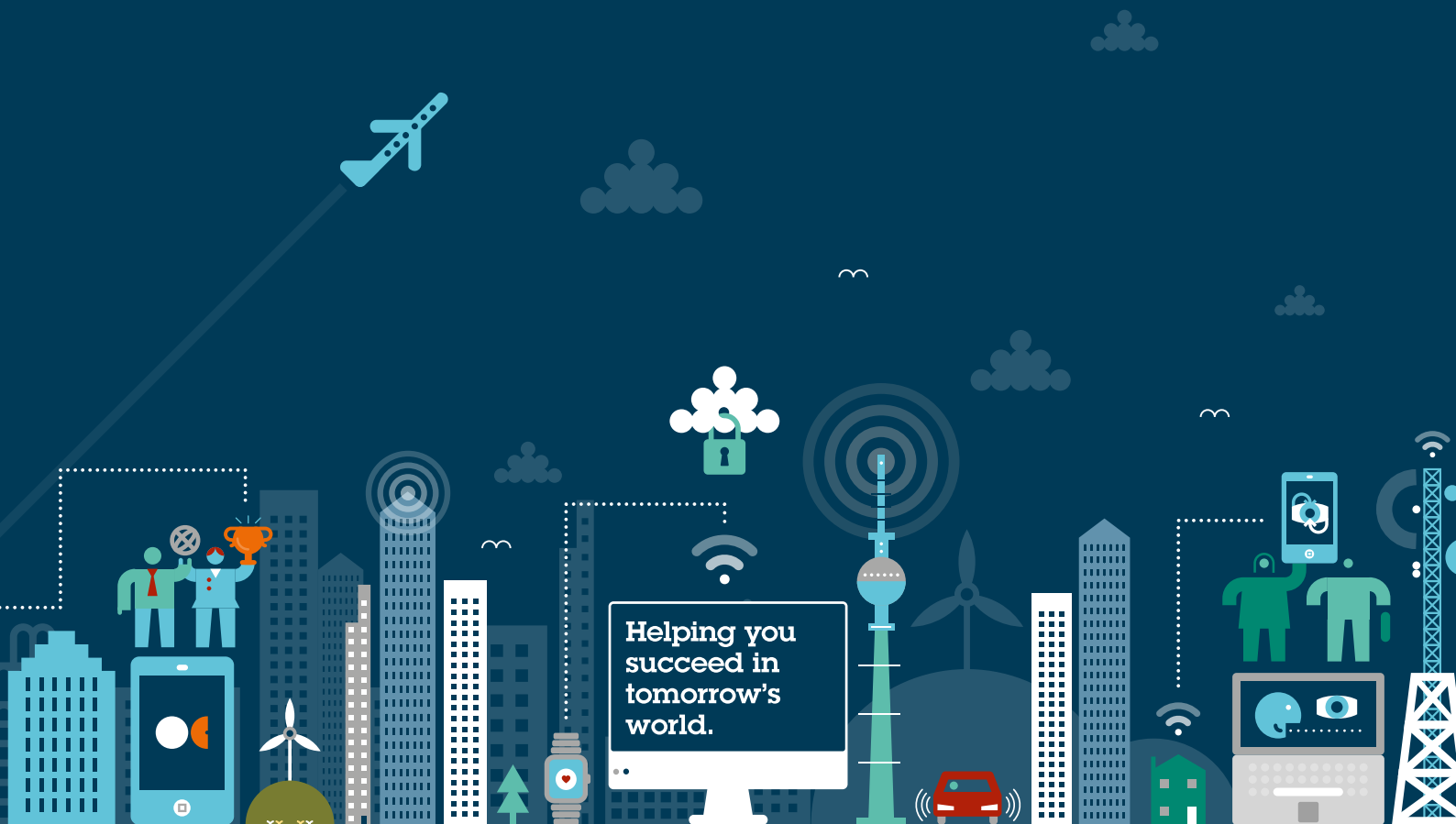


Pensions Action Plan

Q3 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 or sections (DB), defined contribution schemes or sections (DC), or both (All).

