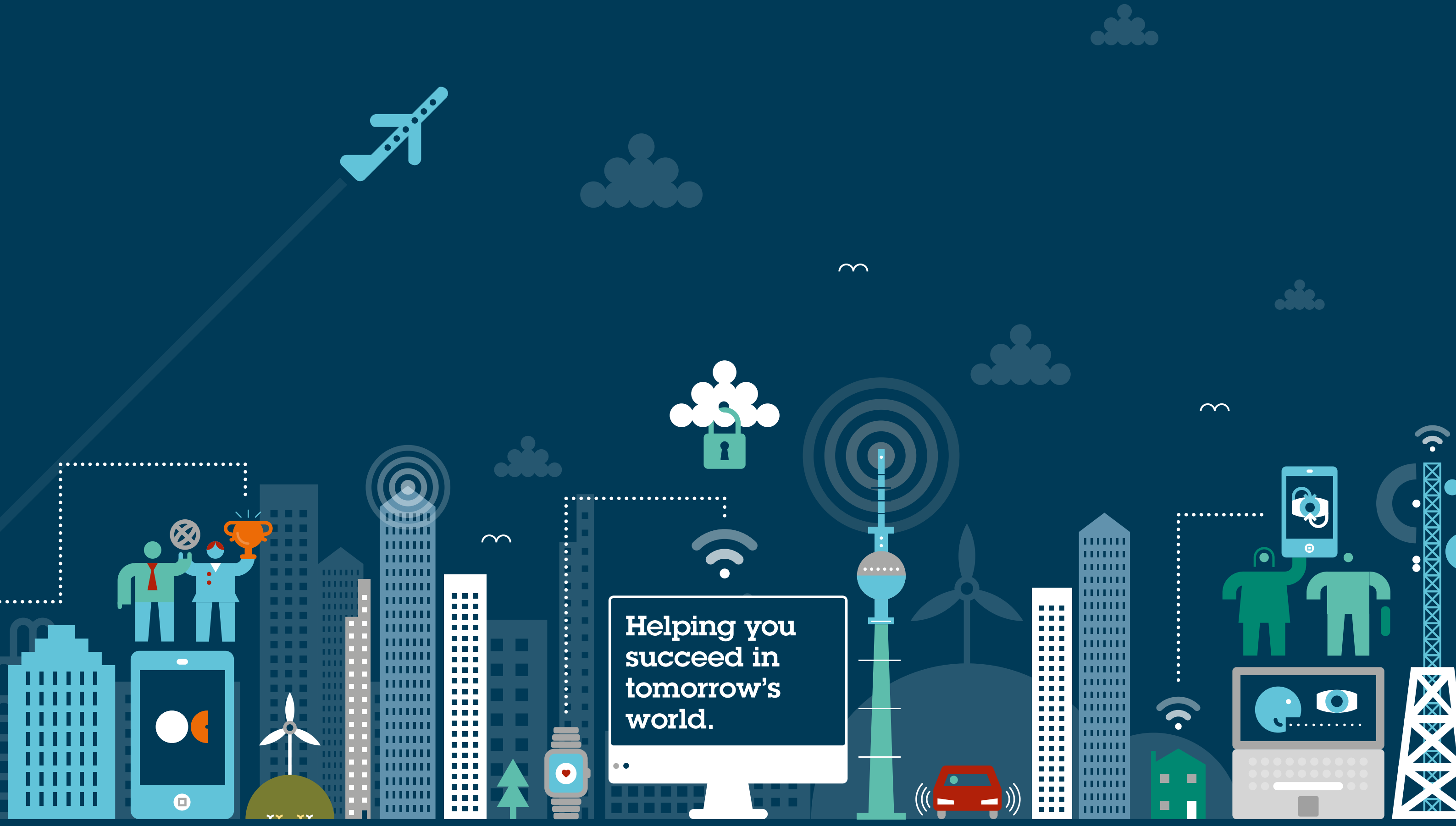
Pensions Action Plan
Q1 2017



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). To read the full report with links go to **osborneclarke.com/PensionsActionPlanQ12017**. You can access the In Focus briefings, papers and articles that are named in orange by clicking on them.

