NORTON ROSE FULBRIGHT

Essential UK Pensions News

March 2021

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

A stronger Pensions Regulator

1. Pensions Minister outlines timetable for key pensions regulations

In a written ministerial statement, Pensions Minister Guy Opperman has set out a rough timetable for implementing the provisions of the Pension Schemes Act 2021 and providing the detail behind the headline reforms it introduces.

Progress on scheme funding has been a little delayed. The Regulator had originally hoped to launch its second consultation in mid-2021 but this is not now expected until the end of this year. This may mean that the new code will not be in force until late 2022 or even 2023.

The table below summarises our understanding of the current timetable:

Topic	Target timing for consultation	Target timing for regulations to come into force
Climate change risk governance and disclosure	Consultation closed March 10, 2021	October 2021
TPR stronger powers	Consultation on use of criminal powers closes April 22, 2021 Consultation on contribution notice tests and information gathering closes April 29, 2021	October 2021
Statutory transfer protections	Early summer	Autumn 2021
Collective Defined Contribution Schemes	Early summer	Unclear
Notifiable events changes	Late 2021?	Spring 2022?
Scheme funding	Late 2021?	2022/2023?
Pension Dashboards	Late 2021?	2023

2. Consultation on new criminal powers guidance

The Pensions Regulator has published for consultation a draft policy on its approach to the investigation and prosecution of the new criminal offences of avoiding employer debt to a scheme or risking accrued members' benefits. These powers, introduced by the Pension Schemes Act 2021, are expected to come into force in October. The consultation closes on April 22, 2021.

The Regulator helpfully clarifies that the purpose of these powers is to punish *"more serious intentional or reckless conduct".* It does not intend to *"achieve a fundamental change in commercial norms or accepted standards of corporate behaviour in the UK".*

To bring a successful prosecution, the Regulator will have to show that the person accused of an offence did not have a "reasonable excuse" for their actions.

When considering whether or not a person had a "reasonable excuse", the Regulator proposes to consider:

- whether the detrimental impact on the scheme was only an incidental consequence of the conduct,
- whether mitigation was provided to the scheme to offset the detrimental impact, and
- if inadequate mitigation was provided, whether there was a viable alternative that would have reduced the detriment.

The Regulator also proposes to take into account the extent to which the person had consulted with the scheme trustee and the Regulator prior to their actions and whether or not they complied with any requirement to notify the Regulator.

A key message from the draft policy is that it is vital for employers and trustees to keep a good record of decisions in order to minimise the likelihood of a criminal prosecution. Employers and trustees should carefully consider any corporate activity that could be caught by the new powers and clearly document their decision-making process.

3. Consultation on new "contribution notice" triggers and information gathering powers

The DWP is consulting on one of the new circumstances in which the Pensions Regulator will be able to require those connected with the employer of a defined benefit (DB) pension scheme to pay contributions to the scheme, under a so-called "contribution notice".

The Pension Schemes Act 2021 introduced two new circumstances in which the Regulator will (probably from October) be able to issue a contribution notice against a company or individual. One of these new circumstances is where the resources of an employer are materially reduced relative to that employer's estimated Section 75 debt.

The consultation considers what "employer resources" means and how the new contribution notice test should work in practice.

The DWP proposes that "employer resources" should be measured by reference to the employer's "profitability". The Regulator would calculate the "normalised annual profits of the employer before tax", using the employer's latest annual accounts. It would then assess the impact of the act it is investigating on those profits before comparing it to the employer's Section 75 debt to see if the impact is material.

The DWP appears to have found it difficult to design a suitable "employer resources" test. The consultation paper comments that *"This would not be a simple test and there remain subjectivities in this approach which could lead to complexities in future Contribution Notice cases and uncertainty for the market as to whether future actions would be caught by the 'employer resources test'. However, upon consideration, no alternatives which are simpler in application, nor any less subjective, were identified."*

Employers and trustees considering planned corporate activity (including "covenant leakage" such as dividend payments) should take this proposed test into account.

This consultation also provides further detail on the Regulator's new information gathering powers, in particular the level of fines that could apply for failure to comply with document or interview requests. The DWP proposes that the Regulator could impose a fixed penalty of £400 for a breach, or escalating fines where there is continued non-compliance. For individuals, the rate would be £200 per day, but for entities the daily rate would start at £500 and increase by £500 each day until it becomes a daily rate of £10,000 from day 20 onwards.

The consultation closes on April 29, 2021.

Governance

4. Consultation on Pensions Regulator's new "super code"

The Pensions Regulator has now issued its long-awaited single Code of Practice for consultation. This completes the first phase of the process, consolidating 10 out of 15 existing, separate codes of practice into one "super" code with the aim of updating them, removing duplication and making them easier to navigate.