To read the full report with links go to

osborneclarke.com/insights/pensions-action-plan-q3-2017/

You can access the In Focus briefings, papers and articles that are named in **orange** by clicking on them.

If you 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**.



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Administration

All

Overpayments – administrator did not consider whether member had a defence to recovery

The deputy Pensions Ombudsman has partially upheld a complaint by a member about the recovery of past overpayments (**Mrs N, PO-10427**). In May 2012, the scheme administrator told the member that it had been overpaying her pension. Having discovered the error, the administrator adjusted the member's benefit to the correct level going forwards. It also started to recoup the past overpayments by deducting money from the member's pension payments.

The member complained about the correction of her pension and the recoupment. She argued that her pension should not be reduced to the correct level because this would cause her financial hardship, and that the past overpayments should not be recovered because she had relied on the additional income and spent it in good faith. The member gave a list of the things she had spent money on. Some of these (home improvements and purchase of a new car) seemed to have been essential and/or incurred before the member received any of the overpayments. Another (funeral expenses) was incurred after the member had been told about the overpayment. As such, the member could not have relied on the overpayments when she spent money on them. However, the member had spent an amount equal to the "vast majority" of the value of the overpaid sums in ways that she could not reasonably reverse (for example, repaying some of her daughter's credit card debts and making a payment to a brother in financial difficulty). She had also spent an amount equal to the remainder of the overpaid sums on her daily standard of living.

In view of this, the deputy Pensions Ombudsman accepted that the member had a valid defence to recovery of the past overpayments. She directed the scheme administrator (who had not considered whether the member had a defence to recovery before starting to recoup the overpayments) to continue to pay the member the corrected level of benefit going forwards, but to repay all of the monies it had recouped from her pension with interest and not to try to make any further recovery.

Actions/Osborne Clarke Comment: When trustees discover that a member's pension has been overpaid, the starting point is that they must reduce the pension to the correct level going forwards and recover past overpayments. There are two main barriers to recovery of the past overpayments. The first is limitation. (We considered two recent decisions on this in our **Q2 2017 pensions action plan**.) The second is a 'change of position' or 'estoppel' defence. The deputy Pensions Ombudsman's decision in this case demonstrates that the question of whether a member has a valid defence to the recovery of overpayments will depend on the facts of the case, but is one that should be considered. Trustees who discover that a member's pension has been overpaid should consider seeking legal advice about the correction of benefits going forwards and the recovery of past overpayments.

Automatic enrolment

DC

Minimum contributions

The minimum contribution rates for DC schemes or sections used for automatic enrolment will increase on 6 April 2018. The minimum rates for employer and member contributions that will apply from April depend upon which of the four permitted definitions of pensionable pay a scheme or section uses to calculate contributions.

Actions/Osborne Clarke Comment: Employers and trustees of DC schemes or sections used for automatic enrolment should consider taking consultancy and or legal advice on whether they need to make any change to employer or member contribution rates from 6 April 2018, whether it is necessary to consult on any change and whether it is necessary to amend the scheme's contribution rule and/or payment schedule.



Brexit

All European Union (Withdrawal) Bill

The Queen's Speech, delivered at the state opening of Parliament on 21 June 2017, confirmed that there will be series of Bills in connection with Brexit. These include the **European Union (Withdrawal) Bill** (the Repeal Bill), which has now been published. The Repeal Bill repeals the European Communities Act 1972 as at the date the UK formally leaves the EU. As a result, as of that date, no new EU directives, regulations or case law will have effect in the UK, but existing EU law will be preserved. We discuss the Repeal Bill in more detail in our [briefing](#).

Actions/Osborne Clarke Comment: All trustees and employers will need to stay informed on the potential impact of Brexit. Our dedicated Brexit [Insights](#) page has more analysis on the challenges and opportunities posed by Brexit, including in relation to [pensions](#).

