Essential UK Pensions News

October 2021

Introduction

Essential UK Pensions News covers the key pensions developments each month.

What's happening this autumn?

October has been a busy month for pensions, with important new legislation, policies and guidance coming into force as well as the announcement of various further consultations and proposals. Despite all of the recent action, we are still expecting significant developments this autumn – here's a quick reminder of the developments coming up in the near future (go to our horizon-scanning table at the end of this briefing for some suggested action points)

What's happening?	When?
Smaller DC schemes (assets of less than £100m): demonstrate value for money (VFM) or wind up	First VFM assessment will be needed in the chair's statement for the first scheme year ending after December 31, 2021
Statutory transfers: new powers for trustees to block suspected scams	Timing still TBC but we understand updated regulations are due imminently in Autumn 2021 and may come into force quickly

A stronger Pensions Regulator

TPR publishes final criminal offences policy

The Pensions Regulator's strengthened powers came into force on October 1, 2021 (see our September Pensions Briefing) and the Regulator has now published its final policy setting out how it will investigate and prosecute the new criminal offences of avoiding an employer debt and conduct risking accrued scheme benefits.

The policy makes clear that the criminal powers will only be used in the most serious cases of intentional and reckless behaviour and not to punish normal, commercial activities. The policy also includes a useful appendix and case study containing common scenarios and the Regulator's likely approach to them. This should hopefully give some comfort to trustees and employees that scenarios such as the use of Flexible Apportionment Agreements should not be prosecuted where all parties have acted in good faith and performed their roles properly.

Employers should note the importance of a clear and accessible paper trail outlining the decisions taken and the reasoning behind them and should ensure that they are open and transparent with the scheme's trustees. When making decisions which impact the pension scheme, employers should also consider the potential mitigation that could be provided and whether there is an alternative course of action as the Regulator's policy makes clear that these factors will be considered when reviewing whether the reasonable excuse defence is satisfied.

The policy also includes helpful guidance on how the Regulator interprets these offences including the burden of proof which will apply. However, the policy does fail to cover key areas, in particular the Regulator's expectations of trustees and where the boundary between reasonable and unreasonable dividend payments is likely to be - this lack of clarity will likely be a disappointment to employers and trustees alike.

Further Consultations on the Regulator's policies and powers

The Pensions Regulator has also launched a consultation on its draft monetary penalties, overlapping powers and information-gathering policies.

The draft monetary penalties policy explains that the Regulator intends that the level of penalty imposed will be linked to the level of culpability and harm caused to the scheme. The draft also provides an indicator that within each band of culpability / harm, the starting point for the penalty will be the middle of the band and the final figure will then depend on any aggravating or mitigating factors.

The draft overlapping powers policy sets out how the Regulator will decide which action to take where it is of the view that it has enough evidence to bring both regulatory and criminal proceedings. The draft policy makes clear that the Regulator views its primary objective as obtaining funds for the scheme which perhaps makes contribution notices more likely than criminal proceedings unless aggravating features such as dishonesty are present.

The draft information-gathering policy covers the use of section 72 notices as well as interviews and inspections including who might be approached for information and the type of information it may request.

The Regulator has also published an updated version of the clearance guidance which includes updates on how a Type-A event is identified in light of the new employer resources and employer insolvency contribution notice tests. Particular points to note for employers include the removal of the requirement for a scheme to be in deficit for an employer-related event to be Type A and the statement that any information provided in the context of a clearance application can be used by the Regulator in other contexts including its enforcement powers.

Governance

Member communications firmly on the agenda

There have been a number of communications related developments this month including the DWP's response to its consultation on simpler annual benefit statements and communications guidance released by the Pensions Ombudsman.

The DWP has published its response to the comments obtained during its consultation on simpler annual benefit statements re-iterating its view that shorter and simpler statements will result in better communication with members.

