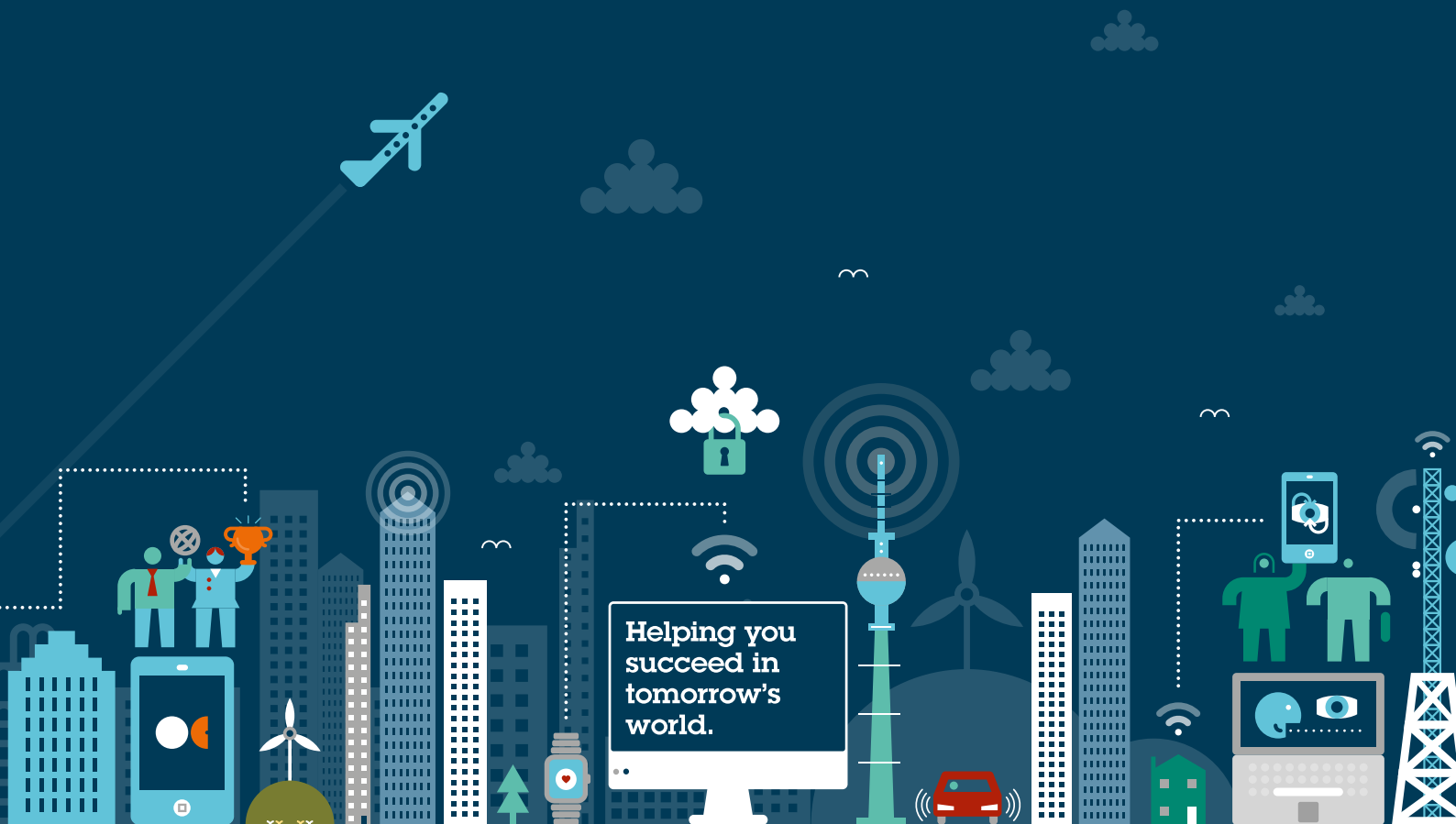


Pensions Action Plan

Q4 2016



This action plan is a summary of changes and proposals in pensions law and regulation over the last quarter, which employers and trustees need to respond to now or in the coming year.

