C/M/S/ Cameron McKenna

Pensions

Update

Issue 24 – January 2006

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Editorial

Nigel Moore

2005 has been the most important year the pensions industry has seen since 1997 when the Pensions Act 1995 came into effect. In 2005 we have seen the implementation of much of the Pensions Act 2004; the establishment of a new Pensions Regulator; the introduction of the Pension Protection Fund and the Financial Assistance Scheme; Regulations and guidance to assist in the implementation of the Finance Act 2004; the implementation of the Civil Partnership Act 2004; and the publication of the second Pension Commission Report setting out recommendations for changes to the UK pensions system.

One of the most significant events was the introduction of the new Pensions Regulator in April 2005 to replace Opra. The new Regulator has wider powers (significantly in relation to the moral hazard provisions) and a more risk-based focus. It was extremely active in 2005, publishing numerous codes and draft codes of practice setting out what it considers to be necessary to comply with a variety of statutory obligations together with a variety of other publications. The other significant area of activity for the Regulator has been in relation to applications for clearance (to avoid the application of the moral hazard provisions) and approval of withdrawal arrangements. These new functions of the Regulator do appear to be having a significant impact on the way in which employers and trustees are approaching pensions issues.

Another new regulatory body which emerged in 2005 was the Board of the Pension Protection Fund. The PPF was designed to provide protection for members whose employer becomes insolvent and whose occupational pension scheme has insufficient resources to pay promised benefits. Probably the most publicised activity of the PPF Board has been the publication of its proposals in relation to the calculation of the risk based levy (which will make up 80% of the total levy from April 2006). The risk based levy is to be based on the insolvency risk of the employer (as determined by Dun & Bradstreet and, in multi-employer schemes depending on the content of the declaration of scheme structure form) and on underfunding risk (based on valuations submitted to it by 31 March 2006) and could represent a significant cost for schemes.

The other key provision in the Pensions Act 2004 related to the introduction of the new scheme specific funding requirement to replace the MFR. Although this should have come into force in September to comply with the European Pensions Directive, the Regulations were delayed several times because of problems in finalising the detail of how they would actually work. However, the Regulations have now been published and came into force on 30 December 2005. The Pensions Regulator has also issued a code of practice explaining how it expects the new requirements to be operated.

Some of the provisions of the Pensions Act 2004 have yet to come into force and 2005 saw consultation papers published on a variety of its provisions including the new scheme modification requirements; employer consultation obligations in relation to certain proposed amendments and member-nominated trustees. 2006 should see these provisions come into force.

The Finance Act 2004 has also generated a large number of Regulations and draft Regulations together with a new manual explaining how the simplified regime is intended to work (which is still in the course of being drafted). The most significant set of draft regulations deal with the transitional provisions for references to existing Inland Revenue limits in scheme documentation. There is still some room for improvement with the draft but it broadly allows schemes to continue to operate in accordance with the existing regime until 2011 (unless a scheme specifically disapplies the application of these Regulations in the interim).

Despite the volume of pensions legislation which has been published in the last two years it seems that there may be even more to come following the publication of the second Pension Commission Report. The content of the Report is discussed elsewhere in this Update but if its recommendations are implemented it could see all employees with some form of funded pension savings and state pension age rising, possibly as high as age 68, in the future.

The pensions team has continued to grow with Camilla Barry joining as a senior assistant and Venetia Trayhurn and Maria Rodia as newly qualified solicitors. Many members of the team have also been actively involved in consultation with the Government on the new legislation published in 2005 and coming in 2006 through the various committees of the Association of Pension Lawyers (Nigel Moore is on the main committee; Mark Atkinson on the Legislative and Parliamentary sub-committee; Keith Webster on the international sub-committee; Mark Grant on the litigation sub-committee; and Mark Kowalik chairs the education and seminars committee).

Finally, we have continued to regularly update our widely praised Plain English Guide to the Pensions Act 2004 throughout the year to incorporate references to Regulations and Codes of Practice. This is a free on-line guide available to subscribers of our Law-Now service. To register, simply go to www.law-now.com/law-now/registerpensions and follow the registration instructions.

If you require any further information on anything contained in this bulletin or any other pensions related matters, please contact either your usual contact in the pensions department or Nigel Moore (020 7367 3405), Mark Grant (020 7367 2325), Mark Atkinson (020 7367 2184), Simon Pilcher (020 7367 2593) or Keith Webster (020 7367 2387).

If you would like someone else in your organisation to receive our Updates, would like to register for any of our seminars, or would like to amend your contact details, please contact Donna Waters (020 7367 3581 or donna.waters@cmck.com).

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The Pensions Regulator

Simon Pilcher

Codes of Practice

No.1: Reporting Breaches of the Law, 6 April 2005

- Sets out the categories of those required to report breaches of law relevant to the Pensions Regulator. Potential reporters now include trustees, managers, scheme administrators, employers and advisors of occupational pension schemes.
- Explains how the duty to whistleblow should be discharged and how to decide whether a breach is of material significance. The Regulator expects those under a whistleblowing obligation to be aware of it, train relevant members of staff and have a procedure in place to deal with any relevant breaches.
- Looks at what constitutes "as soon as reasonably practicable" for the purposes of whistleblowing.

No.2: Notifiable Events, 30 June 2005

- Gives guidance to trustees and employers when reporting a notifiable event.
- Sets out what to do if trustees cannot reach a consensus to report collectively.
- Looks at what constitutes "as soon as reasonably practicable" for Notifiable Events reporting. What is reasonably practicable depends on the circumstances. In all cases however it implies urgency.
- Sets out the minimum information that should be included in a notification.
- Says that trustees must take "all reasonable steps" to comply with the notifiable events duty and that employers must comply with the duty to notify unless they have a "reasonable excuse" for not doing so. Looks at what this means in practice.

Draft Codes of Practice

Trustee Knowledge and Understanding (TKU), March 2005

- States the high level principles of knowledge and understanding that trustees must have to enable them to meet the legal requirements for all occupational schemes. In addition, there are requirements for trustees to be conversant with certain scheme specific documents.
- The exact scope and extent of the knowledge and understanding for individual trustees needs to be appropriate for their particular roles. The process of determining any gaps in knowledge and taking steps to ensure that learning is undertaken should be regularly repeated.
- There is a time period of six months during which a newly-appointed trustee may undertake the necessary learning activities for the role.

Funding Defined Benefits, March 2005 (Revised December 2005)

- Sets out guiding principles for trustees when making decisions in relation to scheme funding and looks at matters that trustees should take into account, when evaluating the advice given by their scheme actuary and to help them when they seek the employer's agreement. Also sets out what is regarded as reasonable periods for passing certain information to the Pensions Regulator.

Dispute Resolution - Reasonable Periods, April 2005

- Provides guidance to trustees or managers of occupational pension schemes when they have to decide on matters in dispute and notify the applicant of their decision.
- Covers the Pensions Regulator's expectation of what the trustees or managers should consider as the reasonable time periods stated in the legislation. In practice this means that IDR complaints must be dealt with within 10 months if a two-stage process is retained.

Early Leavers - Reasonable Periods, May 2005

- Looks at requirements to notify early leavers with at least 3 months and less than 2 years' service of their rights. States that members must be given a reasonable period within which to reply (at least three months) and outlines a default procedure where a member does not reply.

Reporting Late Payment of Contributions to Occupational Money Purchase Schemes, May 2005

- Sets out how trustees can meet the requirements to report late payments of contributions to the Pensions Regulator and members within a reasonable time. Looks at what factors make a late payment "material" and outlines what is a "reasonable period" for reporting in differing circumstances.

Reporting Late Payment of Contributions to Personal Pensions, May 2005

- Sets out how trustees can meet the requirements to report late payments of contributions to the Pensions Regulator and members within a reasonable time. Largely mirrors the Occupational Money Purchase Schemes code of practice.

Modification of Subsisting Rights, July 2005

- Provides guidance to trustees of occupational pension schemes about how they can comply with the requirements of sections 67 to 67I Pensions Act 1995 where modifications to the scheme rules are being considered which affect members' subsisting rights.

Member-nominated Trustees and Directors - Putting arrangements in place, July 2005

- Looks at the nomination and selection processes required to put member-nominated trustee arrangements in place.
- Sets out what constitutes a "reasonable period" for deciding upon arrangements (up to 6 months) and for implementing arrangements (6 months) and a "reasonable interval" for re-running a nomination process in the event of insufficient nominations (normally 12 months).

Reasonable periods for the purposes of the Occupational Pension Schemes (Disclosure of Information) Regulations 2006, September 2005

- Sets out the Regulator's views as to what constitutes the reasonable time periods outlined in the draft Occupational Pension Schemes (Disclosure of Information) Regulations 2006.

Internal Controls, September 2005

- Describes and gives examples of internal controls and explains their role in *"managing and mitigating risk"*. States that trustees need to determine the risks relevant to their scheme and determine a suitable internal control framework. Internal controls are expected to be proportionate to the level of risk identified.

Guidance

Funding Defined Benefits, March 2005

- Contains practical suggestions and examples (including an action plan and specimen documents) to be of assistance to trustees in meeting the legislative requirements for funding defined benefits. It is important to read this guidance in conjunction with the draft code of practice.

Clearance Statements, April 2005

- The Pensions Regulator only expects clearance to be sought where there has been an event "affecting an entity which is financially detrimental to the ability of a defined benefit scheme to meet its pension liabilities" and the scheme has an FRS17 deficit. However, clearance remains an entirely voluntary process.
- Specifies three different classes of event (Type A, B and C) to help parties decide whether they should seek clearance. Type A events being specified events which are financially detrimental to the ability of a defined benefit scheme to meet its pension liabilities and for which it may be appropriate to seek clearance. Type B events being those which do not affect the pension creditor and for which clearance is not necessary. Type C events being events that might affect the pension creditor. Clearance is not relevant for these events if they do not also fall within Type A.
- Guidance is given on the Pensions Regulator's role when clearance is sought for a Type A event.
- The Pensions Regulator envisages that, where possible, scheme trustees will be consulted before the Regulator issues a warning notice indicating its intention to grant clearance.

Complying with the Duty to Report Breaches of the Law, April 2005

- Gives guidance and examples for specific paragraphs of the code of practice (above). Explains the traffic light framework for whistleblowing dealing with events in which the Pensions Regulator is interested (red), events in which it might be interested (amber) and those in which it is not interested (green).

The Pensions Regulator and the Freedom of Information Act 2000, April 2005

- Guidance on how to obtain information from the Pensions Regulator made available under the Freedom of Information Act 2000.

The Notifiable Events Framework, August 2005

- Guidance on the framework to the notifiable events regime, setting out in more detail how the Pensions Regulator (Notifiable Events) Regulations 2005 should be read in light of Directions issued by the Pensions Regulator under Section 69(1) Pensions Act 2004.