The DWP has confirmed that the Occupational and Personal Pension Schemes (Disclosure of Information) (Statement of Benefits: Money Purchase Benefits) (Amendment) Regulations 2021 will require annual benefit statements to be no longer than one double-sided sheet of A4 and allow members to understand:

a. How much money they have in their pension plan and what has been saved in the statement year.
b. How much money they could have at their anticipated or agreed retirement date.
c. What they can do to give themselves more funds at retirement.

The Regulations will initially apply only to automatic enrolment qualifying schemes.

Trustees will also be expected to take care to avoid jargon and present the information in simple and clear language with signposting to additional explanatory resources if necessary.

The consultation response also confirmed that the Regulations will now come into force on October 1, 2022 (rather than the original April 6, 2022 proposed implementation date) – this is designed to give trustees time to adapt their annual benefit statements to meet the new requirements.

The Pensions Ombudsman has separately published its views on best practice for communicating with members and avoiding common communication-related complaints to the Ombudsman.

FCA publishes policy statement on assessing value for money in workplace pension schemes

The FCA has published Policy Statement PS21 /12 setting out how Independent Governance Committees (IGCs) and Governance Advisory Arrangements (GAAs) should compare the value of pension products and services, and promote the best value for pension scheme members.

The policy statement confirms that the FCA is introducing new rules and guidance, including requiring IGCs to:

a. Take into account 3 key elements of Value For Money (VFM):
    i. costs and charges,
    ii. investment performance, and
    iii. the services provided (including member communications).
b. Assess and report on VFM, particularly through comparison with other options on the market.
c. Consider, as far as they are able to, whether an alternative scheme or schemes would offer better VFM and inform the pension provider if this is the case. If the IGC is unsatisfied with the pension provider's response, the IGC should also inform the relevant employer where this could make a difference to the outcomes for scheme members.

The FCA believes that the new rules will assist in their aim of creating a more consistent and transparent framework for assessing value for money in the pensions space. The FCA did however note that VFM is complex in relation to pensions, with further work required to improve the comparability of VFM in pension products.

Investment

Trustees of DB schemes to be asked for more information on asset allocations

TPR has announced that from 2023, trustees of defined benefit schemes will need to provide additional information in their annual scheme returns on how they allocate scheme assets. This follows a joint consultation by TPR and the PPF on reforming the asset class information which TPR collects.

The information which the trustees will need to provide will depend on the scheme's section 179 liabilities – schemes with liabilities of up to £30million (tier 1) will need to provide simplified information, those with liabilities between £30million and £1.5billion (tier 2) will need to provide more detail and those with liabilities in excess of £1.5billion (tier 3) will need to provide enhanced information including considering the sensitivity of their portfolio to investment risk factors and stresses.

The new proposals have a particular focus on bonds, with more specific categories of bond-type now included as asset classes in place of the general government bonds category and all schemes asked to provide details on sub-investment grade bonds. Tier 2 and 3 schemes will also be required to identify the maturity level and credit quality of the bonds held. On the equities side, tier 2 and 3 schemes will need to break these down into developed and emerging market categories.

The more detailed breakdown requested under the amended requirements will likely place additional administrative pressure on trustees who will need to take care to discuss this with their scheme managers and advisers.

TPR responds to Productive Finance Working Group Report

TPR has responded to the recommendations made by the Productive Finance Working Group on facilitating investment by DC pension schemes in longer-term, less liquid assets.

In a blog post, David Fairs welcomed the report and acknowledged that greater innovation in the DC pension space should be considered. The post also expressed TPR's support for the 13 recommendations made in the Productive Finance Working Group Report (see our September Pensions Briefing for further details).

TPR also expressed its intention to take on-board these recommendations and publish additional guidance for trustees on investing in illiquid investments and this is expected in 2022 following engagement with industry stakeholders in Q4 2021.

The blog also set out TPR's expectations of trustees in relation to new investment opportunities and industry developments. TPR would expect trustees to be able to actively engage with and consider (with their advisers, consultants and asset managers) whether such investment opportunities would be suitable and appropriate for their scheme.