The remaining codes of practice – including the DB funding code which will be the subject of a separate consultation – still need to be incorporated. Relevant guidance will also need to be updated in due course.

This is not just a consolidation exercise. The new Code also contains significantly more detail in some areas, e.g. cybersecurity, while also introducing some new topics, most notably additional governance requirements which have their origins in the EU's "IORP II" Directive on pensions.

The key new requirement is for private schemes with 100 or more members to conduct an annual "own risk assessment" of the effectiveness of their governance systems and risk management processes. The Code sets out the elements this assessment should consider and the Regulator warns that the first one is likely to be a substantial piece of work for most schemes. It will be due within a year of the Code coming into force. It is currently unclear when this will happen; potentially not until 2022 but in principle it could be in force as early as this autumn.

Schemes will have a lot of work to do to familiarise themselves with the new Code and check they are compliant with any existing requirements that have been reframed as well as planning how they will meet the new requirements, in particular the annual "own risk assessment".

The consultation closes on May 26, 2021.

Transfers and scams

5. New guidance from the Pensions Ombudsman on providing IFA information to members

The Pensions Ombudsman's office has published some guidance on its approach where trustees, administrators or employers facilitate access to particular independent financial advisers (IFAs), e.g. by providing a list of suggested IFAs or establishing a panel of selected IFAs for members.

The Ombudsman's view is that if trustees, administrators or employers provide a list or panel of IFAs to members, this implies that they have vetted those IFAs.

The Ombudsman appears to expect the person who provides the information to have undertaken significant due diligence before taking this step and to conduct ongoing monitoring of the IFAs included on the list. The Ombudsman also suggests including suitable disclaimers when providing the information to the member, for example that the person providing the IFA information is not responsible for the advice and other IFAs are available.

The implication of the guidance is that without robust due diligence, ongoing monitoring and disclaimers the person providing the information may be vulnerable to claims for maladministration, should a member receive poor advice from one of the IFAs suggested to them.

What the guidance does not address is whether it would be risk-free (or at least less risky) for a trustee not to help members find an IFA. The Ombudsman recommends that schemes establishing an IFA panel should first seek professional advice.

6. Pensions Minister urges schemes to share scams data

Pensions Minister Guy Opperman has publicly called upon pension schemes to share information on scams with the Pension Scams Industry Group (PSIG), revealing that he has also written directly to about 90 large schemes to request this. The Minister believes greater sharing of data would help Project Bloom, the multi-agency taskforce for combatting scams, to spot trends and better understand the scale of the problem.

It is not currently mandatory to share data in this way, but the Minister sees this as part of pension schemes' *"professional, ethical and moral duty"* to protect members from scams. Trustees whose schemes do not currently share data with PSIG should carefully consider whether they should now do so.

The Minister's statement also gives a further indication of what we may expect from the new statutory transfer regulations, implying that the circumstances in which trustees can say no to transfers may be significantly widened. The statement suggests that "red flags" identified in pre-transfer due diligence, such as *"get rich quick promises"*, may provide a legal basis to refuse a statutory transfer.

Trustees and scheme administrators should keep a watching brief for the draft statutory transfer regulations (expected this summer) and carefully consider the implications for their transfer processes and legal risk.

Investment

7. DWP calls for evidence on "social" element of ESG

The DWP has called for evidence about how pension schemes understand and deal with "social" factors in their "environmental, social and governance" (ESG) policies.

This follows a review last month by the Pensions Minister of the ESG policies of the 40 largest schemes. The implication is that the Minister considers schemes are not currently doing enough to take financially material social factors (such as diversity and gender) into account in their investments.

Trustees should bear this in mind when next reviewing their ESG policies and look out for any guidance or additional requirements resulting from this call for evidence, which ends on June 16, 2021.

8. European Commission consults on further extension to clearing exemption for pension schemes

The European Commission is consulting on an extension, by a year to June 18, 2022, of the current exemption for pension schemes from a mandatory clearing requirement which usually applies to certain derivatives under the European Market Infrastructure Regulation ('EMIR').

This proposal follows a recommendation from the European Securities and Markets Authority (ESMA). The year-long extension would allow work to continue on solving the technical issues that currently stand in the way of pension schemes being subject to central clearing processes and if implemented would bring the European exemption for pension schemes closer to the position set out in the UK's onshored version of EMIR which has already extended the exemption to June 18, 2023.

The consultation closes on April 13, 2021.

