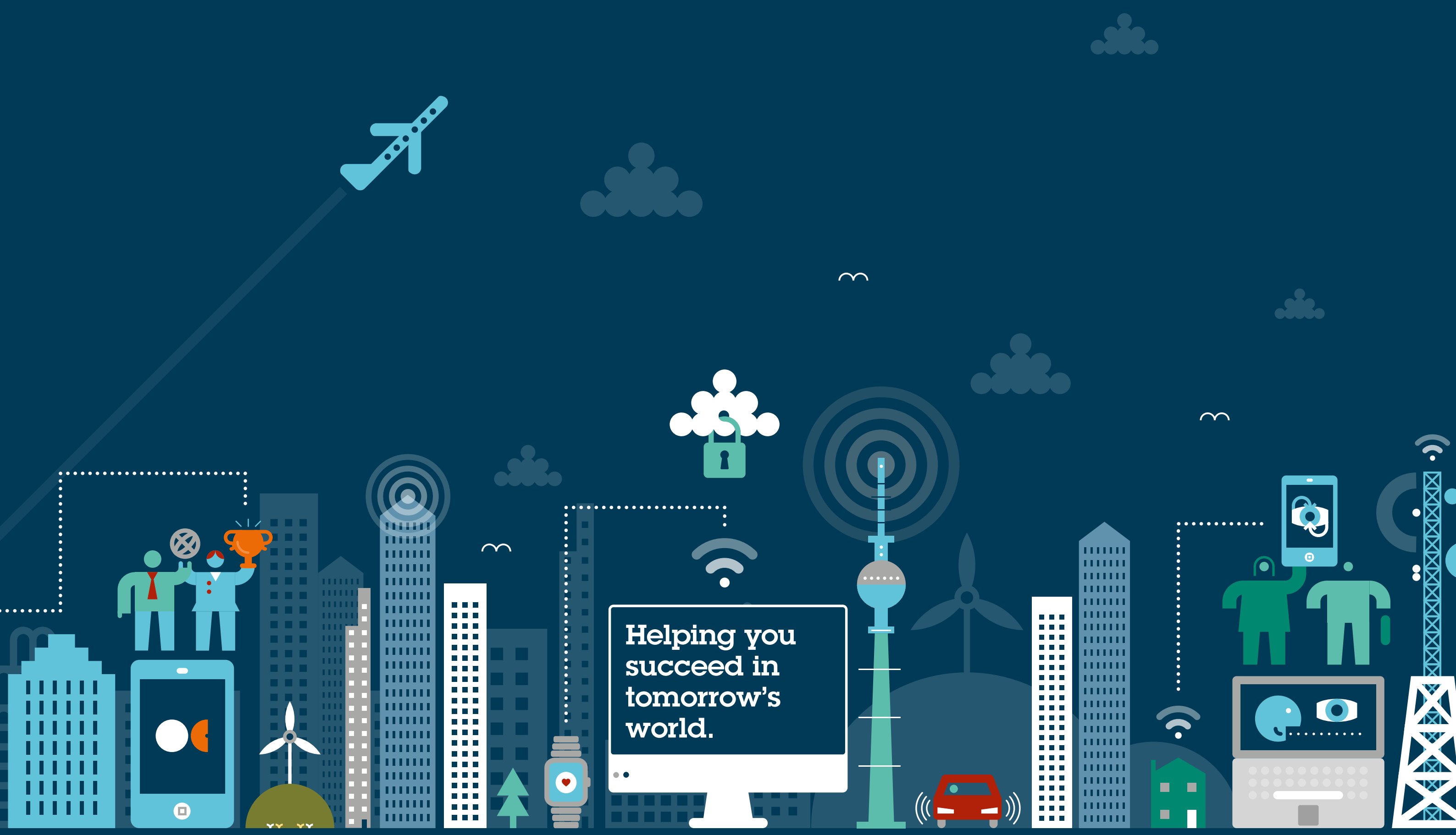
Pensions Action Plan
Q1 2018

Osborne Clarke



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
Pensions Action Plan – Q1 2018

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**.