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

Administration

All	**Underpayments – member entitled to top up pension commencement lump sum** The Pensions Ombudsman has held that a member whose benefits were underpaid when they were put into payment is entitled to receive both the increased (correct) pension and an option to take the additional pension commencement lump sum (PCLS). This applied even though the additional PCLS would be an unauthorised payment which may attract tax charges (*Mr E PO-12248*). The member retired in 2012. The underpayment was subsequently identified and the member's pension was corrected. However, the trustees decided not to pay the additional PCLS the member should have received in 2012 by way of a lump sum. The reason for this was that, in order to be an authorised payment for Finance Act 2004 purposes, a PCLS has to be paid within a year of the pension starting. More than a year had passed, which meant that any top up to the PCLS would be an unauthorised payment attracting tax charges. Instead, the trustees tried to compensate the member for the additional PCLS he had lost by adding a further amount to his annual pension. The Ombudsman noted that underpayment resulted from maladministration by the trustees, in that they had failed to correctly interpret and apply the scheme rules. He ruled that the scheme must give the member the option to take the top up PCLS. In relation to the unauthorised payment charges that might apply, the Ombudsman referred to section 241 of the Finance Act 2004. Section 241 says that the normal tax charges will not apply to an unauthorised payment if the payment is "*…made to comply with an order of a court or of a person or body with power to order the making of the payment*", or "*it is made on the ground that a court or any such person or body is likely to order the making of the payment (or would be were it asked to do so)*". The Ombudsman commented that if "*the circumstances are explained to HMRC, it is entirely possible HMRC will make a concession to allow for the fact a genuine mistake occurred in calculating the original PCLS in 2012*". **Actions/Osborne Clarke Comment:** Where benefits have been underpaid, it is relatively simple to correct and pay arrears of pension. However, the strict one year time limit for paying a PCLS (and the unauthorised payment charges that could apply where a payment is made after one year) can make the question of whether to top up a member's PCLS more difficult. This decision suggests that trustees may need to consider offering to top up PCLSs when they are correcting past underpayments. It also suggests a possible solution to the problem of unauthorised payment charges. Trustees who are considering an underpayment case should discuss this decision with their legal advisers. Trustees who discover an underpayment in the future should take legal advice as soon as possible.
All	**Dependant's pension – evidence of dependency** The Pensions Ombudsman has dismissed a complaint by a member's daughter in a case where the trustees had discretion to pay a pension to a "*Dependant*" (*Miss S PO-10502*). Although the Pensions Ombudsman empathised with the daughter, "*Dependant*" was defined as including "*anyone who shares living expenses with, or receives financial support from, the Member or other person and whose standard of living would be affected by loss of that person's contribution or support*". The daughter could only provide the trustee with bank statements which showed regular cash withdrawals by the member, which she said he paid to her to support her due to her medical condition. She could not prove that the money had been given to her, or provide any more evidence of dependency, such as evidence that she was sharing living expenses such as bills. **Actions/Osborne Clarke Comment:** This decision demonstrates the difficulty trustees can face where a lump sum or pension can only be paid to a 'dependant' as defined in the scheme rules, but a potential beneficiary cannot provide much evidence of dependency. If trustees follow the correct procedure then their decision is unlikely to be criticised. This can be a difficult area and trustees who are not sure whether someone is eligible to receive, or be considered for, a benefit under a lump sum or dependant's pension rule may wish to take legal advice.

Automatic enrolment

All	**Government review** The government has announced a review of automatic enrolment with a view to ensuring that it continues to meet the needs of savers. In addition to a review of the charge cap, the alternative quality requirements for DB schemes and the certification requirements for DC schemes, this review will look at groups who are currently excluded from automatic enrolment. For example, it will gather evidence on people who have a number of jobs but who do not qualify for automatic enrolment in any of them, examine the earnings thresholds and age criteria for automatic enrolment and consider how self-employed people can be helped to save for their retirement. **Actions/Osborne Clarke Comment:** A report will be published later this year setting out policy recommendations. Employers and trustees should monitor developments.
All	**Earnings triggers and qualifying earnings for 2017/18** The government has confirmed that for 2017/18, the automatic enrolment earnings trigger will remain at £10,000 and the qualifying earnings band will be £5,876 to £45,000. **Actions/Osborne Clarke Comment:** Employers and trustees will need to apply the correct figures from 6 April 2017. They will also need to continue to comply with their duties to automatically enrol and reenrol eligible jobholders, and to make a pension scheme available for non-eligible jobholders and entitled workers. Employers and trustees who have questions about how the automatic enrolment duties apply to them should consider taking legal advice.