GMP rectification and equalisation

9. HMRC confirms all GMP final data cuts have been issued

In its latest "Countdown Bulletin", HMRC confirms that all schemes should by now have received their final data cut in relation to GMP reconciliation. Schemes that have not yet received their final data cut should contact the Customer Relationship Team at HMRC by July 31, 2021. An email address is given for this purpose.

Industry trends

10. What the spring Budget 2021 means for pensions

Confirming pre-Budget speculation, the Chancellor's spring Budget included plans to freeze the lifetime allowance at its current level of £1,073,100 until April 2026.

This is expected to bring more middle earners into scope over time, which makes it a controversial step. However, rumours that the Government might introduce more radical reform of the pension tax system, such as introducing of a flat rate of tax relief on contributions of 20 per cent, proved to be unfounded.

The Chancellor also took the opportunity to announce plans to "unlock" the ability of defined contribution pension schemes to invest in more innovative and illiquid investments like private equity and venture capital. The Government is now consulting on how this can be done, including how to incorporate performance fees that are typically incurred in relation to those types of investments within the charge cap.

While "furlough" under the Coronavirus Job Retention Scheme has been extended to the end of September, pension contributions continue not to be covered by the Government.

11. Consultation outcome regarding the DWP general levy

The DWP has published the outcome of its consultation on increases to the DWP general levy. This levy is used to pay for many activities of the Pensions Regulator, the Pensions Ombudsman and the Money and Pensions Service. It needs to increase substantially as a large deficit has developed.

To reflect the current challenging economic circumstances, only moderate increases will apply to the levy for 2021 to 2022, at 10 per cent for DB and DC schemes other than master trusts, and 5 per cent for master trusts and personal pension schemes.

The DWP has decided that the burden of further increases should then fall most heavily on the types of scheme that typically require the most regulation. DB schemes will see the greatest rises over the next three years, followed by DC schemes, then master trusts. GPPs will experience the lowest levy increases. The consultation sets out the levy rates for the years up to 2024.

12. Uber decides to offer pensions to drivers

Last month the Supreme Court decided that Uber drivers are "workers" rather than self-employed for the purposes of certain employment rights. The decision did not address whether they would also be within the scope of the automatic enrolment legislation, but Uber has since announced that it will provide pensions for all its drivers. This may encourage other workers in the "gig" economy to press for pension benefits.

Pensions issues in the pipeline

Development	Expected timing	Suggested action*
Lifetime Allowance frozen	From April 6, 2021 to at least April 2026	Update member communications and administration systems.
Deadline for tender process for fiduciary managers	June 9, 2021	This deadline will apply to certain fiduciary manager appointments which did not follow a competitive tender process. Seek advice on whether this deadline applies, conduct a tender process and certify compliance to the Competition and Markets Authority if necessary.
Deadline for requesting final GMP data cuts from HMRC	July 31, 2021	Contact HMRC ASAP if final data cut not yet received.
Climate change risk governance and disclosure requirements start to apply	October 1, 2021 for first wave of schemes (assets of £5bn and above and all master trusts) 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	Develop project plan for implementing governance structures and reporting. Smaller schemes to consider whether to comply on a voluntary basis.
Requirement for trustees to publish an implementation statement online	For DB schemes: October 1, 2021 For DC schemes (100+ members): As soon as accounts have been signed after October 1, 2020 (and no later than October 1, 2021)	Liaise with investment consultants and managers to gather relevant information to begin preparation of implementation statement and plan website publication.
Requirement for trustees to publish information on voting behaviour and capital structure of investee companies online	October 1, 2021	Liaise with investment consultants and managers to gather relevant information to begin preparation of information and plan website publication.
New stronger powers for the Pensions Regulator (under the Pension Schemes Act 2021), including new criminal offences, come into force	October 2021	Employers and trustees to carefully consider pension scheme ramifications of any corporate activity from point of view of new powers. Carefully document decisions. Review governance structures and policies/protocols to minimise risk of breaches.

Development	Expected timing	Suggested action*
Statutory transfers: additional requirements	Autumn 2021	Review processes and assess trustee legal risk, once legislation available.
Notifiable events: changes to current regime	Spring 2022?	Update or implement a notifiable events protocol for employers and trustee to minimise risk of breaches.
Regulator's new single Code of Practice comes into force, including a requirement for an annual "own risk assessment"	2022? Consultation ends May 26, 2021	Check scheme and employer are compliant with the Code's requirements. Consider planning first "own risk assessment", if relevant.
DB scheme funding: changes to requirements	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.
Pension Dashboards	2023	Look out for consultation, expected late 2021. Develop action plan for getting data ready for dashboard.
Rise in normal minimum pension age from 55 to 57	April 6, 2028	Look out for draft legislation (expected summer 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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