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Administration

All

Incorrect retirement quotation – no change of position or distress and inconvenience

The Pensions Ombudsman has rejected a complaint by a member who was provided with an incorrect early retirement quotation (**Dr E, PO-11401**). The quotation double counted a period of service transferred in from another scheme. The error was corrected before the member retired, reducing her lump sum and annual pension by about 20%. The member claimed that she should receive the lump sum and pension originally quoted because she was entitled to expect to receive accurate information and had relied on the quotation to her detriment. At the Pensions Ombudsman's office, the adjudicator decided that it was not reasonable for the member to have relied on the quotation. The member had called the administrators to discuss the original quotation three times. However, in the years before she received it, she had received a number of documents that showed the correct figures for transferred in service and total service. As such, she should reasonably have noticed that the figure for transferred-in service on the retirement quotation (14 years 388 days) was much higher than the figure given in earlier documents (7 years 169 days). However, the adjudicator did award £500 compensation for distress and inconvenience. The complaint was referred to the Pensions Ombudsman. The Pensions Ombudsman upheld the adjudicator's decision in relation to reliance, saying that *"the good faith requirement does not just concern what the applicant knew at the relevant time, but what they ought to have known. It was reasonable… that Dr E should have been aware of the error, or should have questioned the service stated as it was a considerable increase on her actual service"*. However, he reversed the adjudicator's award of £500 for distress and inconvenience. An award should only be made if there has been "significant" distress and inconvenience. This was not the case here because the member should reasonably have noticed the error.

Actions/Osborne Clarke comment: The Pensions Ombudsman's decision provides a helpful reminder of the principles that apply where a member claims they have suffered a loss as a result of relying on an incorrect benefit quotation. It also reflects the Pensions Ombudsman's guidance note on compensation for distress and inconvenience. The decision confirms that it will not always be appropriate to pay compensation. Trustees may wish to take legal advice if they discover that an incorrect benefit quotation has been issued.

All

No maladministration where member did not complete online process

The Pensions Ombudsman has rejected a complaint by a member whose online instruction to increase the level of his employee contributions was not processed (**Mr N, PO-17148**). The member tried to use the scheme's online portal to increase his contributions from 10% to 20%. However, he did not complete the last stage of the portal process. When the member complained that his request had not been processed, the scheme offered to accept additional contributions to correct the position. The member said that this was not enough because he had lost out on investment growth on those contributions. The Pensions Ombudsman confirmed that the scheme did not need to take any further action. *"[T]he selection confirmation screen had two prominent boxes: one entitled 'cancel' and the other entitled 'commit my selections'"*. As a result, it would have been clear to the member from the screen that the increase to employee contributions would only be processed if he selected 'confirm my selections'. In addition, the member had successfully used the portal to change the level of his employee contributions a couple of years earlier.

Actions/Osborne Clarke Comment: This decision confirms the importance of making sure that online portals provide clear instructions and are easy for members to use. Trustees and employers who offer members access to an online portal may wish to discuss this decision with their portal provider.

Automatic enrolment

DC

Minimum contributions – 2018 and 2019

In our **Q4 2017 pensions action plan**, we reported that the minimum contribution rates for DC schemes or sections used for automatic enrolment will increase on 6 April 2018. Further increases will take place in April 2019.

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 and or 2019, 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.

All

Automatic enrolment review

The DWP has published a policy paper **Automatic enrolment review 2017: Maintaining the momentum**. The paper follows a review of automatic enrolment, last year, to consider how to build on its success. The key focuses of the review were increasing saving, improving member engagement and doing more to help younger people, part-time workers and the self-employed to save.

As noted above, the minimum automatic enrolment contribution is already set to increase in April 2018 and April 2019. The report confirms that the government will consider the case for further increasing the minimum contribution. It also discusses a number of ways in which the pensions industry (including trustees and employers) could help to improve member engagement and encourage people to save more for their retirement.