Multi-employer Withdrawal Arrangements, November 2005

- Guidance on when a withdrawal arrangement may be applicable, how and when to apply to the Pensions Regulator for approval of a proposed withdrawal arrangement, what happens during the approval process, and what factors the Pensions Regulator is likely to consider before granting approval.
- States that the Pensions Regulator will only approve a withdrawal arrangement when its terms have been agreed between the parties to it.
- Sets out the various documents which must be submitted to the Pensions Regulator with the withdrawal arrangement.
- Looks at the potential conflicts of interests on trustee boards in negotiating these agreements with a scheme's employer. The Regulator expects conflicted trustees to either not take part in the decision-making process or rely on independent professional advice.

Directions

Directions Issued by the Pensions Regulator Under Section 69(1) Pensions Act 2004, 6 April 2005

- Sets out a number of important exemptions to the requirement to report notifiable events.

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Camilla Barry

Pension Protection Fund

An Introductory Guide to the Pension Protection Fund, March 2005

- Provides an introduction to the PPF and explains the basic principles of how the PPF will operate in relation to a single employer pension scheme. It sets out briefly which schemes will be eligible for the PPF, the roles and responsibilities of the parties involved, how the PPF will be paid for, the payment of compensation, what happens during an assessment period and contains a glossary of terms.

The Pension Protection Fund, Guidance for trustees March 2005 (updated October 2005)

- Prepared to help trustees and other professionals understand their roles and responsibilities associated with managing an eligible pension scheme through the PPF's assessment process. The process will establish whether a pension scheme will enter into the PPF.

PPF Guidance for undertaking the entry valuation in accordance with Section 143 of the Pensions Act 2004, April 2005

- Intended for actuaries undertaking valuations to determine the level of funding in accordance with section 143 Pensions Act 2004. Sets out the detailed assumptions and discount rates to be applied by the actuary responsible for the valuation and contains a certificate to be provided to the Board after the valuation has been completed.

PPF Guidance for undertaking the risk based levy valuation in accordance with Section 179 of the Pensions Act 2004, April 2005 (updated October 2005)

- Intended for actuaries undertaking valuations to determine the level of funding in accordance with section 179 Pensions Act 2004. The valuation results will be used to set and calculate the risk based pension protection levy in accordance with section 175 Pensions Act 2004. Guidance sets out the detailed assumptions and discount rates to be applied by the actuary responsible for the valuation and contains a valuation certificate.

PPF Guidance – Compensation Cap Factors, May 2005

- Provides detail about the compensation cap and lists factors which will be used in determining the level of compensation payable.

PPF Guidance – Early Retirement Factors, May 2005

- Sets out the early retirement factors to be applied where a person is entitled to early payment (i.e. earlier than normal pension age/normal benefit age) of compensation from the PPF but has not yet received it.

PPF Guidance – How we deal with your concerns, June 2005

- Sets out the process for making a formal complaint of maladministration relating to the way a case has been handled by the PPF and for requesting a review of a decision made by the PPF.

PPF Guidance – A Guide to the Pension Protection Fund Levies 2005/6, June 2005

- Explains how the administration levy and the initial levy operate, and in particular how the levies are calculated, how they are collected, who pays them and when they must be paid.

PPF Introductory Document – Statement of Investment Principles, June 2005

- Outlines the principles and policies governing determinations about investments made by or on behalf of the Board in the management of the PPF's assets.

PPF Consultation Document – The Pension Protection Levy Consultation Document, July 2005

- Seeks responses to the Board's proposals for calculating the pension protection levy from April 2007 and its modified proposals for the financial year beginning April 2006.

PPF Guidance - Valuation Bases – Q&As, August 2005

- Provides further explanation of the valuation bases adopted for PPF entry and for levies together with a justification for the differences between the bases used for those two purposes.

PPF Guidance for insolvency practitioners, September 2005

- Prepared to help insolvency practitioners understand their roles and responsibilities in managing an eligible pension scheme through the PPF's assessment period. Explains how the assessment period works and sets out the stages at which action by the insolvency practitioner is necessary, in particular following insolvency events, confirmation of scheme rescue, scheme failure, withdrawal or notice that a rescue has not occurred or is not possible.

PPF Guidance – Commutation Factors, September 2005

- Sets out the commutation rates to be used where a person has become entitled to PPF compensation but has not yet received it, as permitted under Regulation 19 of the Pension Protection Fund Compensation) Regulations 2005.

PPF Consultation Document – The Pension Protection Levy Consultation Document – Update, October 2005

- Updates the initial consultation paper. Sets out further information on calculations for schemes with multiple participating employers, special contributions made to the pension scheme since the last formal valuation and the timetable for providing additional information to the Board.

PPF's final version of risk based levy proposals, December 2005

- Key provisions include the levy to be capped at 0.5% of a scheme's PPF liabilities to benefit weaker schemes and that no risk based levy is payable for schemes over 125% funded on a PPF basis.
- Also provides for contingent assets to be included in 2006/07 levy calculation.

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Cases

Trustees of the Saffil Pension Scheme v Curzon (High Court), 2 March 2005
This was an appeal by the trustees to the High Court against a decision by the Pensions Ombudsman to grant an incapacity pension to a member which they had declined.

The test under the rules for an incapacity pension was whether the member had left employment by reason of permanent incapacity arising from physical injury or ill health. The member had a back injury. The only way he could resume his normal job was if he had an operation. However, due to the member being "seriously obese" the operation would be unsafe.

Although there was medical evidence which made several references to the member's obesity, it did not do so in the context of saying that he could cure it himself and thereby take a critical step towards ending his incapacity. The Ombudsman was therefore right to conclude that the trustees had come to a perverse decision unsubstantiated by the evidence. The Ombudsman had acted within his powers in deciding to grant the pension rather than remitting the matter back to the trustees. The Ombudsman had the statutory power under the Pension Schemes Act 1993 to direct any person responsible for the management of the scheme to take such steps as he might specify in his determination. While neither the Ombudsman nor the court should substitute their own judgment for that of the trustees, there was an exception where the trustee's decision was perverse (as here).

Furthermore, it was unsatisfactory for the trustees not to give reasons for their decision where the decision was one of fact.

Cornwall and Others v Newhaven Port & Properties Ltd (High Court), 14 April 2005
This was a claim for summary judgment by the trustees. The defendant ("D") was an employer in a multi-employer pension scheme. On its withdrawal from the scheme, a scheme valuation was carried out and D was certified by the actuary as owing a debt under Section 75 Pensions Act 1995. This was assessed as 16.5% of the scheme's overall deficit. D challenged the certificate and apportionment and the trustees sought summary judgment.

The court held that, in principle, the parties were bound by the certificate and opinion of the actuary in calculating the amount of debt. In respect of the deficiency calculation, given that the legislation entrusted the calculation to the scheme actuary and the methodology was prescribed, it was reasonable to infer that Parliament had intended the parties to be bound. The apportionment calculation was said to be more vulnerable to attack (presumably where there was, say, manifest error). However, in this case, there was no evidence to suggest that the wrong methodology had been used. D had no real prospect of success, and the trustees were entitled to judgment.

Re Phoenix Venture Holdings Ltd (Company No 2692 of 2005) (High Court), 20 May 2005
The principal employer of the MG Rover Group pension scheme went into administration and the scheme was put into winding-up by the sole trustee. When the scheme had entered winding-up, a debt of approximately £200,000 was attributable to Phoenix, one of the participating employers, pursuant to Section 75 Pensions Act 1995. On the same day as the scheme was placed into winding-up the trustee executed a deed of amendment which purported to give the trustee the power to apportion the deficit amongst all employers in such shares as the trustee in its absolute discretion decided. Under this new power, on 28 April 2005 the trustee informed Phoenix that it must pay £15m towards the deficit and that all employers would be jointly and severally liable for the whole deficit.

On 12 May 2005 the trustee resolved to apportion £25m of the deficit to Phoenix. It also reserved the right to apportion a further part of the deficit to Phoenix in the future, thereby increasing its potential liability for the deficit.

Phoenix disputed the trustee's ability to apportion the debt in this way, arguing that the imposition of joint and several liability for the whole debt did not constitute apportionment at all. They said that the trustee's action in executing the deed was not authorised and, furthermore, that the passing of the resolutions had not been a valid exercise of the trustee's powers. They submitted that the trustee was bound to have regard to its interests (as a residual beneficiary) in exercising the power. Furthermore, it was submitted that the first resolution (which conferred the power "if a debt arises…when the scheme commences winding-up") was ineffective, as no debt had arisen. The second resolution was therefore also void on this basis.

Phoenix was granted an injunction to prevent the trustee from either presenting a petition to wind it up or from obtaining an administration order in respect of it for so long as adequate security for its debt to the scheme was satisfied. The deed of amendment was authorised under the scheme rules. However, the first resolution was not a valid exercise of the trustee's power of apportionment, since no debt had arisen under section 75 Pensions Act 1995 (it could only arise after winding-up had commenced and the amount of the debt had been ascertained by the actuary). In addition, the court held that "even if the power had arisen and there was subject matter on which it could operate, the creation of a joint and several liability for the whole was not an "apportionment" in "shares" amongst a class of six employers." Accordingly, the second resolution was also invalid.

Drake Insurance Plc v MacDonald (High Court), 9 June 2005

The rectification of an amendment to the rules of a pension scheme will be ordered where the amendment failed to reflect the intention of the parties. In this case, the original rules required trustee and employer consent for early retirement, subject to an actuarial reduction. The rule was amended to remove the requirement for consent and the provision for actuarial reduction. The employer argued that it had not been its intention to bring about a right to an early retirement pension without actuarial reduction and sought rectification of the amendment by re-inserting the original words that provided for the actuarial reduction. The court granted the rectification. The documentation revealed that the employer's intention had been to effect the removal of the requirement for consent by the employer and the trustees but only on the basis that a cost neutral actuarial reduction would continue to apply. The deletion of the provision for actuarial reduction resulted in a failure to reflect the intention of the parties. The evidence of parties' intentions could come from subsequent and prior conduct showing the parties' understanding of what the words meant.

Sieff v Fox (High Court), 23 June 2005

The Duke of Bedford made a settlement in 1971 creating separate trusts of several different funds. The trustees of the settlement made an appointment of assets in favour of Lord Howland relying on certain incorrect tax advice. The trustees claimed they would not have made the appointment if they knew the actual tax consequences and applied to have their actions set aside under the rule in Hastings Bass or because their decision was made under a fundamental misapprehension. If the claim succeeded the trustees hoped to avoid the liability to meet the substantial tax liabilities which had then arisen. It was claimed that, first, the trustees had failed to take into account tax charges, secondly, they were under a duty to consider these because of the impact on beneficiaries, thirdly, if they had been aware of the impact, they would not have made the appointment and finally, if this was the case, the trustees' advisers were at fault in not making the trustees aware of these consequences of the proposed course of action.