Charges

DC Early exit charges

In our [Q2 2017 pensions action plan](#) we reported that the Department of Work and Pensions (DWP) was [consulting on](#) draft regulations to tackle early exit charges where members of occupational pension schemes want to access their pension flexibly between age 55 and the scheme's normal pension age. The government has now published its [response to the consultation](#) and laid final regulations (The Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2017) before Parliament. The regulations will come into force on 1 October 2017. They cap early exit charges at 1% for existing members and ban them for new joiners. The DWP has published [guidance](#) to help schemes to comply.

Actions/Osborne Clarke Comment: Trustees of schemes which provide DC benefits, or benefits which include DC benefits, need to consider with their advisers whether the 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, they need to ensure their providers send them the necessary written confirmation that they are complying with the cap and ban before the end of October this year. Trustees also need to consider communicating with members about the cap and ban before 1 October.

DC Member-borne commission charges

The same [response to consultation](#) and regulations confirm that, with effect from 1 October 2017, the current ban on member-borne commission will be extended to agreements that were in place before 6 April 2016 and have not been varied or renewed since that date. We discussed the ban, and the schemes to which it applies, in more detail in our [Q2 2017 pensions action plan](#).

Actions/Osborne Clarke Comment: Trustees of schemes which provide DC benefits, or benefits which include DC benefits, should discuss this change with their consultant or legal adviser. If it applies to the scheme, the trustees will need to make sure that they obtain a written confirmation from their provider(s) that the ban is being complied with. The starting point is that providers have until 1 April 2018 to comply with the ban and until 30 April 2018 to write to trustees to confirm that it is being complied with.

Data protection

All General Data Protection Regulation

In our [briefing](#) on the Queen's Speech, which was delivered at the state opening of Parliament on 21 June 2017, we reported that there will be a new Data Protection Bill. The Bill will implement the General Data Protection Regulation (GDPR) to ensure that we meet "our obligations while we remain an EU member state" and help to put "the UK in the best position to maintain our ability to share data with other EU members states and internationally after we leave the EU".

Actions/Osborne Clarke Comment: The GDPR is due to come into force in May 2018. It will make significant changes to data protection law and to the penalties for non-compliance. There is no transitional period and both trustees and employers will need to make a number of changes before May in order to ensure they are compliant. For more information about this, and about how we can help you to achieve compliance with the GDPR through our 'Pensions Secure' product, please contact us.

DC

All Reduction of the money purchase annual allowance

Please see the 'Pensions Tax' section of this action plan.

All Financial guidance body

In our [Q4 2016 pensions action plan](#), we reported that the government had announced plans to set up a single public financial guidance body to replace the Pensions Advisory Service, Pension Wise and the Money Advice Service. The government has now published its consultation [response](#) and published a new Bill providing for the single financial guidance body. The aims of moving to a single body include reducing duplication and delivering better value for money.

Actions/Osborne Clarke Comment: Trustees and employers should note the Financial Guidance and Claims Bill. When the new single guidance body is set up, member communications such as booklets, pre-retirement and retirement communications will need to be updated to reflect it.

DC Focus on: Chair's statement

The Pensions Regulator has issued a [compliance and enforcement](#) statement confirming the approach it will take to enforce the requirement for schemes which provide DC benefits to prepare an annual statement, signed by the chair of trustees, within seven months of the end of each scheme year.

Actions/Osborne Clarke Comment: In previous editions we have reported cases where the Pensions Regulator has fined trustees for failure to comply with the requirement to produce a chair's statement within the seven month time limit. This statement confirms that failure to comply carries a mandatory fine. Trustees who are not sure whether the requirement applies to them, or how it applies in a particular situation (for example, if benefits have been transferred out or the scheme is in the process of being wound up), should consider seeking legal advice.



Discrimination

All Same sex partners

The Supreme Court has handed down its much-anticipated judgment in the case of *Walker v Innospec Limited and others [2017] UKSC 47*. The Court has ruled that an exemption in the Equality Act 2010 which means that pension schemes only have to provide a full spouse's pension to a civil partner or a same sex spouse in relation to pension built up by a member after December 2005 is incompatible with EU law and must be disapplied. We discuss the exemption and the Supreme Court's judgment in our [pensions briefing](#).