To help younger people to save, the paper recommends reducing the lower age limit for automatic enrolment (currently 22) to 18. To help people who work part-time or have more than one job, the paper recommends removing the lower earnings threshold. Amongst other things, this would mean that someone earning £10,000 or less in a job would be able to opt-in and receive an employer's contribution calculated with reference to all of their earnings (not just their earnings over £5,876). The paper recognises that these changes will have costs implications for employers and confirms that the government's ambition is to introduce these changes in the mid- 2020s, to allow time for discussion, consultation and preparation.

For the self-employed, the paper identifies a number of options that might help to increase pension saving. It confirms that the government would like to legislate before the end of this Parliament, but will review the options in more detail and consult on proposals before making any changes. Action will also be taken to make sure that employers provide workers who are in more flexible forms of employment (for example, agency workers and people on zero-hours contracts) with access to automatic enrolment when they are eligible for it.

Actions/Osborne Clarke Comment: Trustees and employers should note the policy paper and proposals. Employers should note that the proposals to help the self-employed and workers who are in more flexible forms of employment tie in with recommendations made in the **Taylor review of modern working practices**. Employers might also be interested to read **our insight** about the Taylor review and our **report** on major trends in the future of work.

Brexit

All

Second phase of negotiations

On 15 December 2017, the European Council decided that sufficient progress had been made on Phase 1 of the Brexit negotiations to move on to discussing the transition arrangements that are likely to apply after the UK leaves the European Union on 29 March 2019. The EU is currently suggesting that the transition period should end on 31 December 2020, to align with its budget cycle.

Actions/Osborne Clarke Comment: All trustees and employers will need to stay informed on the potential impact of Brexit. This **Brexit business brief newsletter** discusses the transition period and other developments in more detail. It also contains an option to register for future editions of the newsletter and links to other Brexit resources. Our 2018 **timeline** sets out our thoughts on the possible timeline of events between now and the end of March 2019.

Contracting-out

All

Amending/removing Protected Rights rules

In our **Q4 2017 pensions action plan** we reported that, where a scheme contracted out of the state second pension on the 'protected rights' (money purchase) basis before 6 April 2012, a series of statutory requirements (designed to make special provision for members' protected rights) applied. We also reported that, although contracting-out on the protected rights basis was abolished with effect from 6 April 2012, for some schemes these requirements were written into (or referred to in) the scheme rules. This raised questions as to whether they were 'hard coded' and, if so, whether trustees could do anything to remove them. To help, the Government introduced a statutory power for trustees to amend their rules by resolution to remove all or part of any rule that makes special provision for protected rights. Trustees can still use this statutory power. However, any resolution must be passed before 6 April 2018.

Actions/Osborne Clarke Comment: The power to pass a resolution to remove or amend protected rights provisions must be exercised before 6 April 2018. Trustees and employers of schemes that were contracted-out on the protected rights basis before 6 April 2012 should discuss this point with their legal advisers without delay.

Charges

DC

Member-borne commission charges

In our **Q3 2017 pensions action plan** we reported 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 that provide DC benefits, or benefits that include DC benefits, should discuss this change with their consultant or legal adviser. If it applies to their 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

We have mentioned the EU General Data Protection Regulation (GDPR) in a number of recent pensions action plans. The GDPR will take direct effect in the UK from 25 May 2018. It will make significant changes to data protection law and to the penalties for non-compliance. There is no transitional period and trustees and employers will need to make a number of changes before May to achieve compliance. They will also need to be able to demonstrate their compliance.

Actions / Osborne Clarke comment: For more information about the changes, and about how we can help you to achieve compliance with the GDPR through our 'Pensions Secure' product, please contact us. For more information about the related Data Protection Bill, please read our **insight**

Discrimination

All

Changes to pension schemes

In our **Q2 2017 pensions action plan**, we reported that two cases, one involving changes to the Firefighters' Pension Scheme and another involving changes to the Judicial Pension Scheme, had hit the headlines. Both cases concerned transitional protections designed to protect some members (who were within a certain number of years of normal pension age) from any change to their pension arrangements, and to provide some other members (who were also older) with a tapering protection. Members who had no protection, or who only had tapering protection, complained that the protections were discriminatory on grounds of age and, in some cases, on grounds of race and sex. Equal pay complaints were also made.