The judge allowed the decision to be set aside under the principle in *Re Hastings-Bass: "Where trustees act under a discretion given to them by the terms of the trust, in* *circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account".*

The judge set aside this appointment of assets as the trustees had a duty to take into account tax consequences, but failed to do so because of incorrect advice. The effect of their decision was not what they intended and they would not have acted as they did had they known the correct situation. The judge stated that the courts could limit the application of the rule in Hastings Bass by taking a reasonable view of what trustees ought to take into account, and adopting a critical approach to contentions that the trustees would have acted differently had they known the true facts.

Pinsent Curtis v Capital Cranfield Trustees Limited (Court of Appeal), 13 July 2005

A defined benefit scheme's rules allowed the trustees to claim "appropriate" contributions from the employer until the end of the notice period leading to winding-up. The question was whether the contribution rule permitted the trustees to demand a buy-out debt from the employer before the expiry of that notice period. The Court of Appeal agreed with the first instance judge that the clear meaning of the rule was for the trustees to have the power to decide that the company should make a contribution to the Scheme to enable the benefits of the members to be funded on a winding-up. The liability of the company to make an appropriate contribution did not terminate until the end of the period of notice it had given.

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Pensions Ombudsman

Mark Grant

Rogers (N01041)

Making good loss from delay in handling ill health early retirement

The member would have received a higher level of benefits if the decision to pay her ill health benefits had been made before her 60th birthday. The Ombudsman held that there was an unreasonable delay in making the decision and that the trustees had not handled the case with sufficient urgency. Therefore, he ordered that the trustees pay the benefits that would have been payable had the decision been made before her 60th birthday.

In general, on the matter of what date the benefits ought to be backdated to once the decision has been made, the Ombudsman has held that (depending on the terms of the scheme rules) payments should be made from the date that the trustees/employer have sufficient evidence to make the decision. This is sometimes the date of the application and sometimes much later (especially when there is conflicting medical evidence).

Trouton (N00812)

Decision making in ill health cases and weighing medical evidence

This case highlights that when considering an application for an incapacity pension, it is very important to ensure that when seeking medical advice, the medical practitioner is asked the right questions. If the correct questions have been addressed, as long as there is enough evidence to support the decision made by the trustees/employer, the Ombudsman will not challenge it.

In this case the Ombudsman reviewed the way that the decision-maker had dealt with the medical evidence obtained as follows: *"As is not uncommon, the various medical opinions which have been obtained by one or other party are not unanimous either as to the diagnosis or, more significantly as to the prognosis…For the decision maker to favour one doctor's opinion over that of another is not in my judgement evidence of any perversity in the decision, but simply represents the weighing of one set of evidence against another."*

White (P00925)

Burden of proof in Ombudsman cases

The member complained that he was wrongfully refused his application for injury benefits. For the member to be entitled he had to have suffered an injury solely in the course of official duty. The argument in this case was whether his condition was caused purely by an incident at work or whether it was caused in part by a pre-existing condition. The Ombudsman considered the issue of burden of proof. He stated:

"An Ombudsman does not expect an applicant to bear a burden of proof in the same way as the Court does of a Claimant. The applicant to an Ombudsman makes a complaint or a reference. It is then for the Ombudsman, using his statutory powers if necessary; to investigate the matter and obtain such evidence as is necessary and obtainable. Unless the Ombudsman can be satisfied, on the balance of probabilities, of a particular fact, which is key to making a finding against a Respondent, then such a finding cannot be made; in that sense the burden of proof can be seen as falling on the Ombudsman."

The Ombudsman decided that the decision taken in this case had not been on the basis of the balance of probabilities but instead had sought to impose an even higher standard of proof than that beyond reasonable doubt. The Ombudsman thought the Government department administering the scheme should have erred on the side of giving the benefit of doubt to the member and quashed the decision as a result.

Molnar (N01222)

Member should be shown covert surveillance evidence before decision is reached on ill health retirement

The member made an application for ill health retirement. She complained that the medical appeal board had considered issues other than those concerning her medical condition. The employer arranged for covert surveillance of the member and submitted the video to the medical advisers who considered the member's case. The Ombudsman decided that it was maladministration for the member not to have been given the opportunity to see the evidence and respond. However, he went on to say that while he had identified maladministration he did not consider the decision to decline her application for ill health retirement as being perverse.

Gander (N01128)

No contractual right to an unreduced transfer value

The member alleged maladministration when the transfer value quoted to him and which he had accepted was not paid in full. Only 80% of the transfer value was actually paid. The Ombudsman held that, as regards his statutory rights, the member's acceptance of the transfer value did not give him a right to a benefit greater than that to which he was entitled under the winding up priority list.

The member had claimed there was an offer in the form of the transfer value quoted to him, which he accepted by returning the signed acceptance form. He argued that consideration existed as he had given up his right to benefits under the scheme, thus relieving the scheme of its liability to provide those benefits, and from this an intention to create legal relations could be inferred.

The Ombudsman referred to *Read v Croydon* (1938) in which it was held that a contractual relationship was not formed where one person was bound to supply and another entitled to receive. Thus the member was exercising a statutory right rather than entering into a contractual relationship. The "guarantee" element of the transfer value quotation was accordingly to be interpreted within the context of the statutory framework relating to pension transfers.

Keen (N00935)

Provision of incorrect information does not of itself create any entitlement to benefits of the amount stated

The member was made redundant at the age of 50 and became a deferred member. A few months later, the trustees wrote to him enclosing a 'certificate of entitlement' which certified that, subject to the provisions governing the scheme, he would receive a deferred pension (payable at normal retirement date) of £8081.52 per year (inclusive of guaranteed minimum pension if applicable).

The trustees wrote to the member again seven years later, informing him that an administrative error had resulted in his pension being described incorrectly as a fixed amount. Instead, the amount of his pension could not be calculated with certainty until he was nearing retirement, because the amount of the pension depended upon inflation over the period up to his retirement.

The member claimed that the 'certificate of entitlement' should be honoured as he was entitled to rely on a document described as a 'certificate'. However, the Ombudsman held that that was not his legal entitlement. Where incorrect information had been provided, the member should be put in the position in which he or she would have been, had correct information been given.

Thomas (N00673)

Ex gratia payments can be regarded as an unfunded, unapproved occupational pension

The member retired in 1991 and from that date the employer paid him an ex-gratia pension each month. On the later sale of the employer, the warranty and indemnity agreement contained the following statement: *"None of the Companies nor any of the Companies' Schemes are making any ex-gratia payments to or in respect of any of the employees or officers of the Companies save for those ex-gratia pensions specifically disclosed against this paragraph in the Disclosure Letter."*

The disclosure letter listed the member amongst the names of employees to whom ex gratia payments were being made. After the sale, the member continued to receive this sum each month and in 1999 the payment was marginally increased. However, in 2003 the employer wrote to the member to inform him that they were no longer able to continue with these payments and that they would cease.

The Ombudsman held that the employer had decided to offer retiring employees like the member, who had been of long service and who were not members of the employer's occupational pension scheme, either a lump sum payment or a pension for life. He was satisfied that the member had been offered a pension for life. On the sale of the employer, the details of the monthly payments had been made known to the purchaser in the disclosure letter and had been recognised by it for many years. The Ombudsman concluded that the use of the words "ex gratia" did not automatically mean that the employer was not legally obliged to make the payments. The arrangement constituted, in effect, an unfunded unapproved occupational pension scheme established by the employer for the benefit of the member.

Pritchard (N00208)

Trustee liability for fees of financial advisers instructed by member to handle complaint

The member had a complaint against the trustees for delaying the transfer of his AVCs from Equitable Life to L&G, which meant that the transfer occurred after Equitable Life had instituted a policy of imposing a 16% penalty on such transfers. The member claimed from the trustees the cost of instructing financial advisers for work carried out in connection with his complaint.

The financial advisers conducted the member's complaint on his behalf and eventually the trustees agreed to make good the loss suffered, to include the 16% deduction in the transfer and an amount to take account of adverse movements in annuity rates during the delay. The trustees refused to pay the invoice of the financial advisers for the additional work incurred in dealing with the complaint.

The Ombudsman held that while it was not strictly necessary, it was not unreasonable for a complainant to seek professional advice. *"The reasonable costs so incurred can be seen as a consequence of the maladministration and thus an expense for which redress should be provided."* However, he also concluded that not all the costs were reasonably incurred, so he only awarded the member part of the financial advisers' fees. As the member could have engaged the free services of OPAS to assist him with completing the IDR forms, the Ombudsman decided that the trustees should not bear this cost, although he noted that "they fell short in failing to expressly refer the Applicant to OPAS."

Craythorne (N01352)

Battle of the annuity providers' forms

The member sought to transfer his personal pension fund from Prudential to Halifax. Both Prudential and Halifax insisted on their own standard warranty form being used. The delay between the two providers meant that when Halifax received the transfer value it had fallen by £11,000.

The Ombudsman concluded that Prudential could not reasonably insist on only its own form being used as the documentation supplied by Halifax provided it with the warranty it sought. He also held that *"there is no contractual liability on the policyholder arising from the wording of the policy to use Pru's own* *warranty forms. It is a nonsense that a customer of each company should suffer because neither would accept the validity of a form issued by the other, despite both forms containing the information which the other needed."*

Halifax and Prudential were each ordered to pay half of the member's loss and to give him £75 for distress and inconvenience.

Lindsay (M01026)

No eligibility to join scheme where excluded by terms of employment

The employee was given conflicting information on whether he would be eligible to join the employer's occupational pension scheme. At his interview for the position he was told he would not be eligible. He believed he was not and had not joined the scheme. He later became aware that some co-workers had been included in the scheme. The member complained and eventually brought his complaint to the Ombudsman against the employer and the trustees.

The Ombudsman stated that *"at all times the parties involved, including Mr Lindsay, have fully understood that an entitlement to join the scheme has not formed part of his terms and conditions of employment. The relevant law indicates that an agreement binding an employer and an employee contractually overrides the provisions of a pension scheme Trust Deed, even if the deed is, on the face of it, more favourable."*

The member acknowledged that the remuneration package he was offered and accepted did not include entitlement to membership of the scheme. The Ombudsman concluded that there was no automatic right to membership for an employee who joins on terms which exclude membership. The member's complaint that he was excluded from the scheme and denied benefits was not upheld.

Cameron (M00949)

Member's right to disclosure of legal advice received by trustees

The member claimed that he was entitled to the disclosure of legal advice given to the trustees in relation to the early payment of his deferred benefits. The trustees did not agree and the member complained to the Ombudsman. The member had a previous complaint about a transfer value but his case had been rejected as out of time. He subsequently complained to the Institute of Actuaries about the scheme's actuaries and, as a result, he became aware of legal advice given to the trustees. He claimed that he had a proprietary right as a beneficiary to see that advice.

The trustees said the member was out of time again but the Ombudsman accepted the case, stating: *"even if Mr Cameron knew that legal advice had been given as long ago as 1993, his present dispute about that advice did not arise until he has requested and been refused a copy of such advice."*

The trustees argued for non-disclosure but the Ombudsman ruled that the advice related to the payment of benefits, which was not at the discretion of the trustees. Any discretion concerning the early payment of deferred benefits lay with the company and not the trustees. Disclosure of the advice was ordered.