How to use the action plan: The action plan is divided into different subjects. Changes requiring immediate action are identified in **red**. Changes requiring action in the next 6 to 12 months are identified in **blue**. Changes to note are identified in **green**. The column on the left hand side of the table shows whether the issue applies to defined benefit schemes (DB), defined contribution schemes (DC) or both (All).

If you would like advice on any of the issues raised in this action plan, please contact your usual Osborne Clarke contact, **Jonathan Hazlett**, **Caroline Blackwood** or **Jennifer Cave**.

Administration

All	<p>Incorrect online benefits projection</p> <p>The Pensions Ombudsman has held that a member who retired on the basis of an incorrect projection of his benefits produced by an online portal had suffered a loss of expectation but no direct financial loss (<i>Mr N PO-9713</i>). The online tool had clear warnings and disclaimers saying members should not rely upon it. Instead, members were advised to obtain a formal benefits statement before making any decisions about their benefits. An amount of £500 that had already been offered to the member by the trustees was held to be appropriate. The Pensions Ombudsman made no further award.</p> <p>Actions/Osborne Clarke Comment: Online tools allowing members to obtain information and projections about their benefits must have sufficient warnings and disclaimers in place about their use. Trustees should review, with the benefit of legal advice, any online tools to make sure the necessary wording is clear and appropriately visible.</p>
DB	<p>Recovery of overpayments</p> <p>The High Court has confirmed how the statutory time limits for recovering money apply to trustees who are seeking to recover overpayments (see <i>Webber v Department for Education and another</i>). The Teachers' Pension Scheme made overpayments to Mr Webber between 2002/3 and 2010/11. Under the Limitation Act 1980, a claim to recover money must be brought within 6 years. You can 'bring a claim' by issuing court proceedings. Teachers' Pensions had not issued court proceedings. However, Mr Webber had made an application to the Pensions Ombudsman in 2011. The High Court considered at what point Teachers' Pensions could be said to have 'brought a claim'. It decided that this was 19 December 2011, the date on which Teachers' Pensions submitted their formal response to the Pensions Ombudsman complaint. The result is that Teachers' Pensions will not be able to recover any overpayments made to Mr Webber before December 2005.</p> <p>Actions/Osborne Clarke Comment: Overpayments raise a number of difficult legal questions. This case shows the need for trustees to take quick action to recover overpayments. It also shows the need for trustees to understand the statutory time limits that apply to recovery. Trustees who discover an overpayment should take legal advice as soon as possible.</p>
DB	<p>Bridging pensions</p> <p>The Registered Pension Schemes (Bridging Pensions) and Appointed Day Regulations 2016 have come into force. A 'bridging pension' is an additional element of pension paid to a member between the date they retire and the date they reach state pension age. It is equivalent to the state pension the member will receive at state pension age. It drops away when the member reaches state pension age and becomes able to claim their state pension. The Finance Act 2004 set a general rule that a pension could not be reduced once it is in payment. There was an exception to this for bridging pensions. The new regulations rewrite these provisions. There are two new permitted exceptions. One applies to members who reached state pension age before 6 April 2016, and the other to members who reach it on or after 6 April 2016.</p> <p>Actions/Osborne Clarke Comment: Trustees of DB schemes which offer bridging pensions should be aware of the restrictions imposed by the Finance Act 2004. Trustees should discuss this change, which applies with effect from April 2016, with their legal adviser.</p>

Bankruptcy

All	<p>Income payments order</p> <p>The Court of Appeal has clarified that, where a bankrupt has a right to draw on his personal pension but has chosen not to exercise that right, he cannot be forced to do so (<i>Horton v Henry</i>). As a result, the bankrupt's undrawn pension benefits remain protected throughout the course of the bankruptcy. See our In Focus Briefing for further details.</p> <p>Actions/Osborne Clarke Comment: This decision has clarified that an income payments order cannot extend to cover undrawn DC pension benefits that a bankrupt is entitled to draw but has chosen not to do so. However, trustees of all schemes should be aware that a trustee in bankruptcy can apply for an income payments order over income to which the bankrupt is entitled, which can include pensions in payment.</p>
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Brexit

All

Brexit

The High Court has ruled that the Government must obtain approval from Parliament before triggering Article 50 of the Lisbon Treaty (*R (Miller) v Secretary of State for Exiting the EU*). The Government is appealing this decision to the Supreme Court. This development casts doubt on the Government's plan to trigger Article 50 before the end of March 2017. See our [update](#) for further details.

