primary and secondary legislation to introduce the new CDC statutory framework is to be introduced "*as soon as Parliamentary time allows*", but this may take one to two years in practice.

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Professional standards for trustees published

The Professional Trustee Standards Working Group has published new standards which all professional trustees of occupational pension schemes will be expected to meet, together with information about a new associated accreditation regime.

The general standards applying to all professional trustees cover matters such as fitness and propriety, behaviours and skills, delegation and conflicts of interest. A further set of standards have been included which relate specifically to chairing a trustee board or assisting the chair. The final set of standards are relevant only to professional trustees who act as a sole trustee.

The standards and accompanying accreditation regime are essentially voluntary, but they have been welcomed by the Regulator and are likely to have a significant impact on the provision of professional trustee services in the future.

The Association of Professional Pension Trustees Council will be responsible for maintaining the standards and will oversee the accreditation framework, which will be run by the Pensions Management Institute ("PMI"). The new framework is expected to be launched later this year.

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PPF publishes response to consultation on pensions dashboards

The Pension Protection Fund (the "PPF") has published its response to the consultation on pensions dashboards, issued in December 2018.

In its response, the PPF states that it is supportive of the ambition underlying pension dashboards, but highlights some of the challenges that will have to be overcome for it to be able to supply data relating to schemes in the PPF directly to dashboards in compliance with data protection legislation. In addition, the PPF notes in its response that the disclosure of information is not currently within its statutory functions, and considers that it would be helpful to have legislation put in place that would put the PPF (and the legacy Financial Assistance Scheme) into the categories of scheme that could disclose to the dashboard.

The PPF agreed with the Government that a period of 3-4 years seemed a reasonable timeframe for eligible schemes to be supplying their data to dashboards and that 2-3 years would be a realistic timeframe for it to connect with the dashboard, given wider IT transformation projects that are underway within the PPF.

A copy of the response can be viewed here.

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Pensions Disputes News

High Court ruling confirms that trustees do not owe a fiduciary duty (in the fullest sense) to the employer

The court in *KeyMed v Hillman* was asked to rule on a number of claims brought by KeyMed against two of its directors, who were also members and trustees of the company's pension schemes.

One of the most interesting claims brought as part of this litigation from a legal perspective, although not the most significant in the overall context of the litigation, was a claim that the two defendants had breached their duty, in their capacity as trustees of the pension schemes, to the employer. KeyMed alleged that they had breached this duty by establishing executive pension arrangements for themselves and by setting of unduly conservative investment and funding strategies.

The extent to which trustees can (or should) take an employer's interests into account when acting as trustees can be difficult area for trustees to navigate in practice. It is not a topic which the courts are often asked to look at, so this decision will be of interest to both trustees and employers, particularly of DB schemes.

The court found that there is no fiduciary obligation in the fullest sense, but that it is proper to consider the interests of the employer so long as they do not conflict with the interests of the members or the purposes of the pension scheme (usually, as in this case, the provision of benefits to members). The judge found that, in this case, there was no unmanageable conflict.

In coming to his conclusion, the judge may have been influenced by the fact that the claim about breach of the defendants' fiduciary duties as trustees was part of an attempt by KeyMed to fix the defendants with liability for unlawful conspiracy. This, in turn, was suggested to be partly the result of a serious breakdown in the relationship between KeyMed and the directors prior to the litigation being brought by KeyMed, culminating in an employment claim being brought against KeyMed by one of the defendants.

The context in which the trustees' duties were considered was slightly unusual. However, the conclusion reached by the Court in this case, is generally consistent with the approach which was taken by the High Court in the MNRPF case (which the judge in this case cited). Our view is that the decision does not represent a fundamental shift in the law in this area.

In summary, trustees do not owe a fiduciary duty (in the fullest sense) to employers, but may properly take the interests of the employer into account if it does not conflict with the interests of the members.

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Contact us

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

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