Hudson (N01058)

Acceptable for trustees to agree a contribution holiday where the scheme has a surplus on the MFR basis only

The power to set contributions lay with the trustees under the scheme's rules. A valuation in 1998 showed a surplus on the MFR basis but a deficit on the basis used in the previous valuation. The employer took advice that it would continue to meet the MFR it if it took a contribution holiday for two or three years.

The trustees learnt that the employer intended to wind up the scheme after two years, and sought advice. They established they had the power to wind up the scheme immediately, but agreed with the employer not to do so. Following this, the trustees agreed to a contribution holiday until the time when the employer intended to wind up the scheme. Therefore, benefits continued to accrue even though no further employer contributions were made to the scheme.

The Ombudsman held that the requirement under legislation was for a scheme to be fully funded on the MFR basis only. The trustees only agreed to the contribution holiday after the actuary confirmed that the MFR would continue to be met and that it would be reasonable to allow a contribution holiday. The trustees' agreement not to wind up the scheme when they knew no further employer contributions would be made also did not constitute maladministration.

Bartlett (N00952)

Benefit certificates and contribution holidays – trustees not liable if scheme cannot fund its members' benefits on wind-up

The member complained that the trustees had failed to secure his preserved benefits (by purchasing a deferred annuity) and to honour his pension entitlement stated in the 'benefit certificate' he had received prior to the winding-up of the scheme. The member also complained the trustees had failed to account for the best interests of the members by allowing contribution holidays to continue in the five years preceding the wind-up. When wind-up commenced, the scheme was funded above the MFR level. The member had understood his entitlement to be guaranteed by the benefit certificate, as the accompanying letter had said that his accrued pension was "preserved."

The Ombudsman concluded that the trustees had not committed to secure the member's benefits by purchasing an annuity. The trustees were only required to provide benefits to the extent that there were funds available. However, the Ombudsman noted that a reference in the benefit certificate to the members' benefits being dependent on the availability of funds would have been helpful. He accepted that the fact that a scheme was fully funded on the MFR basis did not necessarily mean the members' full benefits could be met, and the trustees could only ask participating employers for those contributions necessary to maintain the MFR level of funding.

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Acts

Finance Act 2005

This Act deals with a number of corrections to the tax "simplification" process begun by the Finance Act 2004, closing loopholes and correcting ambiguities in the legislation. Key provisions include:

- The removal of the requirement that schemes with fewer than 50 members must provide scheme pensions via an insurer;
- Clarification that where tax free cash is calculated as 25% of a pension, this includes the cost of both the member's and dependant's pensions;
- Provision that a dependant's pension may be paid to a person who was married to the member when the member first started receiving a pension, even if they subsequently divorced;
- Clarification that any part of a member's pension, i.e. including AVCs, may be used to provide tax-free cash lump sum;
- Confirmation that, for an individual with a right to retire before age 55, tax free cash lump sum will be the lower of 25% of the fund and 25% of the reduced lifetime allowance (i.e. reduced by 2.5% for each year before age 55);
- Closure of a loophole that meant that an individual with enhanced protection could take all of his fund in excess of the lifetime allowance as cash without having to pay a tax charge;
- Provision that an individual loses his entitlement to tax free cash if his pension has not come into payment by the time he reaches 75;
- Payments by an employer into a money purchase scheme for an individual will result in loss of enhanced protection;
- Provision that a child's pension either in payment before A-day, or payable on death of a member in retirement before A-Day, may continue until the later of age 23 or ceasing education or vocational training. Otherwise, children's pensions must cease at age 23;
- Introduction of a new rule to deal with cases where the benefits at A–day are undervalued because an individual is awaiting compensation in relation to a pre-A Day mis-selling and reinstatement to a scheme. Primary protection will be available in respect of compensation received post A-day;
- Provision that current income drawdown arrangements will be treated as commencing at A-Day and will be valued at that date to calculate the maximum income that can be drawn under the new rules. Providers have two years to carry out the valuation.

Finance (No 2) Act 2005

Makes provision for a "social security pension lump sum" to be paid where state pension benefits are deferred. There is a minimum twelve-month deferral period before a lump sum can be claimed. This lump sum will be chargeable to income tax at the member's marginal rate.

Income Tax (Trading and Other Income) Act 2005

Rewrites income tax legislation relating to trading, property and investment income to make it clearer and easier to use. It does not generally change the existing law except in fairly minor ways. The Act brings the charging and calculation rules for the different sorts of income together in updated classifications.

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Statutory Instruments

Keith Webster

Part 1: Pensions Regulator Regulations

The Pensions Regulator (Freezing Orders and Consequential Amendments) Regulations 2005 SI 686

- Effective 6 April 2005.
- Extend the time limits for making a transfer payment following a request from a member and the date for calculating the cash equivalent, where a freezing order has been made which has prohibited transfer payments. Time limits are now extended to 3 months from the date that the prohibition on transfer payments ceases to have effect. If the Regulator has made a direction that the employer must pay a contribution to the scheme within a specified time, the trustees have to report a failure to pay within 7 days to the Regulator, and within 14 days to the members.

The Pensions Regulator Tribunal Rules 2005 SI 690

- Effective 6 April 2005.
- Put into place the practice and procedures to be followed in relation to proceedings before the Pensions Regulator Tribunal, which was introduced by the Pensions Act 2004.

The Pensions Regulator Tribunal (Legal Assistance Scheme) Regulations 2005 SI 781

- Effective 15 April 2005.
- Govern the provision of legal assistance in respect of matters that are referred to the Pensions Regulator Tribunal.

The Pensions Regulator Tribunal (Legal Assistance Scheme - Costs) Regulations 2005 SI 782

- Effective 15 April 2005.
- Make provision for the remuneration of work done under a legal assistance order in respect of cases which are brought before the Pensions Regulator Tribunal.

The Pensions Regulator (Notifiable Events) Regulations 2005 SI 900

- Effective 6 April 2005.
- Set out information that employers and trustees must disclose to the Regulator. Notification is only required in respect of those schemes that are eligible for PPF compensation. This regulation should be read in conjunction with the code of practice and directions issued by the Regulator. The directions contain examples of when information needs to be disclosed and the code of practice contains guidance as to how and when disclosure should be made.

The Pensions Regulator (Contribution Notices and Restoration Orders) Regulations 2005 SI 931

- Effective 6 April 2005.
- Provide further details in respect of the moral hazard provisions introduced by the Pensions Act 2004. Cover the Regulator's power to issue contribution notices and restoration orders. Prescribe those schemes in respect of which contribution notices and restoration orders cannot be issued. Also prescribe, in relation to restoration orders, "appropriate persons" who may be involved in transactions involving scheme assets which are at an undervalue.

The Pensions Regulator (Financial Support Directions etc) Regulations 2005 SI 2188

- Effective 1 September 2005.
- Make further provision about the Regulator's power to issue a financial support direction ("FSD"). The regulations prescribe which schemes cannot be the subject of a FSD and the events that must be notified to the Regulator. The regulations define being "insufficiently resourced" for the purposes of the Pensions Act 2004 as being unable to meet 50% of the section 75 deficit, and outline how a person's or company's "resources" are to be valued. They also define the "relevant time" for the purposes of assessing whether a person or company is insufficiently resourced.
- Extend the definition of "employer" in relation to all anti-avoidance provisions (i.e. contribution notices, restoration orders and financial support directions) to include former employers in specified situations.

Part 2: Pension Protection Fund Regulations

The Pension Protection Fund (Partial Guaranteed Schemes) (Modification) Regulations 2005 SI 277

- Effective 8 March 2005.
- Provide that the Board of the PPF ("the Board") can only take into account the assets and liabilities of the unsecured part of a partially guaranteed scheme and can only assume responsibility for that part.

The Pension Protection Fund (Limit on Borrowing) Order 2005 SI 339

- Effective 9 March 2005.
- Section 115(1) Pensions Act 2004 enables the Board to borrow amounts as required to exercise its functions. This sets the borrowing limit of the Board at £25 million.

Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005 SI 441

- Effective 6 April 2005 (for most purposes).
- Set out how the PPF will apply to schemes with more than one employer, either where they are segregated or non-segregated schemes.

The Pension Protection Fund (Hybrid Schemes) Modification Regulations 2005 SI 449

- Effective 6 April 2005.
- Exempt hybrid schemes (i.e. schemes which have both money purchase and defined benefit elements) from the restrictions placed on a scheme in an assessment period in certain circumstances.

The Pension Protection Fund (Entry Rules) Regulations 2005 SI 590

- Effective 6 April 2005 (for most purposes).
- Set out the eligibility criteria for entry to the PPF.
- Set out various insolvency events that must be notified to the Board by the insolvency practitioner.
- Provide for the operation of a scheme during an assessment period.

The Pension Protection Fund (Eligible Schemes) Appointed Day Order 2005 SI 599

- Effective 6 April 2005.
- Appoints the day for the purposes of section 126(2) Pensions Act 2004 as 6 April 2005. A scheme is not an eligible scheme if it is being wound up immediately before 6 April 2005.

The Pension Protection Fund (Reviewable Matters) Regulations 2005 SI 600

- Effective 6 April 2005.
- Make various minor amendments to Schedule 9 Pensions Act 2004, which relates to "reviewable matters".

The Pension Protection Fund (Appointment of Ordinary Members) Regulations 2005 SI 616

- Effective 6 April 2005.
- Set out the procedure to be followed by the Board when appointing ordinary members to it.

The Pension Protection Fund (Maladministration) Regulations 2005 SI 650

- Effective 6 April 2005.

- Set out the procedure for making complaints of maladministration in respect of the decisions of the Board relating to pension compensation or fraud compensation.

The Pension Protection Fund (Reviewable Ill Health Pensions) Regulations 2005 SI 652
- Effective 6 April 2005.
- Provide for the review by the Board of ill health pensions granted to members at the start of an assessment period.

The Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005 SI 669
- Effective 6 April 2005.
- Provide for the review and reconsideration by the Board of its own decisions either at its own initiative or at the request of "interested persons" which can include the trustees, the insolvency practitioner, the employers and others affected by the determination including members.

The Pension Protection Fund (Compensation) Regulations 2005 SI 670
- Effective 6 April 2005.
- Contain provisions relating to the payment of compensation to members by the PPF in various circumstances pursuant to Schedule 7 Pensions Act 2004.

The Pension Protection Fund (Valuation) Regulations 2005 SI 672
- Effective 6 April 2005.
- Provide for the assessment of a scheme's assets and liabilities for the purposes of determining whether or not it is eligible to enter the PPF and to calculate the risk based levy.

The Pension Protection Fund (Provision of Information) Regulations 2005 SI 674
- Effective 6 April 2005.
- Set out information which the Board, members, trustees and insolvency practitioners may be required to provide where compensation is or may be provided by the Board.

The Pension Protection Fund (Statement of Investment Principles) Regulations 2005 SI 675
- Effective 6 April 2005.
- Make provisions relating to a statement of investment principles which the Board is required to prepare, review and revise if necessary in accordance with the Pensions Act 2004.