Brexit

All	**Supreme Court decision on Article 50** In our **Pensions Action Plan for Q4 2016**, we reported that the High Court had ruled that the government must obtain approval from Parliament before triggering Article 50 of the Lisbon Treaty. We also reported that the government was appealing that decision to the Supreme Court. The Supreme Court has now heard the appeal. It has confirmed that the government must obtain approval from Parliament before triggering Article 50 of the Lisbon Treaty, but that it does not need to consult the devolved administrations. The government has prepared a two-clause Bill for the purposes of seeking the necessary authorisation. It still seems likely that Article 50 will be triggered by the end of March 2017. See our update on this **ruling**. Brexit has fewer immediate legal implications for pensions than other areas of business. However, the economic consequences do have funding and investment implications for pension schemes which trustees need to address and monitor. The Pensions Regulator (TPR) has issued this **statement**. See our **update on the pensions legal implications of Brexit** for further details and the update in relation to GMP equalisation later in this action plan. **Actions/Osborne Clarke Comment:** Trustees should continue to 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.

Contracting-out

*Schemes that were contracted-out on a DB basis in April 2016

DB*	**Resolution to remove GMP underpin** From 6 April 2016 a new flat rate state pension was introduced. At the same time, the government abolished the state second pension, and the ability for schemes to contract-out on a defined benefit basis. Schemes that were still open to future accrual in April 2016 are likely to have taken a number of steps in response to the abolition of contracting-out. However, there is one step that schemes may still need to take before 6 April 2017. A scheme that was open to future accrual in April 2016 will usually expect to apply 'section 148' (average earnings) revaluation to active members' guaranteed minimum pensions in the period between 6 April 2016 and the date those members finally leave pensionable service, followed by fixed rate revaluation between the date of leaving pensionable service and GMP age. However, the scheme rules may be drafted in a way which obliges the scheme to provide fixed rate revaluation from 6 April 2016 if this would be better for the member. This fixed rate 'underpin' could significantly increase the cost of revaluation for the scheme. Trustees can use a statutory power to pass a resolution to remove the fixed rate underpin with effect from April 2016. However, certain requirements must be met and, critically, any resolution must be passed before 6 April this year. **Actions/Osborne Clarke Comment:** The power to pass a resolution to remove a fixed rate underpin must be exercised before 6 April 2017. The employers and trustees of schemes that were still open to future accrual when contracting-out ceased on 6 April 2016 should discuss this point with their legal adviser without delay.

DC

DC	**Bulk transfers without member consent** The DWP has issued a **call for evidence** on how the current legal requirements relating to DC bulk transfers without member consent could be improved. Currently such transfers require an actuarial certificate in relation to the rights and benefits that members will have in the receiving scheme, and it is necessary to show a relationship between the employers of the transferring and receiving schemes. The DWP is seeking views on whether these requirements (which were originally designed for DB schemes) can be changed to make them work better for DC schemes. It seems likely that any changes to the law will take effect in April 2018. **Actions/Osborne Clarke Comment:** Employers and trustees who are considering a bulk transfer of DC benefits, for example as part of an exercise to consolidate pension schemes, should note this development. It seems unlikely the law will change before April 2018, but we will report any further developments in a later edition.
All	**Financial guidance** The government has published a **consultation paper** on the model for the new single financial guidance body that will provide advice on debt, money and pensions. With the exception of debt advice, the body will not fund regulated financial advice, but will signpost consumers to other providers. The consultation anticipates that the new body will be launched no earlier than Autumn 2018. In the meantime, the Pensions Advisory Service, Pension Wise and the Money Advice Service will continue to provide their services. **Actions/Osborne Clarke Comment:** Trustees should note this development. 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.

Discrimination

DB	**GMP equalisation** The Department of Work and Pensions has launched a **consultation** on various legislative amendments and a proposed new method for equalising guaranteed minimum pensions (GMPs). There are several differences between the GMP payable to a man and the GMP payable to a woman. These all flow from the fact that the age at which women are entitled to take their GMP is 60, whilst for men it is 65. This consultation is the latest step in a long standing question of whether (and, if so, how) schemes should adjust members' benefits to 'equalise' the GMPs of male and female members. The consultation suggests a new methodology which involves a one-off calculation. See our **In Focus Briefing** for further details. **Actions/Osborne Clarke Comment:** For now, employers and trustees should note this development. It seems likely that more detailed guidance will be provided once primary legislation has been enacted.
All	**Same sex survivors** The Court of Justice of the European Union (CJEU) has given its decision in *Dr Parris v Trinity College Dublin & ors*, a case concerning the pension rights of the survivor of a same sex relationship. The CJEU has held that the rules of the Trinity College Pension Scheme, which provided a survivor's pension to a member's spouse or civil partner where the member married or entered a civil partnership before their 60th birthday, were not discriminatory on the basis of sexual orientation or age. See our **In Focus Briefing** for further details. This decision may well influence the Supreme Court's approach in *Walker v Innospec* when it hears that case early this year, making it more likely that the court will find that the fact that Mr Walker's same sex partner is not entitled to the same pension as an opposite sex spouse would receive is not discriminatory. **Actions/Osborne Clarke Comment:** 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 continue to monitor developments, in particular the decision of the Supreme Court in *Walker v Innospec* this year, in case it changes the legal position.

