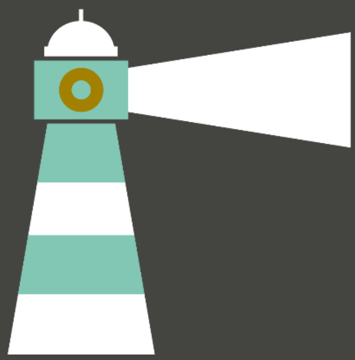
BRIEFING

TRAVERS SMITH

What's Happening in Pensions



Issue 88 – April 2021

In this issue:

Pension Schemes Act 2021: The Pensions Minister has given some information about when we can expect consultations, regulations and commencement of certain provisions of the Pension Schemes Act 2021. Some consultations have been launched.

Pensions Regulator single code of practice: The Pensions Regulator has published for consultation a draft consolidated code of practice, bringing together in shorter and updated form, but also with new and amended content, 10 of its current 15 codes.

Pensions Regulator settlement policy: The Pensions Regulator has published a settlement policy on its usual approach to negotiation and concluding settlements of its regulatory or civil enforcement action.

RPI reform: The trustees of the BT, Ford and Marks and Spencer pension schemes have announced that they are seeking a judicial review of plans to align RPI with CPIH.

DC chair's statements: The Government will discuss concerns about the DC chair's statement requirements with the Pensions Regulator and industry representatives.

Tax announcements: The lifetime allowance is being frozen until 2026. Corporation tax increases in 2023 and a 'super-deduction' for investment in plant and machinery in the meantime could mean that some employers seek to defer pension contributions until 2023 or later. Collective DC tax legislation has been published. The Government will be reviewing the appropriate taxation framework for superfunds (defined benefit consolidator schemes). The annual allowance 'scheme pays' facility may be amended to allow schemes to pay annual allowance charges for earlier tax years.

DC charge cap: The Government has consulted on amending the DC charge cap with the intention of helping DC schemes to invest in illiquid asset classes including venture capital and growth equity.

Financial advice and information: The FCA and Pensions Regulator have published a new version of their guide for employers and trustees on providing support to workers and members with financial matters. The Pensions Ombudsman has published a new note: "Panels and Independent Financial Advisers".

Pension scams: The Pension Scams Industry Group has published a new version of its industry code of good practice. The Pensions Regulator has called on the pensions industry to report suspected pension scams to Action Fraud. The Work and Pensions Select Committee has published a report on pension scams.

Social investment factors: The Government has issued a call for evidence seeking information on how pension scheme trustees understand social factors and how they are included in their environmental, social and governance (ESG) policies.

Contents continue overleaf …

Climate change: The Pensions Regulator has published a climate change strategy which generally concerns the Regulator's own practices but also indicates that the Regulator will be publishing guidance for schemes on climate change matters.

Levy increases: The Government has confirmed its proposed changes and increases to the general pension schemes levy. The Fraud Compensation Fund levy is being significantly increased this year.

Public sector GMP equalisation: The Government has responded to its consultation on how to address GMP equalisation in public service pension schemes, concluding that it will continue to pay fully indexed increases.

Automatic enrolment quality requirements: The Government has decided that no changes are needed to the alternative quality requirements for DB and hybrid schemes, and also for DC schemes.

Cross-border schemes: The Pensions Regulator has updated its post-Brexit cross-border schemes guidance. The changes relate to the application of automatic enrolment requirements.

PASA data management guidance: The Pensions Administration Standards Association has published Data Management Plans Guidance.

Pension Schemes Act 2021 - update

The Pensions Minister has given some information about when we can expect consultations, regulations and commencement of certain provisions of the Pension Schemes Act 2021. Some consultations have also been launched.

The position as we currently understand it is as follows:

- **DB funding:** There should be a Government consultation on draft regulations later this year, following engagement with key interested parties and the Pensions Regulator. The Pensions Regulator is expected to issue a full public consultation on a revised funding code of practice towards the end of 2021, with the code currently expected to be in force in late 2022 or early 2023. This is somewhat later than previous indications.
- **Pensions Regulator powers:** The Government has been consulting on draft regulations to:
  - outline the 'employer resources test' for one of the new contribution notice grounds: with measurement proposed to be based on normalised profits before tax, excluding non-recurring or exceptional items, and to be determined by the Pensions Regulator; and
  - set out information that interview notices issued by the Pensions Regulator must contain; modify how inspection powers apply in multi-employer schemes; and set out penalty rates for non-compliance with information gathering requests.