The Occupational Pension Schemes (Modification of Pension Protection Provisions) Regulations 2005 SI 705
- Effective 6 April 2005 .
- Modify the provisions of the Act in relation to actuarial valuations and compensation where, exceptionally, the Board has permitted the discharge of liabilities by transfer payments or other steps.

The Pension Protection Fund (PPF Ombudsman) Order 2005 SI 824
- Effective 6 April 2005.
- Makes provision in respect of the PPF Ombudsman and the Deputy PPF Ombudsman relating to remuneration, appointment of staff, delegation of functions and restrictions on the disclosure of information.

The Pension Protection Fund (Pension Compensation Cap) Order 2005 SI 825
- Effective 6 April 2005.
- Caps the compensation payable by the PPF at £25,000pa for people below normal retirement age on the assessment date and whose compensation does not derive from an ill health or survivor's pension.

The Occupational Pension Schemes and Pension Protection Fund (Amendment) Regulations 2005 SI 993
- Effective 1 April 2005.
- Make minor amendments and correct certain cross-references relating to a number of PPF regulations.

The Pension Protection Fund (Pension Protection Levies Consultation) Regulations 2005 SI 1440

- Effective 20 June 2005.
- Set out how the Board is to consult on the methods it proposes to use in determining the pension protection levies (risk based and scheme based) and how details of its determinations are to be published.

The Pension Protection Fund (Payments to Meet Investment Costs) Regulations 2005 SI 1610

- Effective 7 July 2005.
- Make provision for the Board to make payments from the PPF to fund managers or custodians in relation to contractual liabilities relating to the investment of the PPF.

The Pension Protection Fund (Tax) (2005-06) Regulations 2005 SI 1907

- Effective 3 August 2005.
- Make provision for the application of income tax, corporation tax and CGT in relation to the Board, the PPF, and the Fraud Compensation Fund during the period 6 April 2005 to 5 April 2006, i.e. before the tax provisions made by the Finance Act 2004 take effect.

The Pension Protection Fund (PPF Ombudsman) Amendment Order 2005 SI 2023

- Effective 21 July 2005.
- Provides that while investigating a complaint of maladministration, the Ombudsman may disclose information to the Board, a complainant, the person who has been notified of the complaint, or an expert witness.

The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005 SI 2024

- Effective 21 July 2005.
- Provide for the reference of reviewable matters to the PPF Ombudsman for investigation following a decision by the Board pursuant to the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005.

The Pension Protection Fund (Investigation by PPF Ombudsman of Complaints of Maladministration) Regulations 2005 SI 2025

- Effective 9 November 2005.
- Set out the procedures to be used by the PPF Ombudsman when investigating complaints of maladministration against the Board.

The Pension Protection Fund (Entry Rules) (Amendment) Regulations 2005 SI 2153

- Effective 24 August 2005.
- Provide for the notification and formalities for application to the PPF under section 129 Pensions Act 2004 for multi-employer schemes and sections without a partial wind-up rule and make changes to the provisions that render schemes ineligible for PPF entry where there has been a compromise.
- Make changes to qualifying insolvency events for PPF entry for companies and partnerships and allow trade unions for which there is no formal insolvency process to apply to the PPF.

The Pension Protection Fund (Insolvent Partnerships) (Amendment of Insolvency Events) Order 2005 SI 2893

- Effective 10 November 2005.
- Amends section 121 Pensions Act 2004 to reflect that an insolvency event can occur where a partnership “enters into administration” as a consequence of the Insolvent Partnerships (Amendment) Order 2005.

Part 3: Other Regulations

The Registered Pension Schemes (Restriction of Employers’ Relief) Regulations 2005 SI 3458

- Effective 6 April 2006.
- Section 196A Finance Act 2004 provides that regulations can restrict the extent to which contributions paid by an employer under a registered pension scheme in respect of an individual are subject to tax relief in two circumstances: where payment of benefits to or in respect of that individual under the scheme are payable only if benefits are not so paid under an employer-financed retirement benefits scheme; and where, because

benefits are or may be payable to or in respect of that individual under an employer-financed retirement benefits scheme, the value of a transfer out from a registered pension scheme will or may be reduced. These Regulations restrict employers' tax relief in those two circumstances.

The Taxes Management Act 1970 (Modifications to Schedule 3 for Pension Scheme Appeals) Order 2005 SI 3457

- Effective 6 April 2006.
- Makes modifications to legislation in respect of appeals by scheme administrators.

The Registered Pension Schemes (Audited Accounts) (Specified Persons) Regulations 2005 SI 3456

- Effective 6 April 2006.
- Prescribe those who may audit the accounts of a registered pension scheme under section 250(6) Finance Act 2004.

The Registered Pension Schemes and Employer-Financed Retirement Benefits Schemes (Information) (Prescribed Descriptions of Persons) Regulations 2005 SI 3455

- Effective 6 April 2006.
- Prescribe who the Inland Revenue may give a notice to requiring the production of documents and the provision of information in connection with, among other things, pension schemes which are or have been registered under Part 4 Finance Act 2004, or which are the subject of an application for registration and annuities purchased with sums or assets held for the purposes of a registered pension scheme.

The Registered Pension Schemes (Accounting and Assessment) Regulations 2005 SI 3454

- Effective 6 April 2006.
- Make provisions in relation to assessments and related matters in connection with charges to tax under Part 4 Finance Act 2004 in respect of pension schemes which are or have been registered under that Part of the Act.

The Employer-Financed Retirement Benefits Schemes (Provision of Information) Regulations 2005 SI 3453

- Effective 6 April 2006.
- Set out prescribed information that must be supplied to HM Revenue and Customs relating to the coming into operation of a scheme and the provision of relevant benefits, by those persons responsible for administering such schemes.

The Registered Pension Schemes (Discharge of Liabilities under Sections 267 and 268 of the Finance Act 2004) Regulations 2005 SI 3452

- Effective 6 April 2006.
- Make provision supplementing sections 267 and 268 Finance Act 2004 in connection with applications by scheme administrators for relief from the lifetime allowance charges and the unauthorised payments surcharge, and the scheme sanction charge.

The Registered Pension Schemes (Prescribed Schemes and Occupations) Regulations 2005 SI 3451

- Effective 6 April 2006.
- Prescribe the pension schemes whose members may take their pensions before normal minimum pension age without a reduction in the lifetime allowance. Also prescribe the occupations where members may take their pension at protected pension age rather than normal minimum pension age.

The Registered Pension Schemes (Minimum Contributions) Regulations 2005 SI 3450

- Effective 6 April 2006.
- Provide for the application of provisions of the Taxes Management Act 1970 as if a sum representing basic rate tax payable on the amount of minimum contributions paid by Commissioners for HM Revenue & Customs were a repayment of tax to which the recipient was not entitled.

The Registered Pension Schemes (Prescribed Interest Rates for Authorised Employer Loans) Regulations 2005 SI 3449

- Effective 6 April 2006.
- Section 179 Finance Act 2004 prescribes conditions which must be met before a loan made by a registered pension scheme to a sponsoring employer is an authorised employer loan. One of the conditions is that the rate of interest payable on the loan is not less than the rate prescribed by regulations. These Regulations prescribe how that rate should be calculated.

The Registered Pension Schemes (Relief at Source) Regulations 2005 SI 3448

- Effective 6 April 2006.
- Make provision for relief from tax on payments made to scheme administrators of registered pension schemes under Part 4 Finance Act 2004.

The Occupational Pension Schemes (Cross-border Activities) Regulations 2005 SI 3381

- Effective 30 December 2005.
- Make provision relating to the carrying out of the Pensions Regulator's functions in relation to cross-border activity within the European Union by occupational pension schemes and their trustees or managers, or by European pensions institutions.

The Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005 SI 3380

- Effective 30 December 2005.
- Require that where an occupational pension scheme covers any liability for risks linked to death, disability or longevity, guarantees any investment performance, or guarantees to provide defined benefits, the scheme must have additional assets above its technical provisions. The additional assets must be free of foreseeable liabilities and must absorb discrepancies between anticipated and actual expenses and profits under the scheme.
- Provide that the minimum additional assets required are 4% of the scheme's technical provisions, plus 0.3% of the amount by which the total amount which the scheme would be obliged to pay on the immediate death of all members of the scheme exceeds the technical provisions.
- Make various other provisions in relation to regulatory own funds.

The Occupational Pension Schemes (Internal Controls) Regulations 2005 SI 3379

- Effective 30 December 2005.
- Insert a new section 249A into the Pensions Act 2004 which imposes a duty on trustees to establish and operate internal controls.
- Provide that the Pensions Regulator must issue a code of practice relating to the duty imposed by section 249A.

The Occupational Pension Schemes (Investment) Regulations 2005 SI 3378

- Effective 30 December 2005.
- Impose requirements on trustees in relation to the statement of investment principles and in relation to the choosing of investments.
- Impose restrictions on borrowing and the giving of guarantees by trustees and in respect of employer-related investments.

The Occupational Pension Schemes (Scheme Funding) Regulations 2005 SI 3377

- Effective 30 December 2005.
- Contain detailed provisions in relation to the new scheme specific funding requirements and replace the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996.
- Identify the assets and liabilities to be taken into account in determining whether the statutory funding objective is met.
- Make provision in respect of the valuation of the assets, the determination of the amount of the liabilities and the matters to be taken into account in calculating a scheme's technical provisions.
- Set out issues to be covered in a statement of funding principles.
- Contain provisions in relation to recovery plans and schedules of

contributions and impose time limits in respect of the preparation and review of such schedules.
- Set out exemptions from the scheme specific funding requirements

The Financial Assistance Scheme (Appeals) Regulations 2005 SI 3273
- Effective 29 November 2005.
- Make provision for the Ombudsman for the Board of the PPF, or a Deputy PPF Ombudsman to investigate and determine appeals against review decisions made by the scheme manager of the Financial Assistance Scheme.

The Financial Assistance Scheme (Modifications and Miscellaneous Amendments) Regulations 2005 SI 3256
- Effective 24 November 2005.
- Modify and apply certain provisions of Pensions Act 2004 in relation to the PPF to regulations governing appeals in relation to the Financial Assistance Scheme.
- Amend the Financial Assistance Scheme Regulations 2005, the Financial Assistance Scheme (Internal Review) Regulations 2005 and the Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005.

The Civil Partnership Act 2004 (Commencement No 2) Order 2005 SI 3175
- Effective 5 December 2005.
- Brings into force various provisions of the Civil Partnership Act 2004.

The Occupational and Personal Pension Schemes (Civil Partnership) (Miscellaneous Amendments) Regulations 2005 SI 3164
- Effective 5 December 2006.
- Make consequential amendments to ensure that surviving civil partners are treated in the same way as widows and widowers.