In line with its view that trustee and sponsor focus should move away from costs and towards potential future saver outcomes for savers, TPR would also expect trustees to be able to demonstrate to members that they have considered the full-range of potential investment opportunities in the context of potential future outcomes rather than just lowest immediate / short-term costs.

Fairs also reiterated TPR's wider stance that schemes which are unable to consider wider, more innovative investment opportunities (either due to scale or governance capacity) should consider consolidation in accordance with TPR's view that greater consolidation will increase the ability of DC schemes to invest in more innovative asset classes.

DWP launches consultation on climate and investment reporting

The DWP has launched a consultation on a proposal to amend the Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 to require trustees of larger occupational pension schemes to obtain data on and calculate, the extent to which their scheme's investment portfolio aligns with the goals of the Paris Agreement. The requirement would apply from October 1, 2022.

The consultation (closing on January 6, 2022), proposes requiring trustees to select a measurement metric and obtain the necessary data to report on the level of scheme alignment, as far as they are able.

The DWP recognises that trustees may not currently be able to obtain the data and metrics which would be necessary to understand whether the scheme's investments have declared Paris-alignment targets – this is something which trustees should discuss with their asset managers in preparation for the new requirements.

Proposed new statutory guidance on the types of portfolio alignment and climate metrics that trustees could select, the level of detail at which the selected metrics should be calculated and reported on, and the management of data gaps, has also been published alongside the consultation.

Additionally, in response to previous trustee concerns, the consultation contains new proposed non-statutory guidance which may be of assistance to trustees looking for best practice principles in relation to incorporating ESG into their Statement of Investment Principles and Implementation Statement.

This consultation follows a recent Work and Pensions Committee report calling on the Government to seize the opportunity presented by COP26 (taking place in November 2021) to create an international consensus on the role that pension schemes can play in achieving the goals of the Paris Agreement.

PLSA publishes case studies to assist schemes in meeting climate goals

The PLSA has published 'Towards a Greener Future: Case Studies from the Pension Sector' which sets out practical real-world case studies to assist pension schemes to put their climate policies into action and meet the regulatory challenges in this space.

The PLSA is hopeful that these case studies will assist pension funds in a practical manner by offering an opportunity to learn from the experiences of their peers and gain insights into how to overcome some of the challenges associated with climate policies in the pensions sector.

Topics covered in the publication include setting climate goals, implementing a strategy which aligns with the Paris Agreement and how to report against standards set by the TCFD. Contributors include both large providers such as NEST as well as insights from smaller schemes.

The PLSA'S director of policy and advocacy, Nigel Peaple explained the objectives of the publication of the new case studies, stating: *"This is a complex area, and we hope that pensions trustees and schemes find our new guide useful whatever the stage they are up to in dealing with climate change."*

GMP Equalisation

PASA's GMP Equalisation Working Group reports on member communications and anti-franking

PASA's cross-industry working group on GMP equalisation has published two new sets of guidance – one looking at member communications and the other at anti-franking.

The member communication guidance is aimed at schemes which have reached the implementation stage of GMP equalisation and have either already started or are getting ready to start communicating with members. The guide contains some useful general principles such as avoiding jargon and making use of a variety of communication channels such as webinars and video presentations.

It also provides some best practice tips and checklists on the timing of communications and schemes should take particular care to double-check what has been said about communication frequency or timing in any previous member communications.

Communicating with past transfers out is recognised as a particularly difficult issue and the guidance suggests that trustees may simply wish to place a general statement on the website urging any former members who cannot be traced to get in touch.

The guide also contains some helpful categories which trustees may like to place members and former members into when deciding on their communication strategy and some accompanying example text which could be sent to each category of member.

The anti-franking guidance considers the complex issue of the interaction between anti-franking legislation and GMP equalisation noting that anti-franking can have a significant impact on any uplift figure. The guidance attempts to fill in gaps left by the legislation and scheme rules by setting out 3 anti-franking methods which the working group considers to be permitted.

No steer on how trustees decide which method to use or whether different methods can be applied to different groups of members is provided but this will likely depend on the availability of data and the capability of the scheme administrator - trustees should seek to discuss this with their administrator and their legal and actuarial advisers.