Both cases have now been heard by the Employment Appeal Tribunal. In *McCloud and others v Lord Chancellor and Secretary of State for Justice and another*, the EAT has confirmed that the transitional protections introduced into the Judicial Pension Scheme are discriminatory and are not objectively justified (that is, are not a 'proportionate means' of achieving a legitimate aim). In *Ms R Sargeant and others v London Fire and Emergency Planning Authority and others*, the EAT has accepted that the aim of the transitional measures in the Firefighters' Pension Scheme is legitimate, but has sent the case back to an employment tribunal to consider whether the measures are a 'proportionate means' of achieving that legitimate aim.

Actions/Osborne Clarke comment: These cases involve changes to public sector pension schemes. However, the EAT's decisions confirm the need for employers and trustees to think about the risk of discrimination when proposing changes, or considering proposals to make changes, to pension arrangements.

Indexation / revaluation

DB

RPI has not "become inappropriate" as a measure of inflation for pension increases

The High Court has considered whether the wording of a scheme rule allows the employer and trustees to change the index used to calculate pension increases. In *British Telecommunications Plc v BT Pension Scheme Trustees Limited*, the relevant scheme rule provided for pensions to be increased in line with the *"cost of living"*, subject to a maximum of 5%. The *"cost of living"* was to be measured by increases in *"the Government's published General (All Items) Index of Retail Prices or if this ceases to be published or becomes inappropriate, such other measure as the Principal Company, in consultation with the Trustees, decides"*. The judge ruled that the question of whether RPI had "become inappropriate" was an objective question. In terms of whether RPI had "become inappropriate", the judge concluded that the threshold was a high one: *"…it is not enough that it would be better to use another index, or that another index has become more appropriate, or that RPI is merely undesirable"*. It was also necessary to consider the purpose of the rule. The purpose of the rule was to increase pension payments to reflect increases in the cost of living of pensioners receiving benefits under the scheme. As such, the question was whether RPI was still a suitable index for this purpose, not whether it was still appropriate for general purposes. The judge concluded that RPI has not "become inappropriate" as a measure of inflation for pension increases and so that RPI should be retained. We understand that BT intends to appeal the decision.

Actions/Osborne Clarke Comment: This decision confirms again that the question of whether the index used to calculate pension increases or the rate of revaluation can be changed from RPI to CPI will depend on the wording of the scheme rules. Trustees and employers who are considering whether the rules of their scheme contain a power to change the index and (if there is a power) whether they can and should use it, should consider taking legal advice.

Investment

All

Investment and environmental, social and governance (ESG) factors

The government has published an **interim response** to the Law Commission's June 2017 report "Pension Funds and Social Investment". The interim response sets out some areas in which the government is considering taking action to help ensure that ESG factors are properly taken into account in pension fund investment. It confirms that a full response will follow this summer and we will cover the full response when it is published.

Separately, the Pensions and Lifetime Savings Association has published **guidance**, in association with Client Earth, designed to help trustees to *"understand the importance of integrating climate change considerations into their investment practices"* and to identify *"a programme of action … that they can implement to safeguard their assets and improve the resilience of their portfolios"*.

These steps both complement the investment guidance issued by Pensions Regulator for **DB** and **DC** schemes, which confirms that trustees need to consider climate change risk, and social and governance factors, when setting and implementing their investment strategy.

Actions / Osborne Clarke comment: Trustees and employers may wish to discuss the Government's interim response and the PLSA's guidance with their investment advisers.

Master trusts

All

New authorisation and supervision regime

The Department for Work and Pensions has **consulted** on draft regulations setting out the framework for a new authorisation and supervision regime for master trusts. Under the new regime, which is expected to apply from 1 October 2018, master trusts will need to apply for authorisation by the Pensions Regulator. Master trusts that are authorised will be regulated by the Pensions Regulator. Master trusts that do not obtain authorisation will have to wind-up.