The Occupational Pensions (Revaluation) Order 2005 SI 3156
- Effective 1 January 2006.
- Contains the revaluation percentages for the years 1986 to 2005

The Social Security (Inherited SERPS) (Amendments Relating to Civil Partnership) Regulations 2005 SI 3030
- Effective 5 December 2005.
- Extend the Social Security (Inherited SERPS) Regulations 2001 to surviving civil partners. In particular, a surviving civil partner whose civil partner dies on or after 5 December 2005 may receive an increase in the rate of additional earnings related pension under SERPS in the same way as a surviving spouse.

The Dissolution etc (Pensions) Regulations 2005 SI 2920
- Effective 5 December 2005.
- Establish that the existing rules for pension sharing on divorce shall apply to pension sharing orders and pension attachment orders for registered civil partnerships. In particular, they provide for the valuation of pension rights by the court, specify that notices of change of circumstances are to be provided by the scheme to the civil partner or vice versa, and provide for a 7 day stay period during which pension sharing orders cannot take effect.

The Protected Rights (Transfer Payment) (Amendment) Regulations 2005 SI 2906
- Effective 28 November 2005
- Amend the Protected Rights (Transfer Payment) Regulations 1996 to widen the category of schemes that can give effect to a member's protected rights by way of a transfer payment.

The Civil Partnership (Pensions Social Security and Child Support) (Consequential, etc Provisions) Order 2005 SI 2877
- Effective 5 December 2005.
- Extends application of regulations relating to pension sharing on divorce, occupational and personal pension schemes and social security to include civil partners.

The Pensions Ombudsman Disclosure of Information Act (Amendment of Specified Person) Order 2005 SI 2743

- Effective 1 November 2005.
- Amend section 149(6) Pensions Schemes Act 1993 by adding the Financial Services Ombudsman as one of the potential people to whom the Pensions Ombudsman may disclose information obtained for the purpose of an investigation, provided the disclosure would enable or assist that person to carry out his functions.

The Social Security (Deferral of Retirement Pensions, Shared Additional Pension and Graduated Retirement Benefit) Miscellaneous Provisions Regulations 2005 SI 2677

- Effective 6 April 2006.
- Make provision for those who have deferred their entitlement to state pension for 12 months or more and therefore have chosen between receiving increments or a lump sum. They prescribe the timing and manner in which the election between a lump sum or increments must be made.

The Employment Equality (Sex Discrimination) Regulations 2005 SI 2467

- Effective 1 October 2005.
- Amend and update the Sex Discrimination Act (SDA) 1975 and Equal Pay Act (EPA) 1970 in accordance with European law. They extend the EPA to include office holders and set out the extent to which it is discriminatory to pay a woman on pregnancy or maternity leave less than she would otherwise have been paid. In relation to the SDA, they amend the definition of "indirect discrimination" and address discrimination on the grounds of pregnancy or maternity leave, harassment and the terms and conditions of employment during maternity leave.

The Occupational Pension Schemes (Administration and Audited Accounts) (Amendment) Regulations 2005 SI 2426

- Effective 6 April 2006.
- Amend the Occupational Pension Schemes (Scheme Administration) Regulations 1996 and the Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) 1996 to reflect requirements of the European Pensions Directive. They also make consequential amendments in relation to the Finance Act 2004 and the Pensions Act 2004.
- Limit the exemption from providing audited accounts for Funded Unapproved Retirement Benefit Schemes to those with fewer than 100 members. They also impose additional accounting requirements on "earmarked schemes" and introduce a materiality test into the auditor's report for when the auditor is required to qualify a scheme's accounts.

The Pension Schemes (Categories) Regulations 2005 SI 2401

- Effective 6 April 2006 but for pension schemes with their main administration in the UK or for those established pursuant to the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999, they are effective on 22 September 2005.
- Specify which pension schemes will be categorised as 'occupational pension schemes' for the purposes of the Pension Schemes Act 1993 and set out the stakeholder pension schemes which will be treated as personal pension schemes.

The Occupational Pension Schemes (Trust and Retirement Benefits Exemption) Regulations SI 2360

- Effective 22 September 2005.
- Exempt certain occupational pension schemes from the requirement in section 252(2) Pensions Act 2004 that they must be established under irrevocable trusts and from the requirement that occupational pension schemes limit their activities to retirement benefits activities.

The Occupational Pension Schemes (Employer Debt etc) (Amendment) Regulations 2005 SI 2224

- Effective 2 September 2005.
- Change the basis on which a section

75 debt under the Pensions Act 1995 for a withdrawing employer is calculated. Previously calculated on the MFR basis, the debt is now calculated on a full buy-out basis. They also enable a withdrawing employer to continue to pay the debt on a MFR basis provided they enter an arrangement to cover the reminder of the debt: a 'withdrawal arrangement'.

The Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005 SI 2189

- Effective 1 September 2005 except for civil partnerships for which the effective date is 5 December 2005.
- Concern the information that must be provided by, or to, the scheme manager of the Financial Assistance Scheme. Such information is required to be provided both by trustees, managers and other persons acting in relation to occupational pension schemes whose members may qualify for assistance from the Financial Assistance Scheme. They also provide for the recovery of overpayments and the suspension of payments by the scheme manager.

The Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005 SI 2184

- Effective 1 September 2005.
- Prescribe how fraud compensation applications must be made, including the information that must be provided, and how payments are to be managed. They also provide which occupational schemes cannot apply for fraud compensation and who may make an application under section 182 Pensions Act 2004.

The Occupational Pension Schemes (Winding up) (Modification for Multi-employer Schemes and Miscellaneous Amendments) Regulations 2005 SI 2159

- Effective 31 August 2005.
- Modify the position under the Pensions Act 2004 for multi-employer occupational pensions schemes (with no partial wind up rule) being wound up at any time after 6 April 2005.
- Provide that trustees may pay PPF benefits to members during the winding up rather than paying reduced benefits according to the statutory winding up priorities if they have determined in the previous 3 months that the scheme is likely to enter an assessment period in the next 12 months.

The Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2005 SI 2113

- Effective 19 August 2005.
- Make minor amendments to existing regulations for the PPF and the Pensions Regulator.

The Civil Partnership (Contracted-out Occupational and Appropriate Personal Pensions Schemes) (Surviving Civil Partners) Order 2005 SI 2050

- Effective 5 December 2005.
- Amend the Pension Schemes Act 1993 by enabling surviving civil partners to receive pensions under contracted-out occupational and appropriate personal pension schemes in the same way as spouses.

The Financial Assistance Scheme (Internal Review) Regulations 2005 SI 1994

- Effective 20 July 2005.
- Provide for the internal review of reviewable determinations made by, or on behalf of the scheme manager under the Financial Assistance Scheme.

The Financial Assistance Scheme Regulations 2005 SI 1986

- Effective 1 September 2005, except in relation to civil partnerships where the effective date is 5 December 2005.
- Establish the Financial Assistance Scheme to allow payments in situations where the liabilities to certain members of occupational pension schemes are unlikely to be satisfied in full.

The Occupational Pension Schemes (Equal Treatment) (Amendment) Regulations SI 1923

- Effective 10 August 2005.
- Amend the time limit within which a person must commence proceedings

before an employment tribunal to secure equal treatment under an occupational pension scheme. They also remove the 2-year limit on backdating successful claims and the obligation on the employer to contribute funds where rights to be admitted to the scheme are backdated.

The Social Security (Shared Additional Pension) (Miscellaneous Amendments) Regulations 2005 SI 1551

- Effective 6 July 2005.
- Amend existing regulations in relation to the claiming and paying of shared additional pension including the time and manner in which a claim is made and the various deferral arrangements introduced by the Pensions Act 2004. The provisions regularise the conditions for shared additional pension so they are consistent with the provisions in relation to State Pension.

The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 SI 1529

- Effective 1 July 2005.
- Revokes and re-enacts with amendments, the Financial Services and Markets Act (Financial Promotion) Order 2001. Changes include extending existing exemptions and introducing new exemptions from the restriction on financial promotions in the Act.

The Social (Contributions) (Amendment No 4) Regulations 2005 SI 1086

- Effective 5 April 2005.
- Amend the Social Security (Contributions) (Amendment No 3) Regulations 2005 to correct errors in those regulations. In particular, they clarify that the total amount that can be disregarded in computing earnings in respect of the period 6 April 2005 to 5 October 2005 is £1300.

The Occupational and Personal Pension Schemes (Pension Liberation) Regulations 2005 SI 992

- Effective 27 April 2005.
- Modify the Pension Schemes Act 1993 in respect of payments made to an occupational or personal pension scheme under a court restitution order under section 19 Pensions Act 2004 or a repatriation order made by the Pensions Regulator under section 21 Pensions Act 2004.

The Occupational Pension Schemes (Contracting-out) (Amount Required for Restoring State Scheme Rights) Amendment Regulations 2005 SI 891

- Effective 21 April 2005.
- Set out how to calculate the additional state pension of a member of a contracted-out pension scheme which is in wind up where that member has chosen to have his additional state pension reinstated. This applies where the effective date of the calculation is on or after 21 April 2005.

The Pensions Increase (Review) Order 2005 SI 858

- Effective 11 April 2005.
- Specifies an increase of 3.1% for pensions beginning before 12 April 2004. For pensions beginning after 12 April 2004, the percentage increase ranges from 0.26% to 3.1%.

The Social Security (Graduated Retirement Benefit) (Amendment) Regulations 2005 SI 846

- Effective 5 April 2005.
- Correct error made in the Social Security (Graduated Retirement Benefit) Regulations regarding when certain provisions take effect.

The Occupational Pension Schemes (Levies) Regulations 2005 SI 842

- Effective 1 April 2005.
- Impose the administration levy, the initial levy and the PPF Ombudsman levy.

The Social Security (Inherited SERPS) (Amendment) Regulations 2005 SI 811

- Effective 6 April 2005.
- Modify the calculation of the proportion of a lump sum payment which is accrued in respect of a widowed person's additional pension so that it is increased in line with the additional pension for widowed persons.

The Social Security (Contributions) (Amendment) Regulations 2005 SI 778

- Effective 6 April 2005.
- Amend the Social Security (Contributions) Regulations 2001 in relation to payment of Class 3 NICs following the issue of gender recognition certificates under the Gender Recognition Act 2004.
- Amend the 2001 Regulations to exempt contributions to a pension scheme made on behalf of workers seconded to the UK by US employers from Class 1 NICs liability.

The Retirement Benefit Schemes (Increase in Permitted Maximum in Transitional Cases) Order 2005 SI 723

- Effective 6 April 2005.
- Increases the permitted maximum used in the calculation of benefits payable to a class of employees from an approved retirement benefit scheme (under the Income and Corporation Taxes Act 1988) from £100,000 to £150,000.

The Retirement Benefit Schemes (Indexation of Earnings Cap) Order 2005 SI 720

- Effective 16 March 2005.
- Sets the earnings cap for the year of assessment 2005-06 at £105 600.