Restructuring

PPF expects fall in levy for 2022/23

The Pension Protection Fund has published its proposals for the calculation of the 2022/23 PPF levy. The proposals see a fall in the Levy Estimate to £415 million, which is a reduction of £105 million from £520 million in 2021/22.

For schemes, this means around 82 percent of schemes paying the risk-based levy, will receive a reduction in their levy payments.

The PPF is proposing to retain the current Levy formulae with limited changes to that used for 2021/22 – the main parameters (the Levy Scaling Factor, Scheme-Based Multiplier and risk-based Levy Cap) will remain the same as in 2021/22.

According to the PPF, a significant proportion of the reduction in the Levy Estimate stems from the incorporation of the latest actuarial assumption basis for measuring funding levels – these reflect the reduction in the price of buying-out the scheme benefits with an insurance company.

The consultation also notes that following the Court of Appeal's judgment in *Hughes* in July 2021, the Compensation Cap must be dis-applied when determining the compensation payable to members and that the PPF will publish updated section 179 valuation guidance to account for this.

The consultation closes on November 9, 2021, with the final rules and Policy Statement expected to be published at the end of December 2021.

Industry trends

Small pots working group publishes first report

The Small Pots Co-Ordination Group (SPCG) - an industry working group tasked with looking at potential solutions to the proliferation of small, deferred DC pension pots - has published its first update report.

The SPCG are considering a model by which small pots would be automatically consolidated within auto-enrolment workplace schemes, subject to a member opt-out right.

The SPCG envisages that trustees would rely on the discretion given to them to undertake a bulk transfer without member consent in the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991.

The group are prioritising exploring the feasibility of potential member-exchange trials to be conducted by three large master trusts (NOW: Pensions, The People's Pension and Smart Pension) – this would involve members who have a small deferred pot at one master trust and an active pot in another, being identified, their pots being matched-up and the deferred pot being transferred into the active one.

Such an approach could potentially generate issues for trustees such as the availability of the data that would be required in order to match member pots and the care required in selecting a trusted third party to perform the matching as well as data protection considerations in relation to sharing member data. The update report recognises these concerns and that trustee comfort would be crucial to the success of any pilot.

The SPCG is expected to continue to provide progress updates as discussions progress.

Pensions issues in the pipeline

Development	Expected timing	Suggested action*
Climate change risk governance and disclosure requirements start to apply	From October 1, 2021, for first wave of schemes (assets of £5bn and above and all master trusts) From October 1, 2022, for second wave of schemes (assets of £1bn and above) Requirements may be extended to smaller schemes (assets under £1bn) from late 2024 or early 2025 – TBC	First wave schemes to ensure they have produced their first report on time. Second wave schemes to finalise and follow project plan for implementing governance structures and reporting. Smaller schemes to consider whether to comply on a voluntary basis.
Requirement for trustees of smaller DC schemes (assets of less than £100m) annually to assess the value provided to their members and, where they conclude value not provided, to consider winding up	From October 1, 2021 (for scheme years ending after December 31, 2021)	Trustees to consider whether their DC scheme is in scope for the new requirements. Prepare for value assessment (if relevant) and for reporting in chair's statement and scheme return to the Pensions Regulator. If value assessment unlikely to be met, consider options for DC members.
Trustees of all DC schemes to report on net investment returns in the chair's statement	From October 1, 2021 (for scheme years ending after October 1, 2021)	Gather relevant information and prepare for reporting.
Introduction of Long Term Asset Fund	November 15, 2021	Discuss with investment adviser.
Statutory transfers: additional requirements	Autumn 2021	Review processes and assess trustee legal risk, in the light of the draft regulations, published for consultation May 14, 2021. Look out for revised regulations expected imminently.