Brexit has fewer immediate legal implications for pensions than other areas of business. However, the economic consequences of Brexit do have funding and investment implications for pension schemes which trustees need to address and monitor. The Pensions Regulator has issued this [statement](#). See our [briefing on the legal implications of Brexit](#) for further details.

Actions/Osborne Clarke Comment: Trustees should take investment advice as required in light of any market volatility, review the employer covenant as necessary, take an integrated risk management (IRM) approach to funding, investment and the employer covenant if making any changes, add Brexit to their risk register and monitor developments and respond appropriately.

Charges

All

Early exit charges

Earlier this year, the DWP launched a consultation on proposals to cap the early exit charges imposed on members of occupational pension schemes who wish to access their pension flexibly after age 55 but before the scheme's normal pension age. The DWP has now published its response to this consultation. This confirms that the Government intends to cap early exit charges for members of occupational pension schemes at 1% (after deduction of any market value adjustment) for existing members and 0% for new members. The intention is to have the appropriate regulations in force by October 2017. A similar cap will apply to personal and stakeholder schemes from 31 March 2017.

Actions/Osborne Clarke Comment: Trustees need to consider whether their scheme imposes any 'early exit charges' on members who choose to leave before normal pension age in order to access their pension flexibly. If so, trustees should consider taking further advice on this once the draft regulations have been published in Spring 2017. Trustees should take action, which will include communication with members, before the cap and ban come into force in October 2017.

DC

All

Financial guidance

The Government has announced that it plans to set up a single public financial guidance body to replace the Pensions Advisory Service, Pension Wise and the Money Advice Service. A consultation is to be issued on the design and implementation of the new single body.

Actions/Osborne Clarke Comment: Member communications such as booklets, pre-retirement and retirement communications will need to be updated to reflect the new body when it is set up.

DC

Chair's statement

The Pensions Regulator has issued its first fines for failure to comply with the requirement to produce an annual Chair's statement within seven months of the end of each scheme year. The annual scheme return to the Pensions Regulator now asks for confirmation that this has been done. Failure to prepare a statement carries a mandatory fine of £500 to £2,000. The Pensions Regulator fined a professional trustee a total of £6,000, being £2,000 for each of three DC schemes. In a [report on its regulatory intervention](#) the Pensions Regulator explained that it imposed the maximum fine in this case because the trustee was a professional trustee and there were no mitigating factors.

Actions/Osborne Clarke Comment: This intervention underlines the importance of preparing an annual Chair's statement within the seven month limit. It also reflects the higher standards expected of professional trustees. Trustees who are preparing a statement need to complete it on time and provide for future statements in their business plan. Trustees who have not already prepared or started to prepare a statement should consider seeking legal advice without delay.

DC

Transaction costs

The FCA has published a consultation paper on '[Transaction cost disclosure in workplace pensions](#)'. The consultation acknowledges that the trustees of schemes which provide DC benefits now have to calculate the charges and (where possible) transaction costs borne by members each year, assess the extent to which they represent value for money and report on them in their annual Chair's statement. It recognises that it will be difficult for trustees to do this unless asset managers are subject to a duty to report on costs in a standardised form and goes on to consult on rules that would achieve this. The consultation remains open and the FCA is expected to publish final rules in Q2 2017.

Actions/Osborne Clarke Comment: Trustees who are going to complete a value for money review and prepare a DC Chair's statement in 2017 need to be aware of this consultation and of the likelihood of new rules (making it much easier to obtain information about transaction costs) in late Spring/Summer 2017.

Discrimination

DB

Same sex survivors

A number of cases have been heard in the European courts regarding the restriction of survivors' benefits for civil partners or same sex spouses (*Dr David L Parris v Trinity College Dublin & Ors*, and *Aldeguer Tomas v Spain*). Pension schemes can still restrict survivor's benefits for survivors of civil partnerships or same sex marriages so that they relate only to the benefits accrued by the member on or after 5 December 2005. This is an area of continuing inequality as between opposite and same sex couples. This inequality has been challenged in the UK courts by Mr Walker, whose same sex partner will receive a significantly reduced survivor's pension in the event of Mr Walker's death. The Court of Appeal has rejected Mr Walker's claim. The decision is being appealed to the Supreme Court. See our [In Focus Briefing](#) for more details.