Actions / Osborne Clarke comment: We will cover the new regime in more detail in a future edition. For now, trustees and employers who are considering a bulk transfer to a master trust, or who provide (or are considering providing) employees with access to a master trust, may want to discuss this change with their consultant or legal adviser.

Pension tax

All

Money Laundering Regulations 2017 – new requirements for all trustees

In our **Q4 2017 pensions action plan**, we reported that new Money Laundering Regulations had come into force, under which:

– all trustees must set up a record of 'beneficial owners', maintain this and comply with certain information requirements;

– if the scheme has incurred (or incurs) a 'UK tax', the trustees need to register it with HMRC as a 'taxable relevant trust' and comply with related requirements; and

– 'trust or company service providers' are subject to additional requirements.

Trustees who have not yet complied with the first requirement (record of beneficial owners) should take immediate action.

The trustees of schemes affected by the second requirement (registering with HMRC as a 'taxable relevant trust') need to be aware that the deadline for registration was 31 January 2018. Since we published our Q4 pensions action plan HMRC has confirmed that, for this year only, it will not impose a penalty provided that the trustees register by 5 March 2018. However, urgent action is still needed.

Actions/Osborne Clarke Comment: All trustees need to take action to comply with the regulations. Trustees who are not sure how the regulations apply to them (including the trustees of death benefit trusts) should consider taking legal advice without delay.

Restructuring

All

High court decision confirms the importance of checking the restrictions on a power of amendment

The High Court has confirmed that, if a scheme's power of amendment says that amendments must not *"prejudice or adversely affect… the rights of any Member"*, then it will protect the rights members have built up in the scheme as a result of service before the date of amendment, and give active/contributing members a right to a 'final salary link' on those benefits if the scheme closes to future accrual.

In *Wedgwood Pension Plan Trustee Limited v Keith Salt (Representative Beneficiary of the Wedgwood Group Pension Plan),* the scheme power of amendment contained this restriction. The scheme was closed to future accrual in 2006, using a power in the scheme rules that allowed employers to stop paying contributions in relation to active members after giving notice to the trustees. This power to give notice had not always been in the scheme rules. It was introduced in 2001. Before 2001, an employer who wanted to stop participating in the scheme had to show that it was *"impracticable or inexpedient"* for it to continue to participate. The judge decided that the amendment in 2001 breached the restriction in the scheme's power of amendment because it replaced a requirement for an employer to show that it was *"impracticable or inexpedient"* for it to continue to participate in the scheme, with a requirement simply to give notice. This change made it easier for an employer to stop contributing the scheme, and making it easier for an employer to stop contributing *'prejudiced or adversely affected the rights of members'*. However, this did not mean that the power to give notice could not be used. It just meant that it could only be used if the employer could also show that, when they gave notice, the *"impracticable or inexpedient"* requirement of the old power was also met. The judge decided that this was the case here. As a result, the notices the employers had served in 2006 had been valid and the scheme had closed to future accrual without a 'final salary link'. In terms of a salary link, it was not necessary to provide a link here because the scheme was closed to future accrual by serving a notice. However, it would have been necessary to provide members with a 'final salary link' if, as is more common, the scheme had been closed to future accrual by making amendments to its rules.

Actions/Osborne Clarke Comment: The decision in this case is specific to its facts. However the conclusion about the meaning of wording, in an amendment power, which say amendments must not *"prejudice or adversely affect … the rights of any Member"* is of much wider application. This case confirms the importance, for all trustees and employers, of taking legal advice on the scheme's power of amendment before making changes to, or closing, a scheme.

Scheme Funding

DB

Changes to the ways of managing section 75 debt

In our **Q2 2017 pensions action plan**, we reported that the Department for Work and Pensions was consulting on changes to the legislation that sets out the options for managing the statutory (section 75) debt that arises where one employer in a multi-employer scheme stops employing its last active member.