PPF 2022 / 23 Levy	December 2021	Keep an eye out for the final rules following the closure of the consultation on November, 9 2021.
Requirement to measure and report on alignment with Paris Agreement	October 1, 2022	Keep an eye out for the final regulations following the closure of the consultation on January 6, 2022 and discuss the requirements with asset managers.
Climate change risk governance and disclosure requirements start to apply for: • Asset managers, life insurers, FCA-regulated pension schemes. • Standard listed companies.	From January 1, 2022 Consultations published June 22, 2021; final rules expected Q4 2021.	For noting only. Information from asset managers and investee companies may become more readily available which would help trustees with their own disclosures.
Compliance report for Competition and Markets Authority (CMA) regarding objective-setting for investment consultants and tendering of fiduciary manager appointments	January 7, 2022	Prepare the necessary documentation in good time and ensure it is submitted to the CMA before the deadline. In future, compliance may need to be confirmed to the Pensions Regulator, instead of to the CMA, through the annual scheme return. However, the regulations required to make this change have been delayed, probably to the first half of 2022.
Reporting non-taxable pension death payments to HMRC using Real Time Information	April 6, 2022	Check scheme administrators are aware of and prepared for this new requirement.
Ensure members of occupational pension schemes aged 50+ have taken or opted out of guidance before they flexibly access or transfer DC benefits.	April 6, 2022? Consultation published July 2021 and closed on September 3, 2021.	Look out for final regulations and liaise with administrators to update transfer processes and prepare the necessary communications. Similar obligations will apply to personal pension schemes.
Introduction of the £100 "de minimis" threshold, below which flat fees cannot be charged for DC auto-enrolment schemes	April 2022 (current DWP aim)	This is still TBC.
Notifiable events: changes to current regime	April 2022? Consultation on detailed regulations closed on October 27, 2021.	Update or implement a notifiable events protocol for employers and trustee to minimise risk of breaches. Train key people on the new requirements. Review trustee confidentiality agreements.
Regulator's new single Code of Practice comes into force, including a requirement for an annual "own risk assessment"	Summer 2022? Interim response to consultation published August 24, 2021	Check scheme and employer are compliant with the Code's requirements. Consider planning first "own risk assessment", if relevant.

New simpler annual benefit statements for DC schemes used for auto-enrolment	October 1, 2022	Understand the new requirements and be able to design the new form of statement in time for October 2022 (if applicable). Consultation ran from May 17 to June 29, 2021. Response published on October 19, 2021.
Additional TPR guidance for trustees on investing in illiquid investments	2022	Watch out for the industry consultation expected in Q4 2021.
DB scheme funding: changes to requirements	Late 2022/2023	Consider scheme's long term objective and journey plan and discuss with employers. Look out for second consultation, expected late 2021, and consider implications with advisers.
Legislative framework for superfunds	2022/23	Look out for draft regulations and a consultation in due course. DWP expects to share its vision for a regulatory regime in autumn/winter 2021.
Statutory framework for Collective DC schemes	2022? 2023?	Consultation took place July 19, 2021 - August 31, 2021. Target timing for regulations to come into force TBC.
Pension Dashboards	From April 2023 Compulsory staged on-boarding of schemes, starting with the largest schemes with 1,000+ members.	Look out for consultation, and draft regulations expected late 2021 or early 2022. Develop action plan for getting data ready for dashboard.
Changes to asset class information requirements for DB schemes	2023	Keep an eye for further details and discuss with asset managers and advisers.
Reforms to auto-enrolment – lower minimum age to 18 and remove lower earnings limit.	"Mid 2020s" So far this is only the Government's stated intention but no firm steps taken.	Look out for a consultation and draft regulations.
Rise in normal minimum pension age from 55 to 57	April 6, 2028	Draft legislation published July 20, 2021. Take advice on which members benefit from the new protected pension age (of 55). Update member communications.
RPI reform and switch to CPIH	2030	Take advice on implications for DB schemes and necessary actions.

*** This table sets out some indicative action points that trustees and employers may wish to consider but should not be read as a comprehensive plan of action or client-specific advice. Should you wish to discuss these issues further, please contact the Norton Rose Fulbright LLP pension team who will be happy to assist.**

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