Actions/Osborne Clarke Comment: The Supreme Court is expected to hear the *Walker v Innospec* appeal in Spring 2017. Many schemes already provide parity for same sex civil partners and spouses as compared to opposite sex spouses in relation to survivors' benefits. Schemes that currently rely on the Equality Act 2010 exemption for same sex survivor benefits can continue to do so. However, employers and trustees should monitor developments to see if the Supreme Court's decision in *Walker v Innospec* changes the legal position.

Indexation/reevaluation

DB

RPI/CPI

The Court of Appeal has considered whether the wording of the rules of a scheme enables the trustees to switch the index used to calculate the revaluation and indexation of pension benefits from RPI to CPI (see *Barnados & ors v Buckinghamshire & ors*). The Court of Appeal has confirmed that the wording does not allow the trustees to choose to switch the index; a switch could only be made if RPI is officially replaced as an index.

The Court of Appeal also held that pension scheme members do not have a right to pension revaluation or increases in accordance with a certain index until the trustees have selected the index to be used – which for each member will be at the point of leaving the scheme or drawing their benefits. A switch of index affecting members' benefits prior to this point would therefore not be a detrimental modification to members' benefits and would not be prevented by the requirements of section 67 Pensions Act 1995, which restrict amendments to accrued benefits.

Actions/Osborne Clarke Comment: This decision confirms that whether the trustees of a scheme can switch the index used for revaluation and indexation depends on the particular wording of the scheme documents. Careful analysis will be required. The decision included one dissenting judgment, showing how difficult the interpretation can be. If it is concluded that the trustees do have power to switch, the Court of Appeal's confirmation that this will not present a section 67 issue is useful. We understand the Court of Appeal refused permission to appeal this decision to the Supreme Court, but a separate application for this may be made.

DB

Discretionary pension increases

The High Court is currently hearing a case relating to the Airways Pension Scheme. We understand that the basis on which the scheme pays pensions increases changed from RPI to CPI. After this, the trustees used the scheme's power of amendment (which, for historical reasons, does not include a requirement for employer consent) to introduce a new power to pay discretionary pension increases. The trustees then proposed to exercise this new power to pay a discretionary increase above CPI to pensioners of 0.2%. We understand that British Airways is contesting the increase in view of the overall funding position of its schemes.

Actions/Osborne Clarke Comment: This case raises interesting questions around trustee powers and duties, in particular the extent to which trustees can introduce new powers, or use alternative powers in a trust deed and rules, to award greater increases where they do not feel a CPI increase is sufficient. We will provide a further update when the judgment is available.

Liability management

All	<p>Section 67 – amendment</p> <p>TPR has issued a report confirming that it exercised its powers to declare a deed of amendment that purported to change a scheme's benefits from DB to DC void. The deed had been executed by the scheme trustees in August 2010. However, the evidence indicated that the trustees had not intended to convert benefits from DB to DC and that the change was a mistake. The scheme's principal employer went into administration in 2014. Uncertainty as to whether the scheme benefits were DB or DC then made the scheme's eligibility for the Pension Protection Fund unclear. The scheme was small so, although an application for rectification was possible, the Pensions Regulator held that this would be disproportionate, and it would have put additional costs on the Pension Protection Fund. In the circumstances, the Pensions Regulator agreed to exercise its powers to declare the deed void, ensuring that members were eligible for DB benefits and thereby entitled to compensation from the Pension Protection Fund.</p> <p>Actions/Osborne Clarke Comment: Trustees should be aware of this possible route for dealing with a deed of amendment where the correct processes for making the amendments were not followed. However this remains a rarely used power of the Pensions Regulator, the circumstances were specific, and in many cases a rectification application to court will still be necessary, which can be expensive and time consuming. This case also demonstrates the importance of complying with the requirements of the scheme amendment power and statutory requirements on amending a scheme before making any amendments. Legal advice should always be taken on amendments to the scheme, and the process for making them, to ensure that all requirements are followed so that the amendment will be valid.</p>
DB	<p>British Steel – RPI/CPI</p> <p>It has been widely reported that the DWP will not be taking forward options published earlier this year for restructuring the British Steel Pension Scheme (BSPS). Most controversially, the options included the possibility of dis-applying in a limited respect (and only in relation to the BSPS) the restrictions on detrimental modifications of members' accrued rights contained in section 67 Pensions Act 1995, thereby allowing pension indexation and revaluation increases to be made by reference to CPI instead of RPI. It is reported that Tata Steel is continuing to consider how to deal with the BSPS. Tata Steel may aim to close the scheme to future accrual, and may be in talks with the Pensions Regulator and the Pension Protection Fund about a deal which may involve the Pension Protection Fund assuming responsibility for all or some of the BSPS.</p> <p>Actions/Osborne Clarke Comment: The Government has retreated from making any statutory changes that may allow schemes more widely to switch from RPI to CPI for indexation and revaluation regardless of the scheme rules. Case law continues to develop in this area so trustees should monitor the situation for developments.</p>
All	<p>Duty of trust and confidence</p> <p>The Court of Appeal will shortly hear an appeal in a long-standing case about whether the BBC has breached its implied duty of trust and confidence when it capped pensionable salary in the final salary section of the BBC pension scheme (<i>Bradbury v BBC</i>).</p> <p>Actions/Osborne Clarke Comment: Employers must be aware of their duties of trust and confidence when making changes to a pension scheme to manage liabilities. We await the outcome of this appeal to determine whether the judgment changes the current position in relation to the legality of so-called non-pensionability agreements.</p>