There is a proposal to introduce a new option, called a 'deferred debt arrangement', which could be particularly helpful for employers in non-associated multi-employer schemes. The 'deferred debt arrangement' would allow the employer to defer the requirement to pay the section 75 debt, provided certain conditions are met. The draft regulations also make some other small changes, for example to the 'restructuring' and 'period of grace' options. The consultation closed on 18 May 2017 and it has been **suggested** that the new regulations could be introduced in April 2018.

Actions/Osborne Clarke Comment: Trustees and employers should note the possibility that changes will be made, in April, to the legislation that sets out the options for managing section 75 debts. We will report any further developments in a future action plan.

DB

Future of DB schemes

In our **Q3 2017 pensions action plan**, we reported that the secretary of state for Work and Pensions had announced that the DWP intended to publish a white paper on the future regulation of DB schemes towards the end of 2017. It has now been **confirmed** that the white paper will delivered this spring, or at least before *"the summer period"*.

Actions/Osborne Clarke Comment: Recent events have increased the focus on the white paper, including any proposals it might contain for new powers for the Pensions Regulator or in relation to those who leave pension schemes under-resourced. We will report any further developments in a future edition. For now employers and trustees should note the revised timetable for the white paper.

The Pension Protection Fund

All

Final levy determination

In our **Q4 2017 action plan**, we reported that the Pension Protection Fund had published a combined draft levy determination for 2018/19. The final levy determination was **published** on 19 December 2017.

Actions/Osborne Clarke Comment: Trustees may wish to discuss the levy determination with their scheme actuary.

All

Contingent assets: new standard forms and revised guidance

In our **Q4 2017 action plan**, we reported that the Pension Protection Fund had published a consultation on possible changes to contingent assets. The Pension Protection Fund has now **published** new standard forms for contingent assets and revised guidance. If a contingent asset is executed on or after 18 January 2018, the new forms must be used. If a contingent asset was executed before 18 January 2018, it will still be possible to certify or recertify it for levy purposes this year (please see below). However, it may be necessary to put a replacement contingent asset into place, using the new form, before March 2019.

Actions/Osborne Clarke Comment: Trustees and employers who are putting a new or replacement contingent asset into place will need to use the new standard forms if they wish to certify it for levy purposes. Even if they do not intend to certify the contingent asset for levy purposes, they may wish to consider with their legal advisers whether it would be appropriate to use the new form.

Trustees and employers with a contingent asset executed before 18 January 2018 should consider taking legal advice on whether they will need to replace it with a contingent asset in the new standard form in order to be able to certify or recertify it for levy purposes next year.

All

Contingent assets: certification/re-certification for levy purposes

The Pension Protection Fund has **confirmed** that the deadline for certifying or re-certifying contingent assets on Exchange for 2018/19 levy purposes is midnight on 31 March 2018. Any hard copy documents must be received by the PPF by 5pm on 29 March 2018. In addition, some new requirements apply to certification/recertification this year. For example:

- if trustees want to certify or re-certify a Type A contingent asset (a guarantee) and the resulting levy reduction will be £100,000 or more, then they will need to obtain an appropriate report on the strength of the guarantor; and
- new rules apply in cases where there is more than one guarantor and where the guarantor is also a scheme employer.

Actions/Osborne Clarke Comment: Trustees and employers should note the March deadline for certifying or re-certifying contingent assets for levy purposes. They should also consider taking legal advice, without delay, on whether they are affected by any of the changes to the requirements for certification or recertification.

All

Changes to PPF compensation for members entitled to a bridging pension

In our **Q4 2017 action plan**, we reported that the DWP had opened a **consultation** on draft regulations to allow the Pension Protection Fund to reduce a member's pension at state pension age to remove any bridging pension element. A **response** to the consultation has now been published and the regulations have been made. The regulations will come into force on 24 February 2018 and will apply to any scheme that enters a PPF assessment period on or after that date.