  Commencement is expected in the autumn.
- **Criminal offences:** These provisions are also to be commenced this autumn. The Pensions Regulator has consulted on a draft investigation and prosecution policy which has given rise to a number of concerns across the pensions industry: we have submitted our own detailed consultation response and also helped key industry bodies to respond: see this Professional Pensions article (registration needed).
- **Enhanced notifiable events regime:** A consultation is expected later this year; commencement will be as soon as practicable thereafter.
- **Climate change:** Regulations on governance and disclosure should be laid this summer, following the recent consultation (see WHiP Issue 87) and will start to apply from 1 October 2021 for the first wave of affected schemes.
- **Pension scam transfer protections:** A consultation on draft regulations is expected in early summer, with commencement in early autumn.
- **Collective DC:** A consultation on draft regulations is expected in early summer (an indicative draft was previously shown to Parliament). There has been no indication about commencement.
- **Pensions dashboards:** A consultation on proposed regulations is expected later this year, with regulations to be laid before Parliament for debate in 2022. Initial dashboard delivery will hopefully be in 2023.

- **PPF compensation:** There has been no announcement about commencement of this provision.

Autumn commencements are usually on 1 October.

For more information, see our briefing note on the Act which we have updated to include this latest information.

Pensions Regulator single code of practice

The Pensions Regulator has published for consultation a draft 149 page consolidated code of practice, bringing together in shorter and updated form, but also with new and amended content, 10 of its current 15 codes: these are mainly those concerning governance and administration. The new code will be web-based and has topic-focused modules, which allows the removal of repetitive text.

New content in various parts of the draft code is intended to meet the Regulator's obligation to produce a code of practice in relation to the statutory requirement for schemes to have an 'effective system of governance', including (under regulations and only for schemes with 100 or more members) the carrying out and documenting of an annual 'own-risk assessment'.

The ten codes included are:

- 01: Reporting breaches of the law
- 04: Early leavers
- 05: Reporting of late payment of contributions to occupational pension schemes
- 06: Reporting of late payment of contributions to personal pension schemes
- 07: Trustee knowledge and understanding (TKU)
- 08: Member-nominated trustees/member-nominated directors – putting arrangements in place
- 09: Internal controls
- 11: Modification of subsisting rights
- 13: Dispute resolution – reasonable periods
- 14: Governance and administration of public service pension schemes

The five codes not included, but which are expected to be brought into the combined code in due course, are:

- 02: Notifiable events (we note that there are forthcoming changes here, under the Pension Schemes Act 2021)
- 03: Funding defined benefits (but the new version of this, to be consulted on later in the year, will be included in the combined code)
- 10: Modification of subsisting rights
- 12: Circumstances in relation to the material detriment test
- 15: Authorisation and supervision of master trusts

There are some concerns in the pensions industry that the draft consolidated Code appears to alter the substantive requirements applicable to trustees in some areas, rather than (as was expected) merely restating existing requirements.

The consultation closes on 26 May 2021. A project to review Regulator guidance, starting with directly code-related guidance, will begin later in the year.

Pensions Regulator settlement policy

The Pensions Regulator has published a settlement policy on its enforcement team's usual approach to negotiation and concluding settlements of its regulatory or civil enforcement action. It appears that the policy will apply to, among other things, the Regulator's role under the DB scheme funding legislation, though this area is not addressed directly.

RPI reform

The trustees of the BT, Ford and Marks and Spencer pension schemes have announced that they are seeking a judicial review of plans to align the Retail Prices Index (RPI) with CPIH (the Consumer Prices Index including owner-occupied housing costs). This is expected to happen in February 2030, when the UK Statistics Authority can make changes to RPI without the need for the Chancellor of the Exchequer's consent. No compensation is being offered to index-linked gilt holders. See WHiP Issue 86.

DC chair's statements

A statutory Government review of the legislation covering DC chair's governance statements has concluded that some reform is needed. The Government accepts that there is confusion as to the purpose of the statements, i.e. whether they are a compliance document or member communication tool. It will discuss options for improvement with the Pensions Regulator and industry representatives (for which no timescale is given).

The Government will also, "at a time consistent on delivering on other priorities", review the mandatory nature of fines for non-compliance, with a view to allowing the Regulator to take a more risk-based approach.

Tax announcements

The following were the announcements of most interest in the 3 March 2021 Budget:

- The standard lifetime allowance will be frozen at the current level of £1,073,100 until April 2026, by legislation to remove the CPI inflation link for the next five tax years (see below).
- Corporation tax will rise from 19% to up to 25% from April 2023. This might have the effect that some profit-making companies will seek to delay some of their pension contributions until then in order to secure a higher tax deduction. A new 130% "super-deduction" for business investment in plant and machinery between April 2021 and March 2023 may also mean that companies wish to prioritise that spending in the same period.