Master trusts

DC	<p>Pension Schemes Bill</p> <p>The Pension Schemes Bill 2016 has been published and is making its way through Parliament. The Bill sets out a new regulatory regime for master trusts, to be policed by the Pensions Regulator. It also contains provisions enabling the Government to legislate for a cap on early exit charges in DC occupational schemes. The Bill is expected to come into force in 2017. See our In Focus Briefing for further details on the master trust changes and 'Charges' above for more detail about the cap on early exit charges.</p> <p>Actions/Osborne Clarke Comment: Trustees of existing master trusts need to begin considering how they will ensure that the scheme will be compliant with the new regime. Trustees of DC occupational schemes should review any early exit charges or member borne commission charges payable by members and aim to remove these or bring them within the allowed limit.</p>
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Pensions Tax

All	<p>LISA</p> <p>The Government has published the Savings (Government Contributions) Bill 2016/17, which contains provisions relating to the new Lifetime ISA (LISA) which is expected to be introduced in April 2017. The LISA will provide a way for individuals to save both for a deposit on a first home and for their retirement. See our In Focus Briefing for further details.</p> <p>The FCA has issued a consultation paper setting out its proposed approach to regulating the promotion and distribution of LISAs. This acknowledges various risks, including that investors may not sufficiently understand the differences between a pension and a LISA, and the risk that employees will lose out on employer pension contributions if opting for the LISA instead. The consultation remains open.</p> <p>Actions/Osborne Clarke Comment: Employers should monitor developments. The LISA may be structured in future so that employers can make contributions and offer LISAs to employees as a method of workplace saving, although this facility is unlikely to be available from April 2017. Issues as to how the LISA will interact with automatic enrolment remain to be resolved.</p>
All	<p>Secondary market for annuities</p> <p>HM Treasury has confirmed that the Government will not proceed with its plans to create a secondary market for annuities. The main reason given was that it had become "<i>clear that creating the conditions to allow a vibrant and competitive market to emerge, with multiple buyers and sellers of annuities, could not be balanced with sufficient consumer protections</i>".</p> <p>Actions/Osborne Clarke Comment: This proposal may have been of interest to pensioner members. Trustees may wish to consider including a short item on the Government's decision not to proceed in their next member communication.</p>