Actions/Osborne Clarke Comment: The trustees of schemes that provide a bridging pension may wish to discuss this further with their legal advisers..

Trustees

All

Draft standards and new accreditation framework for professional trustees

In our **Q3 2017 pensions action plan**, we reported that the Professional Trustee Standards Working Group had been established to prepare a series of 'Fit and Proper' protocols for professional trustees. The working group has now published a **consultation paper** and **draft standards for professional trustees of occupational pension schemes**.
The draft standards will apply to anyone who falls within the Pensions Regulator's description of a professional trustee, including individuals. The standards are divided into three categories:

– standards which will apply to all professional trustees;

– additional standards which will apply to professional trustees who are chairs; and

– additional standards which will apply to professional trustees who act as sole trustee.

The working group is also developing an accreditation framework for professional trustees and, until this framework is in place, the standards will apply on a 'comply or explain' basis. The consultation will close on 2 March 2018 and the standards are expected to apply from April or May 2018. The details of the accreditation framework will be published later this year.

Actions/Osborne Clarke Comment: Trustees, in particular professional trustees, should note this consultation and may wish to consider responding to it. Employers and trustees who are selecting a professional trustee should note that an accreditation framework for professional trustees is likely to be introduced in due course but that, in the meantime, the draft standards advise asking professional trustees to describe how they meet each of the standards.

All

21st century trusteeship

In our **Q4 2017 action plan**, we reported that the Pensions Regulator had launched a new campaign called "21st century trusteeship – raising the standards of governance". The **dedicated webpage** for the campaign carries links to guidance and to a number of example documents that trustees might find helpful. These include **example terms of reference** for the board and for a sub-committee, a **sample business plan**, a **sample annual planner** and **sample study planner** and learning log.

Actions/Osborne Clarke Comment: Trustees might like to read the dedicated webpage and the materials on it. They might also like to review the documents they have in place against the example documents listed above and consider whether it would be helpful to update the scheme's documents.

Notes

Notes

Osborne Clarke in numbers

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Belgium: Brussels
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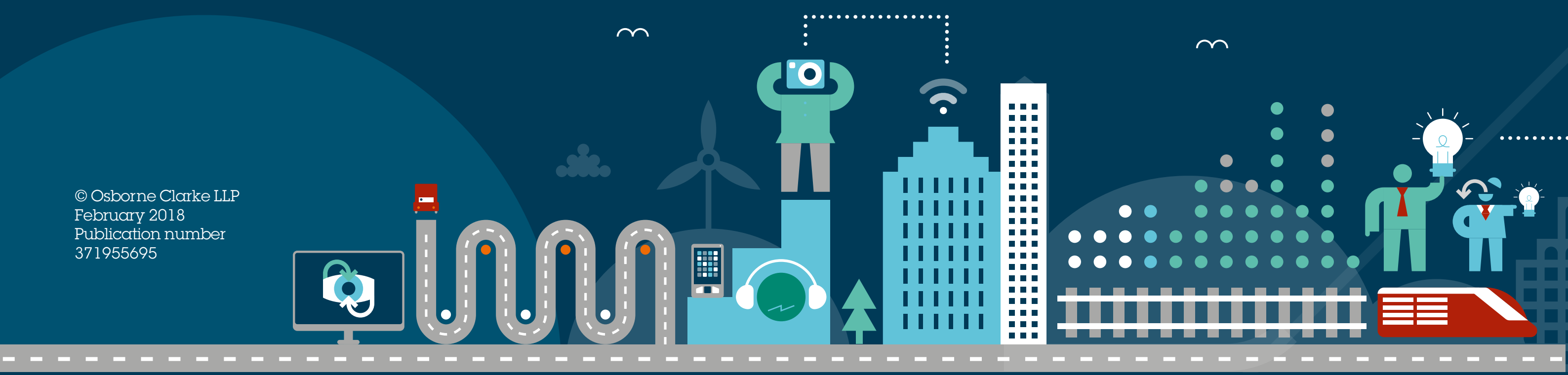

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