Actions/Osborne Clarke Comment: The trustees and employers of schemes which have relied on the Equality Act exemption to provide different spouse's pensions to same sex partners need to discuss the Supreme Court's decision with their legal and actuarial advisers. They will need advice on amending the scheme rules to provide equal benefits. They will also need advice on reviewing and adjusting any spouse's pension put into payment to a civil partner or same sex spouse since December 2005.

All GMP equalisation

In our [Q2 2017 pensions action plan](#), we reported that the DWP had published its [consultation response](#) on a proposed new method for equalising for the effect of guaranteed minimum pensions (GMPs). We also reported that the response referred to an on-going legal case. The legal case is an application to the High Court asking for directions on whether the trustee of three Lloyds Banking Group pension schemes is required to equalise the schemes for the effect of GMPs and, if so, how equalisation should be achieved. Lloyds Banking Group Pensions Trustees Limited have released a [statement](#) giving details of the claim and a Lloyds Banking Group spokesman has said that the application "*relates to a longstanding industry-wide issue about how differences between equality and pensions legislation impact occupational pension schemes. The group supports the trustee in seeking a resolution so that it can bring an end to decades of uncertainty and provide clarity to interested parties*". We understand that the application was issued in May and is listed for hearing in June 2018.

Actions/Osborne Clarke Comment: The question of whether it is necessary to equalise for the effect of GMPs and, if so, how to do it, has been open for a long time. Unless a scheme is winding up, or going into the Pension Protection Fund, most trustees and employers have chosen not to take any action until there is clear guidance on the point. It seems likely that this case will provide that guidance. For now, trustees and employers should note that this claim has been issued. We will report further developments in a future edition.

DB Disability discrimination

The Court of Appeal has ruled that an employee whose working hours were reduced to accommodate his disability in the period before he took ill health retirement was not discriminated against on grounds of disability when his part time salary was used to calculate the enhancement to his ill health pension. In *Williams v the Trustees of Swansea University Pension & Assurance Scheme and another [2017] EWCA 1008 Civ*, the court considered the meaning of 'unfavourable treatment'. Under the scheme rules, Mr Williams was entitled to receive an ill health pension, enhanced to take account of the pensionable service he could have completed if he had continued in employment to normal retirement date. The scheme calculated the enhancement using the part time salary Mr Williams was receiving when he retired. Mr Williams claimed he had been treated unfavourably because someone taking ill health retirement from full time employment due to a more sudden disability (for example, a heart attack or a stroke) would receive a pension based on their full time salary. The Court of Appeal dismissed the appeal, concluding that "*treatment which confers advantages on a disabled person, but would have conferred greater advantages had his disability arisen more suddenly*" does not amount to unfavourable treatment. We understand that Mr Williams is seeking permission to appeal to the Supreme Court and will report any developments in a future action plan.

Actions/Osborne Clarke Comment: This decision is relevant for trustees and employers who may have to consider an application for ill health retirement by a member who has moved from full time to part time working due to increasing disability. Trustees and employers should consider taking legal advice if they have any concerns about an application for ill health retirement.

Indexation/reevaluation

DB RPI/CPI

In *British Airways v Airways Pension Scheme Trustee Ltd [2017] EWHC 1191 (Ch)*, the High Court concluded that the trustee of the Airways Pension Scheme acted appropriately both when it used the scheme's power of amendment to introduce a new power for the trustee to award additional discretionary pension increases and when it later exercised that power to award an additional pension increase. The wording of the scheme rules was such that members were only entitled to receive pension increases based on CPI. The trustee used its powers to grant an additional increase of 0.2%, being 50% of the difference between CPI and RPI in September 2012. We understand that British Airways has been granted permission to appeal to the Court of Appeal and will report any developments in a future action plan.

Actions/Osborne Clarke Comment: The British Airways pension scheme trustee was only able to take these steps because it did not need the employer's agreement to exercise the scheme's power of amendment. It is rare for trustees to be able to exercise a power of amendment and/or a power to award additional benefits without the employer's agreement. However, the **judgment** does confirm the need for trustees to follow the correct approach when exercising their powers and to ensure that the minutes of their meetings correctly reflect the discussion held and decisions reached. Trustees who are not sure what approach to follow, or what factors to take (and not take) into account, when exercising their powers should consider taking legal advice.