Funding

DB	**Integrated risk management** TPR has published a **quick guide to Integrated Risk Management** (IRM) and a **checklist of key considerations**. The guide is aimed at smaller schemes and explains how they can benefit from IRM and how to get started. The checklist then helps schemes to apply IRM. **Actions/Osborne Clarke Comment:** IRM is a tool to help trustees identify, prioritise and manage risks in the areas of employer covenant, investment and funding and all DB trustees should be applying it. As such, the quick guide and checklist could be of interest to all trustees. However, they will be particularly useful for newly appointed trustees who would like to understand IRM better or for the trustees of schemes who are in the early stages of discussing IRM with their scheme actuary.
DB	**Investment – environmental, social and governance factors** The European Parliament has approved IORP II, a revision of the 2003 Directive on Institutions for Occupational Retirement Provision. A new feature of IORP II is a requirement for occupational pension schemes to carry out investment risk assessments on environmental, social and governance (ESG) factors at least every 3 years. See our **In Focus Briefing** for further details. **Actions/Osborne Clarke Comment:** IORP II must be transposed by Member States within the next 2 years. As such, for UK schemes, implementation may be affected by Brexit. However, there is a strong argument that trustees already have a duty to consider financial ESG factors when reaching investment decisions. As such, trustees may wish to discuss this development and their duty to consider financial ESG factors with both their legal and investment advisers.

Master trusts

DC	**Chair's statement** TPR has issued its first fines to master trust trustees for failure to comply with the requirement to prepare an annual Chair's statement within seven months of the end of each scheme year. Failure to prepare a statement carries a mandatory fine of £500 to £2,000. In a **report on its regulatory intervention** TPR explained that it imposed the maximum fine of £2,000 in the case of one master trust because the trustee was a professional trustee and there were no mitigating factors. It imposed fines totalling £3,020 in the case of three other master trusts where mitigating factors were present. TPR said: "*Protecting consumers from poorly governed master trusts is one of our priorities in our 2016-2019 Corporate Plan. We expect all master trusts to comply with the requirement to prepare a chair statement.*" **Actions/Osborne Clarke Comment:** This intervention underlines the importance to the trustees of master trusts of preparing an annual Chair's statement within the seven month time limit. It also reflects the higher standards expected of professional trustees. Trustees need to complete statements on time and provide for future statements in their business plan.
DC	**Master trust assurance framework** The Institute of Chartered Accountants in England and Wales (ICAEW) has updated its **'Master Trust Supplement'** to reflect TPR's new DC Code and guidance. The supplement is designed to help the trustees of a master trust to assess whether their scheme meets equivalent standards of governance and administration to those set out in TPR's DC Code. **Actions/Osborne Clarke Comment:** Trustees of master trust schemes need to take action in response to the updated supplement. They also need to start preparing for the changes that will be made by the Pension Schemes Bill 2016/17. This bill, which is making its way through Parliament, will set up a new system for regulating master trusts. We commented on the bill in our last **action plan**.

Tax

All	**Autumn statement** The Chancellor delivered his Autumn Statement on 23 November 2016. For pensions, the key announcements were that the money purchase annual allowance will reduce from £10,000 to £4,000 with effect from April 2017, salary sacrifice arrangements can continue for pension contributions purposes and the government is consulting on pension scams. Our **In Focus Briefing** contains more information about the Autumn Statement and we discuss the consultation on pension scams immediately below. **Actions/Osborne Clarke Comment:** Employers and trustees should consider whether and, if so how, to communicate the reduction to the money purchase annual allowance to members. Any communication will need to be carefully worded to make sure that it cannot be considered as financial advice.
All	**Pension scams** Pension scams continue to be a widespread problem, and they can have devastating financial consequences for members. The government has published a **consultation** on three sets of proposals for dealing more effectively with them. These include a proposal to ban cold calling in relation to pensions, a proposal to make it harder to open fraudulent schemes and a proposal to limit the statutory right to transfer pension benefits. See our **In Focus Briefing** for further details. **Actions/Osborne Clarke Comment:** The proposal to limit the statutory right to transfer pension benefits is of particular interest. At the moment, trustees can find themselves in a difficult position where they have concerns about the legitimacy of a scheme to which a member wants to transfer. If the government gets the final legislation right, this could clarify what is currently a difficult area for pension trustees, whilst simultaneously providing better protection for members. For the time being, trustees should monitor developments. They should also consider seeking legal advice in any case where a member is transferring their benefits out of the scheme and the administrators have flagged concerns about the transfer or receiving scheme.