The Finance Bill includes provisions, among others:

- to freeze the lifetime allowance (see above); and
- in relation to the tax treatment of collective DC schemes (draft legislation here was previously published – see WHiP Issue 83).

The Government's 23 March 'Tax Day' announcements included the following:

- The Government will be reviewing the appropriate taxation framework for superfunds (defined benefit consolidator schemes). It said: "it should not be assumed that the tax regime that currently applies to entities and transactions in the Superfund structure or the pension schemes that have transferred to the Superfund will remain unchanged. The Government's approach will be informed by the features of the permanent regulatory regime". No further detail has yet been given.
- The "Scheme pays" legislation, whereby members can ask their scheme to pay an annual allowance charge and reduce their benefits, will be tweaked so that it can be used in respect of charges for earlier tax years. This is offered in connection with the remedies being granted to public sector scheme members following the *McCloud* public sector pension scheme age discrimination case (see WHiP Issue 74).

DC charge cap

The Government has briefly consulted on amending the DC charge cap with the intention of helping DC schemes to invest in illiquid asset classes including venture capital and growth equity. The proposal, with revised draft regulations, is (as previously signalled – see WHiP Issue 84) to allow:

- the smoothing of performance fees over five years; and
- exempting them from pro-rated calculations.

There is also a call for evidence regarding the impact of 'look-through' on alternative asset classes, particularly venture capital and growth equity.

Legislative changes would take effect from 1 October 2021. We have assisted industry bodies in their responses: see this Professional Pensions article (registration needed).

Financial advice and information

FCA/TPR guide on providing financial information

The FCA and Pensions Regulator have published a new version of their guide for employers and trustees on providing support to workers and members with financial matters without needing to be subject to FCA regulation.

The guide was first published in September 2017 (see WHiP Issue 67). In June 2020, the FCA consulted on a revised version of the guide, which drew some criticism (see WHiP Issue 84). The final version accepts that numerical information including unsolicited transfer values and equivalent annuity estimates can be given to members (though not drawdown estimates, as these are too speculative), subject to certain important provisos.

There is also a section on directing members to independent financial advisers.

Pensions Ombudsman note on facilitating financial advice

The Pensions Ombudsman has published a new note: "Panels and Independent Financial Advisers". He says:

> "Historically, pension scheme administrators, trustees and employers have expressed concern with regard to the scope of their responsibilities in providing financial advice to members and have hesitated in recommending or facilitating access to particular financial advisers. The Pensions Ombudsman (TPO)'s guidance on this topic sets out its approach to the provision of factual information in respect of independent financial advisers."

This is issued in connection with the potential for complaints against schemes where there has allegedly been bad advice: for example, a complaint that the trustees did not undertake sufficient due diligence when compiling a panel of suggested financial advisers.

Pension scams

Updated industry code

The Pension Scams Industry Group has published a new version of its industry code of good practice, now called a "code of best practice" (but still without statutory status). The 134 page document includes at the end a summary of changes. We note the following points of interest:

- The code now comprises distinct sections including: a Practitioner Guide; a Resource Pack; and a Technical Guide.
- The code is updated to cover topics including: the Combat Scams Pledge initiative and latest Pensions Regulator guidance; the latest FCA ScamSmart guidance and materials on transfers; and recent judgments and Pensions Ombudsman determinations. Further changes are expected later in the year when we have the Pensions Act 2021 regulations on transfer scam protections (see above).
- Specific calls for action include:
  - "The recommendation to consider the use of the telephone to better engage with the member during the due diligence process and also that a final telephone call should be made with the member before any transfer payment is made when sufficient concerns of pension scamming have been identified. This mirrors the requirements outlined in TPR's Combat Scams pledge.
  - All transfers of concern should be reported (not merely those transfers which are refused).

– Reports should be made to a number of different agencies as required. Full information is provided in Section 8 of the Practitioners Guide.

– Appropriate management information should be developed and maintained. This should include details of transfers refused, cancelled by the member when concerns have been raised with them and transfers paid under discharge at the insistence of the member.

Pensions Regulator

The Pensions Regulator has called on the pensions industry to report suspected pension scams to Action Fraud, the national fraud and cybercrime reporting centre, following a long-term drop in reporting.

Data from Action Fraud shows a steady fall in pension scam reports from 1,788 in 2014 to 358 in 2020 – an almost 80% reduction – though with a slight rise in reporting so far this year.