DB Changes to benefits members have already built up

In *FDR Ltd v Dutton and others [2017] EWCA Civ 200*, the Court of Appeal considered what pension increase the trustees should pay when the scheme rules had been amended to change the rate of pension increase applying to the benefits members had already built up. An amendment made in 1991 changed the rate of pension increase on pre-1991 pension from 3% fixed, to inflation capped at 5%. The amendment was made before section 67 of the Pensions Act 1995 (which protects pension rights built up before an amendment) came into force. However, the scheme amendment power contained wording which protected pension benefits "secured" before any amendment. The court decided that the trustees should do two calculations each year in relation to pre-1991 pension. The first was to take the member's pre-1991 pension on the date they retired and increase it by 3% for each year since retirement. The second was to take the member's pre-1991 pension on the date they retired and increase it by inflation capped at 5% for each year since retirement. The member would be entitled to the higher of the two pensions.

Actions/Osborne Clarke Comment: This case confirms the general principle that you cannot reduce benefits that have already built up. If trustees or employers discover that scheme rules have been amended in a way that seems to reduce, or to have the potential to reduce, the benefits that members built up before the date of change, they should consider taking legal advice without delay.

Investment

All Final report on the asset management market

The FCA has published its **Asset Management Market Study Final Report**. The report considers how asset managers compete to deliver value for money for retail and institutional investors, including pension schemes.

Actions/Osborne Clarke Comment: Trustees of DB and DC schemes may wish to discuss the report with their investment consultant.



Pensions tax

All Money purchase annual allowance and employer arranged financial advice

In our [Q2 2017 pensions action plan](#), we reported that the Finance (No 2) Bill 2016 / 17 contained two provisions which were removed in the rush to finalise the Bill before the general election. The first was a provision reducing the money purchase annual allowance from £10,000 to £4,000 with effect from 6 April 2017. The second was a provision changing the income tax exemption for employer arranged financial advice, again with effect from April 2017. Following its re-election, the government has now **confirmed** that it intends to introduce a new Finance Bill "as soon as possible after the summer recess" to legislate for the changes that were withdrawn from the Finance (No 2) Bill. A separate [list of provisions](#) confirms that these include the reduction of the money purchase annual allowance and the change to the income tax exemption for employer arranged financial advice, and that the government intends to backdate both changes to 6 April 2017.

Actions/Osborne Clarke Comment: The money purchase annual allowance applies to members who have flexibly accessed DC pensions savings. 'Flexible access' would include, for example, taking an uncrystallised funds pension lump sum. Any doubt created by the general election as to whether the reduction would go ahead and, if so, whether from April 2017 or April 2018 has now been removed. As such, trustees and employers should consider updating employees and members. Trustees and employers should also note that the income tax exemption for employer-arranged financial advice is set to increase to £500 per employee per tax year, and be available for advice on the employee's pension arrangements and use of them.

All Pension scams

In a consultation which closed on 13 February 2017, the government sought views on three sets of proposals for dealing more effectively with pension scams. Our [briefing](#) contains more information about the proposals, one of which was to introduce a ban on cold calling to help stop fraudsters from contacting pension scheme members. The government's response to the consultation has been delayed by the election, but the Parliamentary Under Secretary for Work and Pensions has now confirmed that it will be published shortly.

Actions/Osborne Clarke Comment: Pension scams continue to represent a serious risk to the members of DB and DC schemes. We will report on the consultation response in a future edition. In the meantime, Trustees should continue to follow best practice and consider taking legal advice if they have doubts about a pension transfer.

Scheme Funding

DB Future of DB schemes

In our [Q2 2017 pensions action plan](#), we reported that the government had published a [green paper](#) on the future regulation of DB schemes. The consultation period for the green paper expired on 14 May 2017 and the secretary of state for Work and Pensions has now **announced** that the DWP "intends to publish a white paper later this year which will set out proposed next steps on what reform is needed to support the sector... address the commitments in the government's [manifesto](#) in relation to the regulation and rules governing defined benefit private pensions...[and]... consider innovative delivery structures, such as consolidation and measures to drive efficiency within the sector".