Pension Protection Fund

DB	**Levy determination for 2017/18** Following consultation, the PPF has published its planned **levy rules for 2017/18**. The rules are not final. However, the PPF has said that "*except for the possible addition of material relating to (the charging of a levy to) eligible schemes which cease to have a substantive employer after a restructuring of the pension arrangements, it is (its) firm intention that there will be no other changes to the provisional levy rules*" before the final determination is published at some point before 31 March 2017. **Actions/Osborne Clarke Comment:** Trustees should consider discussing the draft levy rules and related issues with their scheme actuary. Trustees should also discuss with employers whether they wish to put any new contingent assets into place, or to recertify an existing one, before the expected deadline of midnight on 31 March 2017.
DB	**Valuation assumptions** Following consultation, the PPF has published updated guidance on the actuarial 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 updated **guidance** should be used for all valuations with an effective date on or after 1 December 2016. **Actions/Osborne Clarke Comment:** Trustees should discuss this change and its potential impact on their section 179 or section 143 valuation with their scheme actuary.

Scheme funding

DB	**Anti-avoidance and future of DB schemes** The Work and Pensions Committee has published its **report** on defined benefit (DB) pension schemes. The Committee was tasked with recommending changes to the DB pensions sector which would reduce the likelihood of cases such as BHS happening again. In its report, the Committee analysed four key areas of DB pensions and made recommendations for the government, the PPF and TPR to consider. The four key areas were promoting well run schemes, intervening in problem schemes, stressed schemes and anti-avoidance. Our **In Focus Briefing** contains further details about the report and recommendations. The government has confirmed that it is going to issue a Green Paper on the future regulation of DB schemes in the first quarter of this year.. **Actions/Osborne Clarke Comment:** Employers and trustees should note the Committee's report and monitor developments in this area. We will report on the green paper and the legal implications of it when it is issued.

Trustees

All	**Record keeping** After conducting a survey of more than 530 occupational pension schemes, TPR has announced that, to try to improve record keeping standards, it is going to require trustees to report on record keeping in their scheme return. TPR has also published a **quick guide** to help trustees to understand why good record keeping is important and what steps they need to take. **Actions/Osborne Clarke Comment:** TPR first published guidance on record keeping in 2010. This new requirement for trustees to report on record keeping in their scheme return emphasises the fundamental importance of good record keeping for pension schemes. Trustees may wish to review their scheme's compliance with TPR's record keeping guidance at their next trustees' meeting with a view to identifying and taking any further action needed.
All	**Trustee standards** In our last **action plan** we reported that TPR had issued a discussion paper entitled "*21st century trusteeship and governance*". TPR has now published its **response** to the discussion paper. In the response TPR confirms that "*all members of occupational pension schemes have the right to expect that their retirement savings are being looked after properly by the trustees*" and says that it intends to drive higher standards in three main ways. The three main ways are "*more targeted education and tools to raise the standards of poor trustees*", "*setting out clearly what we mean in practice by the higher standards we already expect of professional trustees and the specific qualities and skills we expect chairs to bring to trustee boards*" and "*tougher enforcement against trustees who fail to meet the required standards*". **Actions/Osborne Clarke Comment:** This response shows the importance of, and increasing focus on, good governance and effective trusteeship. It also confirms the higher standard expected of professional trustees. It is likely that TPR will issue further guidance in this area in Spring 2017 and trustees should monitor and be ready to respond to this. In the meantime, trustees may wish to consider the response at their next trustees' meeting.

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Key contacts

Jonathan Hazlett,
Partner, UK
T +44 117 917 3350
jonathan.hazlett@osborneclarke.com

Jennifer Cave
Senior Associate and Training & Know-how Lawyer, UK
T +44 117 917 4188
jennifer.cave@osborneclarke.com

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