The Regulator also urged trustees, providers and administrators to sign up to its Pledge campaign.

Work and Pensions Committee report

The Work and Pensions Select Committee has published the first report, concerning pension scams, in its inquiry into the impact of the 2015 'freedom and choice' reforms. The Committee calls on the Government and regulators to act quickly and decisively to protect individuals. Points of interest include the following:

- The Committee says that Action Fraud has a "tattered reputation" and that The City of London Police should make annual reports to Parliament on efforts to repair it.
- The transfer scam protections in the Pension Schemes Act 2021 (see above) are welcomed and should be kept under review.
- A call for online advertisements to be regulated: "It is immoral that tech firms such as Google are accepting payment to advertise scams, and then further payment from regulators to warn about the scam."
- There are many bodies with potentially overlapping enforcement responsibilities relating to pension scams. 'Project Bloom' should be given a statutory remit, an appropriate name (the Committee proposes "the Pension Scams Centre"), dedicated funding and the staffing to manage a pension scams intelligence database alongside law enforcement.
- Where an individual has been the victim of a financial crime involving the early access of their pension resulting in an unauthorised payment charge, HM Treasury should recognise that it may not be in the public interest to demand payment of the tax charge.

Social investment factors

The Government has issued a call for evidence seeking information on how pension scheme trustees understand social factors and how they are included in their environmental, social and governance (ESG) policies. The call for evidence closes on 16 June 2021. The government says that any legislative changes will be subject to consultation.

Climate change

The Pensions Regulator has published a climate change strategy which generally concerns the Regulator's own practices. However, among other things it says that the Regulator will publish guidance on climate risk-related requirements. This will clarify what the Regulator expects from schemes as they assess, manage and prepare to report under the climate change measures being introduced through the Pension Schemes Act 2021.

Levy increases

General pension schemes levy

The Government has responded to its consultation on changes to the general pension schemes levy (see WHiP Issue 86). It is proceeding with its preferred option, which was to increase rates and introduce separate rates for DB, DC, master trusts and personal pensions. Regulations have been laid to implement the changes.

For 2021/22, the increases will be 5% for master trusts and personal pensions and 10% for other schemes; for 2022/23 and 2023/24, there will be higher increases based on membership numbers (set out in a table in Annex 1 to the original consultation). These later increases will be significantly bigger for DB schemes (as much as 120% by 2024) than for DC schemes.

The levy helps fund the Pensions Regulator, the Pensions Ombudsman and the Money and Pensions Service. It also funds part of the development costs for the pensions dashboard.

Fraud compensation levy

The PPF has announced that it will be raising the maximum Fraud Compensation Fund levy for 2021/22: this is 75p per occupational pension scheme member (but 30p per master trust member). The 2020/21 levy was 25p per member. This follows a recent High Court decision on the scope of the compensation eligibility criteria.

Public sector GMP equalisation

The Government has responded to its consultation on how to address GMP equalisation in public service pension schemes, concluding that it will do this by continuing to pay fully indexed increases. GMP conversion was rejected as an option, due to being too "resource intensive".

There can be knock-on effects for private sector schemes that mirror public sector schemes.

Automatic enrolment quality requirements

The Government has decided that no changes are needed to the alternative quality requirements for DB and hybrid schemes, and also for DC schemes. Although the Government's call for evidence was only about DB and hybrid schemes, the response also covers DC scheme quality requirements.

This statutory review should have concluded in 2020. The next required review is in 2023.

Cross-border schemes

The Pensions Regulator has again (see WHiP Issue 87) updated its post-Brexit cross-border schemes guidance. The main changes are relevant to UK employers who use a non-UK occupational or personal pension scheme to comply with their automatic enrolment obligations.

PASA data management guidance

The Pensions Administration Standards Association has published Data Management Plans Guidance. It sets out the purpose of having a data management plan as part of good scheme governance and the information that it might be expected to include.

FOR FURTHER INFORMATION, PLEASE CONTACT

Daniel Gerring
Head of Pensions
daniel.gerring@traverssmith.com
+44 (0)20 7295 3341

Susie Daykin
Partner
susie.daykin@traverssmith.com
+44 (0)20 7295 3247

David James
Partner
david.james@traverssmith.com
+44 (0)20 7295 3087

Andy Lewis
Partner
andrew.lewis@traverssmith.com
+44 (0)20 7295 3444

Dan Naylor
Partner
dan.naylor@traverssmith.com
+44 (0)20 7295 3454