Pension Protection Fund

DB	<p>PPF compensation cap</p> <p>The DWP has published long-awaited confirmation that the long service element of the Pension Protection Fund compensation cap will come into force on 6 April 2017. Further information is included in our In Focus Briefing.</p> <p>Actions/Osborne Clarke Comment: Trustees should note this development. Trustees concerned that their scheme may soon enter an assessment period should consider seeking advice in relation to the cap and this change.</p>
DB	<p>Draft levy determination</p> <p>The Pension Protection Fund has published its draft levy determination for the levy year 2017 – 2018. It also published draft appendices and draft updated guidance papers on certifying contingent assets, deficit-repair contributions and other areas. The consultation has now closed.</p> <p>Actions/Osborne Clarke Comment: Trustees should consider discussing the draft determination and related issues with their scheme actuary. Trustees should also discuss with employers whether they wish to put any new contingent asset into place or to recertify an existing one. Trustees should note that the deadline for doing so is expected to be the end of March 2017.</p>
DB	<p>Valuation assumptions</p> <p>The Pension Protection Fund has published for consultation updated assumptions to be used in section 179 valuations (completed by on-going schemes) and section 143 valuations (completed by schemes in an assessment period). The Pension Protection Fund has said that the changes are intended to bring the valuation assumptions into line with pricing in the bulk annuity market. The consultation has now closed.</p> <p>Actions/Osborne Clarke Comment: Trustees should consider discussing this consultation and its potential impact on their section 179 or section 143 valuation, with their scheme actuary.</p>

State Pension

All

Review of the SPA

The DWP has published an interim report regarding the current review of the state pension age. The Pensions Act 2014 requires state pension age to be reviewed every six years. John Cridland CBE is currently conducting an independent review. The review is considering the suitability of the current universal state pension age rising in line with increases in life expectancy by reference to three pillars: affordability, fairness and longer working lives. Responses to consultation questions in the interim review are invited by 31 December 2016. The final report will be submitted to the Secretary of State early in the new year, with a report to Parliament on the review due by mid-2017.

Actions/Osborne Clarke Comment: Employers and trustees should continue to monitor developments.

TPR

DB

Increased focus on TPR's anti-avoidance powers

The Pensions Regulator has recently set out how its involvement led to a DB scheme's benefits being protected following the sale of its sponsoring employer. The Pensions Regulator intervened in a transaction which would have affected the Database Group Ltd Retirement Benefit Scheme. For more information about this, and about how TPR said its powers could be improved in its written response to the Work and Pensions Committee's inquiry into DB schemes, please see our [In Focus Briefing](#).

Actions/Osborne Clarke Comment: This intervention shows the importance of, and increasing focus on, TPR's moral hazard powers. This focus is only likely to intensify in light of the high-profile collapse of BHS. Companies considering corporate activity which could affect the covenant or security offered to their DB pension scheme should seek legal advice. Trustees of DB schemes affected by a company proposal should also seek legal advice at an early stage.

Transfers

DB

Overseas transfers and the advice requirement

The DWP has issued a call for evidence on how the advice requirement is working for members who are resident or moving overseas, and whether the requirement should be changed to work better for them. Since April 2015, pension scheme members who have safeguarded (usually final salary) pension benefits worth more than £30,000 have had to take advice from a FCA-authorized adviser before they can transfer their benefits to another scheme. This advice requirement has caused some headaches where a member is resident overseas, or moving overseas and wants to transfer to a Qualifying Recognised Overseas Pension Scheme. For more information about the call for evidence, please see our [In Focus Briefing](#).

Actions/Osborne Clarke Comment: Trustees should monitor this development. However, for the time being, they should continue to apply the advice requirement as it stands.

Trustees

All

TPR discussion paper – trustee standards

TPR has published a discussion paper entitled "21st century trusteeship and governance". The paper "sets out what TPR is doing to educate and support trustees of both defined contribution and defined benefit schemes, and – drawing on the findings of TPR research in a number of key areas – considers what more could be done by TPR and the wider industry in support of raising standards".

Actions/Osborne Clarke Comment: Trustees should monitor this development which could impact, for example, on the requirements for being a professional trustee, the requirements for being a chair of trustees and the knowledge and understanding requirements for all trustees.

VAT

All

Extension of transitional period

HMRC has confirmed that it has decided to extend the transitional period for relying on the 70/30 exemption for the recovery of VAT on scheme administration and investment costs for a further 12 months. For more information about VAT and this development, please see our [In Focus briefings on Pension costs and VAT](#), and [HMRC and VAT](#).

Actions/Osborne Clarke Comment: HMRC's announcement means that schemes may continue to rely on the treatment outlined in [VAT Notice 700/17: Funded Pension Schemes](#) until 31 December 2017. Trustees should continue to monitor the position in order to ensure that they are in a position to discuss HMRC's final solution with the employer when it is announced.

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