The Occupational Pension Schemes (Winding up etc) Regulations 2005 SI 706

- Effective 6 April 2005.
- Set out how the scheme's assets and liabilities are to be determined and how certain benefits are to be treated. They predominantly apply to schemes that begin winding up after 6 April 2005. They also exclude certain schemes from the application of section 73 Pensions Act 2004 (preferential liabilities on winding up). For schemes in wind up before that date, the priority order under the Pensions Act 1995 continues to apply.

The Personal and Occupational Pension Schemes (Indexation and Disclosure of Information) (Miscellaneous Amendments) Regulations 2005 SI 704

- Effective 6 April 2005.
- Remove the requirement to index pensions derived from protected rights accrued pre 6 April 1997. The change affects pensions coming into payment on or after 6 April 2005.
- Ensure that the new policy on indexation is reflected in the treatment of hybrid schemes, transfers between pension schemes and pension credits (held as a result of a pension share).
- Introduce a new disclosure requirement for occupational pension schemes.

The Occupational Pension Schemes (Independent Trustee) Regulations 2005 SI 703

- Effective 11 April 2005.
- Provide details about the powers of the Pensions Regulator in relation to his duty to compile and maintain a register of persons who satisfy prescribed conditions as an independent trustee.

The Transfer of Employment (Pension Protection) Regulations 2005

- Effective 6 April 2005
- Provide that where the transferee's pension scheme is not a money purchase scheme the value of the benefits provided must be at least 6% of pensionable pay and go on to define what "relevant contributions" are for the purposes of the Pensions Act 2004.

The Occupational and Personal Pension Schemes (General Levy) Regulations 2005 SI 626

- Effective 1 April 2005
- Make provision for the imposition and payment of the general levy to meet the cost of the Pensions Ombudsman, the Pensions Regulator and the legal assistance scheme under the Pensions Act 2004. The general levy is calculated on a sliding scale depending on the number of members that a scheme has.

The Occupational Pension Schemes (Employer Debt) Regulations 2005 SI 678

- Effective 6 April 2005.
- Replace the Occupational Pension Schemes (Deficiency on Winding Up etc.) Regulations 1996 for schemes not in wind-up before 6 April 2005. They provide that for the purpose of calculating section 75 debts, liabilities in respect of pensions are to be valued on the basis that the trustees will purchase annuities. They also provide for the calculation of section 75 debts in relation to multi-employer schemes.

The Register of Occupational and Personal Pension Schemes Regulations 2005 SI 597

- Effective 6 April 2005.
- Revoke the Register of Occupational and Personal Pension Schemes Regulations 1997.
- Prescribe the pension schemes which are registrable and the information relating to the schemes which is registrable. They also establish an information service known as the Pension Tracing Service to help people get back in touch with pension schemes they are a member of and have lost touch with.

The Stakeholder Pension Schemes (Amendment) Regulations 2005 SI 577

- Effective 6 April 2005
- Provide for "lifestyling" to be applied to stakeholder scheme members who have made no choice as to how their contributions should be invested. Lifestyling can be introduced from at least 5 years before a member's retirement date. A number of other technical amendments are made.

The Contracting-out, Protected Rights and Safeguarded Rights (Transfer Payment) Amendment Regulations 2005 SI 555

- Effective 6 April 2005.
- Amend the Contracting-out (Transfer and Transfer Payment) Regulations 1996, the Protected Rights (Transfer Payment) Regulations 1996 and the Pension Sharing (Pension Credit Benefit) Regulations 2000. They allow transfers of guaranteed minimum pensions to be made to overseas schemes and arrangements and remove the condition that the transferring scheme must establish that the member has permanently emigrated overseas.

The Guaranteed Minimum Pensions Increase Order 2005 SI 521

- Effective 6 April 2005.
- Specifies an increase of 3% for the part of guaranteed minimum pension attributable to earnings factors for the tax years 1988-89 to 1996-97.

The Social Security (Retirement Pensions etc) (Transitional Provisions) Regulations 2005 SI 469

- Effective 6 April 2005.
- Modify the deferral of entitlement to state pensions introduced by the Pensions Act 2004 to accommodate those who had already elected to defer their entitlement to State Pension or Shared Additional Pension for at least 12 months (and so become entitled to elect to receive a lump sum) when the relevant Pensions Act 2004 provisions came into force. In particular, they prescribe the period for which the lump sum is to be calculated and allow for the lump sum to be calculated in a way beneficial to the claimant. They also simplify the transition from the old incremental rate of 1/7th% to the new rate of 1/5th%.

The Social Security (Graduated Retirement Benefit) Regulations 2005 SI 454

- Effective 6 April 2005.
- Introduce an increase in the incremental rate from 1/7th% to 1/5th%. They also introduce a lump sum reward for those who have deferred their entitlement to their graduated retirement benefit for at least 12 months and for widows and widowers where their deceased spouses deferred entitlement to their graduated retirement benefit for at least 12 months as at the date of death.

The Social Security (Deferral of Retirement) Pensions Regulations 2005 SI 453

- Effective 6 April 2005.
- Prescribe the day on which the accrual period begins for those who elect to defer claiming their State pension for at least 12 months and receive a lump sum and identify the circumstances in which the amount of retirement pension will be excluded in the calculation of the lump sum.
- Make minor amendments to the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979.

The Social Security Pensions (Low Earnings Threshold) Order 2005 SI 217

- Effective 6 April 2005.
- Specifies that the low earnings threshold for the tax years following 2004-05 shall be £12,100.

The Social Security Revaluation of Earnings Factors Order 2005 SI 216

- Effective 6 April 2005.
- Increases earnings factors for specified tax years relevant to the calculation of additional pension in the rate of any long-term benefit, of any guaranteed minimum pension or to any other calculation required under Pension Schemes Act 1993.

The Social Security (Contributions) (Amendment) Regulations 2005 SI 166

- Effective 6 April 2005.
- Amend The Social Security (Contributions) Regulations 2001 by increasing the earnings limits and thresholds and the prescribed equivalents.

The Occupational Pension Schemes (Winding up, Deficiency on Winding up and Transfer Values) (Amendment) Regulations 2005 SI 72

- Effective 15 February 2005.
- Stipulate that the liabilities of salary-related occupational pension schemes will be calculated on a "full buy-out" basis for the purpose of calculating a section 75 debt on a sponsoring employer where the winding-up commences on or after 15 February 2005.

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Inland Revenue

Pensions Update No. 150, 29 March 2005

- Sets out the Revenue's position on certain practices that are intended to increase a person's personal lifetime allowance. The following example is given: a member leaves his scheme and transfers benefits to a personal pension scheme; he then sets up a new scheme under Section 590 Income and Corporation Taxes Act 1988 (to which the Revenue must give mandatory approval); the Section 591 scheme (normal discretionary approval) then winds up, and the Section 590 scheme provides additional benefits, back-funded for the period of service which had already been fully funded in the Section 591 scheme. The effect of this is to get around the benefits limits approved under normal Revenue discretionary practice. The Revenue may view this type of activity as a tax avoidance scheme and call into question the approval of the original Section 591 scheme.

Pensions Update No. 151, 29 March 2005

- Explains the revised procedures for claiming tax relief on members' contributions to overseas pension schemes, known as corresponding relief, including the completion of form PS 3008

Pensions Update No. 152, 29 March 2005

- Sets out amendments to overseas transfer practice. Currently, all contracted-out rights such as GMPs and protected rights are not subject to Revenue requirements because the DWP Regulations apply instead. From 6 April 2005, overseas transfers of contracted-out rights also had to meet Revenue requirements, in particular that the transferee must have left the UK on a permanent basis with no intention of returning to the UK to work or to retire. The change in practice coincides with the issue of the Contracting-out, Protected Rights and Safeguarded Rights (Transfer Payment) Amendment Regulations 2005.
- Also sets out the revised procedure for making such transfers.

Pensions Update No. 153, 29 March 2005

- Sets out the increase in the level of the permitted maximum, or earnings cap, for members joining schemes from June 1989, to £105,600. In addition the "1987 permitted maximum", relevant for calculating final remuneration, has also been increased from £100,000 to £105,600.

Pensions Update No. 154, 29 July 2005

- Outlines members' ability to rely on primary protection or enhanced protection. The Revenue acknowledge that they are aware that certain individuals may be establishing arrangements that are intended to inflate members' *relevant pre-commencement pension rights (primary protection) or relevant existing arrangements* (enhanced protection). Such arrangements are viewed by the Revenue as an abuse of such protection and amount to avoidance of the lifetime allowance charge.
- Gives example of artificial inflation of pension rights under a small self-administered scheme (SSAS). However, the Update states that *"there is no objection to individuals legitimately maximising their benefits in the run-up to A Day, where they able to do so".* Where the action is considered to be an abuse, approval may be jeopardised.

Pensions Update No. 155, 16 September 2005

- Confirms that actuarial valuation reports (AVRs) will not need to be submitted to the Revenue if due after 5 April 2006. This means that no AVR will need to be submitted in the case of a small self-administered scheme (SSAS) if it has an *"as at"* date of on or after 6 April 2005. In the case of a large self-administered scheme an AVR will not be required to be submitted if it has an "as at" date on or after 6 April 2004.
- In the case of a SSAS where no member has a notionally earmarked share of the fund in excess of £750,000, an AVR will not need to be submitted in the period up to A-Day. The Update goes on to acknowledge that a function of the AVR is to justify future contributions. The Revenue expects schemes to make contributions which are justified in accordance with the current funding guidelines and to retain evidence of that justification. The Revenue reserves the right to inspect the justification.
- States that where scheme rules are amended to reflect the easement contained in the Update the Revenue would not want to see copies of the amendment.

Pensions Update No. 156, 26 October 2005

- Confirms that amendments to schemes which are effective after 5 April 2006 should not be submitted to Audit & Pension Schemes Services (APSS);
- Provides that scheme rules may be amended before 6 April 2006 to cover authorised payments which are not currently allowed under the scheme rules provided such amendments are not effective before that date;
- Confirms amending scheme rules will not disapply the proposed Pension Schemes (Modification of Rules of Existing Schemes) Regulations unless the amendment specifically states that the regulations will not apply and amendments made before 6 April 2006 but effective after 5 April 2006 will not prejudice existing approval;
- Changes effective before 6 April 2006 must continue to be submitted to the APSS.

Pensions Update No. 157, 12 December 2005

- Sets out processes to allow scheme administrators to bring up to date all outstanding issues surrounding form 1(SF) (Chargeable events) for the tax year 2004-5 and earlier.

Pensions Update No.158, 14 December 2005

- Explains the actions the Revenue will take in relation to pre-A Day avoidance.

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European developments

Claim to ECJ under Insolvency Directive, October 2005

- The trade union, Amicus, has submitted written submissions to the European Court of Justice claiming that the Government has not complied with the 1980 Insolvency Directive which required it to take necessary measures to protect the interests of employees, pensioners and deferred pensioners. The Government has stated that it does not believe this to be the case and intends to defend this claim.