Actions/Osborne Clarke Comment: We will report on the white paper in a later edition. Trustees and employers might want to read our [briefing](#) about the original green paper and or the responses to the green paper that were submitted by the [Pensions Regulator](#) and the [Pension Protection Fund](#).

State pension

All Review of the State Pension Age

In our [Q2 2017 pensions action plan](#), we noted that John Cridland's independent review of SPA arrangements after 2028 had been **published**. By 2028, the SPA will be age 67. John Cridland recommended that it be increased from 67 to 68 over the period 2037 to 2039. This is seven years earlier than legislation currently requires. The secretary of state for Work and Pensions was due to publish its review report by 7 May this year. The report was delayed by the general election, but has now been **published**. It confirms that the government intends to follow John Cridland's recommendation, but will not legislate for the change until the next review of the SPA (due in 2023) has been completed. This is so that the government can make sure its decision is based on the latest life expectancy projections.

Actions/Osborne Clarke Comment: Trustees and employers should note that the current government intends to increase the SPA from 67 to 68 between 2037 and 2039, and that this change would affect members and employees born between April 1970 and April 1978. However, trustees and employers should continue to monitor developments in this area because a final decision will not be taken until the next SPA review in 2023.

The Pensions Regulator

All TPR Future

The Pensions Regulator has published a **report** summarising the key findings of an external review it commissioned as part of its "TPR Future" work. "TPR Future" is a review of the way the Pensions Regulator works and what it might need to change in the medium to long term. The report identifies five opportunities for change. These are: clarifying its identity and improving how it engages; setting clear expectations (including providing clarity on the standards and behaviours expected of trustees and providing appropriate guidance for master trusts as the new Pension Schemes Act is implemented); improving its regulatory oversight; using a wider range of regulatory interventions (including continuing to test the wider and swifter use of its powers and making a case to government for changes if it finds any of its powers are not fit for purpose); and being more efficient and effective.

Actions/Osborne Clarke Comment: Trustees and employers should note this report and its connection to the final two entries in this Plan.

All Focus on: Scheme return

The Pensions Regulator has imposed a fine of £1,000 on the London Borough of Barnet Council, as the scheme manager for part of the Local Government Pension Scheme, for failure to submit a scheme return by the date specified in the scheme return notice. In its **regulatory intervention report**, the Pensions Regulator explains why the scheme return is so important. It also confirms that it considers the completion of the scheme return to be "*a basic administrative responsibility*" and that it will consider issuing a financial penalty in any case where "*despite efforts to encourage them, the trustees or managers of a scheme have failed to comply*".

Actions/Osborne Clarke Comment: In a recent **compliance and enforcement** bulletin, the Pensions Regulator confirmed that it has adopted a "zero tolerance" approach to failure to submit a scheme return. This case illustrates the zero tolerance approach and underlines the importance of submitting a scheme return by the date specified in the scheme return notice. Failure to do this can result in a fine of up to £5,000 for each individual trustee and £50,000 for a corporate trustee.



Trustees

All

'Fit and Proper' protocols for professional trustees

Following a recommendation by the Pensions Regulator that trustee bodies across the pensions industry lead the way in setting the standards professional trustees should meet, the creation of a new working group has been **announced**. The Professional Trustee Standards Working Group will prepare a set of 'Fit and Proper' protocols for professional trustees. The protocols will cover competencies, experience and professionalism and will recognise the differences between professional trustees appointed as chairs, non-chairs and sole trustees. Professional trustees will then be encouraged by the Pensions Regulator to follow the protocols.

Actions/Osborne Clarke Comment: The **announcement** suggests that professional trustees will be consulted on the protocols before they are adopted and we will report further developments in future editions. In practice, we anticipate the protocols will be a useful resource for all trustees, including non-professionals.

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