Proposed Portability Directive, October 2005

- The European Commission has approved a new pensions portability Directive. The proposal is designed to reduce the obstacles to mobility within and between Member States caused by present occupational pension scheme provisions. The perceived obstacles relate to: conditions for acquiring pension rights (i.e. different qualifying periods), rules relating to preservation of deferred benefits (such as pension rights losing value over time) and the transferability of acquired rights. The proposal also seeks to improve the information given to workers on how mobility may affect supplementary pension rights.

Pensions Directive, September 2005

- The Pensions Directive came into force on 23 September 2005. Many of the provisions of the Pensions Act 2004 are aimed at complying with this Directive, including provisions in relation to scheme specific funding and investment. Only 9 member states were in compliance with the Directive when it came into force (presumably not including the UK as many of the Pensions Act 2004 provisions had yet to come into force).

Commission Green Paper on demographic change, March 2005

- From 2005 to 2030 it is estimated that the number of people over age 65 will rise by 52.3% while numbers in the age group 15-64 will decrease by 6.8%. The ratio of dependent young and old people to people of working age is predicted to increase from 49% in 2005 to 66% in 2030. To offset the loss of working-age people, there would need to be an employment rate of over 70 per cent. The Commission wants to open a debate on how to tackle the problems which these changes represent and what role the European Union should play.

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Miscellaneous

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Section 309 A–C of Companies Act 1985, 2004

- Has effect from 6 April 2005 on exonerations and on certain new indemnities granted by group companies to directors after 29 October 2004.
- An exoneration for the benefit of a director made after 29 October 2004 in respect of negligence, default, or breach of duty or trust will be void if conferred by the company suffering the loss. So an exoneration given by a company to directors of a group trustee company would be void to the extent that it exonerated them from a loss to the exonerating company caused by their negligence, default, or breach of duty or trust.
- Indemnification against regulatory penalties (such as those levied by the Pensions Regulator) and indemnification in respect of civil proceedings brought against the director by the company of which he is a director or certain related companies would also be void, whether the indemnity came from the trust company itself or from a group company.
- Exonerations and indemnities provided to individual trustees by companies are unaffected by these changes, as are indemnities to trustees or trustee directors from trust assets. The legislation also contains exceptions for indemnities which satisfy certain conditions.

DWP consultation - The Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 2005, January 2005

- The Pensions Act 2004 has changed the requirements for schemes' internal dispute resolution procedures.
- The procedures can now be simplified to a one-stage process (in which it appears all the trustee body must be involved), where prescribed deadlines will be replaced by a requirement to act within a reasonable period (the Regulator has issued a draft Code of Practice giving guidance on "reasonable periods" – see Regulator section of this Update).

DWP consultation, contracting-out – Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2005, March 2005

The Government aims to simplify the administration of schemes which are contracted-out. The key proposals are to:

- Allow protected rights to be paid pro-rata with the excess benefit on retirement as tax-free cash.
- Increase trivial commutation limit to allow commutation of protected rights.
- Allow protected rights to be paid at the same time as other benefits.

DWP consultation – the Occupational Pension Schemes (Consultation by Employers) Regulations 2006, June 2005

- Requirement, proposed to be effective from 6 April 2006, for employers to consult with prospective and active members and their representatives about "major or significant" changes to future private or occupational pension arrangements.
- For occupational pension schemes, the changes are: increasing the age at which benefits can be paid; preventing all or certain prospective members from being admitted to the scheme; preventing future benefit accrual for active or prospective members; removing an employer's liability to make contributions to the scheme; and introducing member contributions when there were not previously payable.
- Certain specific changes also apply in relation to occupational defined contribution and non-defined contribution schemes.

- In the case of defined contribution schemes, consultation is required in respect of reducing employer contributions by 2% or to below 3%.
- In the case of non-defined contribution schemes, changing any benefits to money purchase, reducing the rate of future accrual, or increasing member contributions by 2% or more will all require consultation.
- The obligation is to provide, at least 2 months before the date of the proposed change, information about the effect of the change, background information and the timescale for introducing the change in an appropriate time and fashion and with appropriate content to permit members' representatives to study the change.
- "Consultation" means exchanging views with and providing advice by, the members' representatives and/or members directly.

DWP consultation - Occupational Pension Schemes (Early Leavers: Cash Transfer Sums and Contribution Refunds) Regulations 2005, June 2005

- Expected to be effective from 6 April 2006.
- Option for leavers with at least three months' pensionable service to receive a transfer value instead of a refund of their own contributions.
- The regulations set out further details on how this right will operate. The Minimum Funding Requirement will remain as the underpin for the calculation of this transfer value, pending the scheme's first scheme-specific funding basis valuation.
- These transfer values will be much like a member's Cash Equivalent Transfer Value ("CETV") of vested rights, so it will be possible to reduce them where the actuary's valuation discloses underfunding.

DTI consultation – draft Employment Equality (Age) Regulations 2006, July 2005

- The draft Regulations are to implement EU Employment Directive which requires the abolition of direct and indirect discrimination based on age in employment and vocational training. (Harassment and victimisation on the ground of age are also expressly prohibited).
- It is thought that the regulations will come into force on 1 October 2006.
- Objective justification can apply for discriminatory treatment, whether direct or (more unusually) indirect.
- The directive permits certain exemptions from this protection in relation to occupational pension schemes and the Regulations make use of this flexibility. For example it seems to be permitted to set ages for admission to membership and for receiving benefits, and to vary rates of contributions and benefits based on the salary, seniority and the amount of the member's pensionable service.

DWP guidance – "Automatic enrolment in workplace pension schemes: Guidance on the regulatory framework", July 2005

- Sets out DWP's thoughts on various obstacles to employers applying a policy of automatic enrolment (see also the report of the Pensions Commission below) to new employees regarding their stakeholder arrangement or group personal pension plan.
- These obstacles include EU law, restrictions on 'financial promotion' under the Financial Services and Markets Act 2000, employment law, and the Data Protection Act 1998.
- Solutions and/or comfort are offered to employers on these various points. DWP believes that the only obstacles which cannot easily be overcome are the protections in employment law (in particular, the prohibition on unauthorised deductions from wages).

DWP consultation - Occupational Pension Schemes (Disclosure of Information) Regulations 2005, September 2005

- Expected to be effective from April 2006.
- Aims to make the pensions disclosure regime more proportionate than the current prescriptive regime, by requiring information to be provided within a "reasonable period".

- A separate consultation exercise has just concluded on what constitutes a "reasonable period" in various circumstances – in the majority of cases this will reflect current prescribed limits.
- Aims to provide comparable rights to information for members of final salary and money purchase schemes.
- From 6 April 2007, a statement of annual benefit information should be provided in respect of non-money purchase benefits to active members, actives who become deferreds and those becoming pension credit members on or after that date. Other deferred and pension credit members can receive that information on request.
- At the trustees' option, the member can also be provided with an indication of their own and their survivors' benefits assuming that pensionable service were to terminate within a month of the date of the provision of that information.

GN 19 – Winding up and Scheme Asset Deficiency, September 2005

- New version in force from 2 September 2005.
- Provides actuaries with further guidance about assessing and apportioning statutory debts under section 75 Pensions Act 1995 and identifying the assets that should be allotted to each category of members.
- New guidance is offered in particular on apportionment of liabilities under withdrawal arrangements.

DWP consultation – Occupational Pension Schemes (Modification of Subsisting Rights) Regulations, October 2005

- Expected to be effective 6 April 2006.
- Prescribe requirements that must be met when a scheme modifies the rules relating to the subsisting rights of members, and exclude categories of schemes and specific modifications from the subsisting rights requirements.

DWP Consultation – Occupational Pension Schemes (Exemption) Regulations 2006, October 2005

- Expected to be effective 6 April 2006.
- Provide exemptions from certain Pensions Act requirements for unregistered pension schemes (e.g. requirement to have an internal dispute resolution procedure, requirement to appoint professional advisers).

The Pensions Commission Report (the "Turner Report"), 30 November 2005

- The Government's latest effort to tackle the UK's "pensions crisis", attacked in some quarters even before it was released.
- Suggests a 'National Pension Savings Scheme' with 'soft' automatic enrolment (i.e. the individual can still opt out) into this (or alternatively into an employer arrangement), to which broadly at least 8% annual contributions are made: 4% by the member, 1% from Government in tax relief, and 3% from the employer.
- Suggests state second pension to become flat-rate over time by calculating it by reference to a 'flat' element of earnings.
- Phase out contracting-out by 2030 for defined benefit schemes, and before that for others.

GN 16 – Transfers without consent, November 2005

- New version in force from 29 November 2005.
- Relevant when seeking to make a transfer between schemes without obtaining each individual member's consent.
- Consideration of relative benefit security, assuming winding-up were triggered pre-and post-merger, is no longer a pre-condition for issuing the actuary's certificate. The actuary must consider the rights provided for under the rules, not the rights which might be delivered in practice.
- When assessing whether discretionary benefits will be *"broadly, no less favourable"* in the receiving scheme, employer covenant and commitment to funding these benefits may be relevant.
- However, relative benefit security remains a major issue for trustees in deciding whether to transfer.

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Developments in 2006

Once again, we all face an extremely busy year, although hopefully we will see less by way of Regulations than 2005. Some of the key events expected in 2006 are:

- A-day and the implementation of the tax simplification regime introduced by the Finance Act 2004.
- Legislation on age discrimination. The Equal Treatment Directive requires the UK to implement age discrimination legislation in 2006. Draft Regulations have already been published containing far-reaching exemptions for occupational pension schemes. However, consultation revealed that the draft Regulations may not cover all possible forms of age discrimination and it remains to be seen what changes will be made in the final version.
- The new scheme specific funding requirements were published at the end of December 2005. 2006 will see many schemes carrying out their first valuations on the new basis. It will be interesting to see how it works in practice.
- Further provisions in the Pensions Act 2004 will come into force, particularly the provisions in relation to trustee knowledge and understanding, and the new section 67 provisions on scheme amendments.
- Final versions of Pensions Act 2004 Regulations will be published in relation to a wide range of issues.
- The Pensions Regulator will continue to develop its role and its practice in relation to applications for clearance and approval of withdrawal arrangements.
- The risk based element of the PPF levy will be implemented and it will become clear how much it is costing schemes/employers.
- The Government should formally respond to the findings of the Pensions Commission.
- Schemes will deal for the first time with pension rights relating to Civil Partners.

Apart from age discrimination, most of this represents the implementation of existing legislation. It would be nice to think that 2006 will not bring yet more new legislation and that there will be a period of respite from April to allow pension schemes time to come to terms with the changes required by recent legislation. Whether this will prove to be the case, only time will tell.

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The Pensions team is part of the CMS Cameron McKenna HR group and advises employers and trustees of schemes varying in size from a few million pounds to several billion pounds. Additionally, we act for some of the largest firms of administrators, actuaries, consultants, brokers and professional trustees.

We provide a full range of services in connection with occupational pension schemes, covering all aspects of employment law and EU law.

The team also works closely with our corporate lawyers, providing support on mergers and acquisitions, and with the financial services team which specialises in financial services and other regulatory matters, fund management and personal pensions mis-selling issues.

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