BRIEFING

What's Happening in Pensions

Issue 92 – November 2021

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Pensions Regulator powers: The Pensions Regulator has finalised its policy on the prosecution of the criminal offences introduced by the Pension Schemes Act 2021. It has also updated its contribution notices code of practice, the related guidance and the clearance guidance. Regulations have come into force with details of the new 'employer resources test' contribution notice ground. There is a new consultation on policies regarding overlapping powers, the new financial penalties and information gathering.

Climate change and stewardship: The Government is consulting on amending the climate change governance and reporting regulations to require trustees subject to those regulations to calculate and disclose an additional portfolio alignment metric setting out the extent to which their investments are aligned with the Paris Agreement goal of limiting the global average temperature increase. The consultation also covers proposed statutory and non-statutory guidance on stewardship and the content of statements of investment principles and implementation statements. Separately, details of climate reporting obligations for large companies and financial services firms have been announced.

Sustainability disclosures: The Government has published a policy paper "Greening Finance: A Roadmap to Sustainable Investing" setting out its plans for aligning the financial system with the UK's net zero commitment. New UK Sustainability Disclosure Requirements will require companies, some financial institutions and occupational pension schemes to prepare and disclose sustainability-related information. Detail is to follow.

Normal minimum pension age: The Government has confirmed that normal minimum pension age under the Finance Act 2004 will be increased from 55 to 57 from 6 April 2028 but has changed the previously proposed protections.

DC scheme annual benefit statements: The Government has laid the expected regulations requiring short benefit statements for members of DC automatic enrolment schemes but commencement has been pushed back to 1 October 2022.

DC regulations: Regulations have amended several aspects of DC governance and disclosure requirements. DC schemes now need to disclose investment returns net of charges in their next chair's statement for all investment funds; value for member assessments and reporting are required for smaller schemes; and the smoothing of illiquid investment performance fees is permitted for the purposes of charges cap assessments.

Long-term asset fund regime: The FCA has announced finalised rules for long-term asset funds. This new type of open-ended authorised investment fund is intended to help support investment in assets including venture capital, private equity, private debt, real estate and infrastructure.

Pension Protection Levy: The PPF is consulting on proposals for the 2022/23 pension protection levy. An overall smaller anticipated levy charge is proposed: £415 million compared with £520 million for 2021/22.

CPI and RPI: The price inflation figures for the year to September 2021 have been published. These are the annual figures taken into account in the assessment of increases to state pensions, GMPs and many occupational pension scheme pensions.

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GMP fixed rate revaluation: The Government is consulting on reducing the level of fixed rate GMP revaluation for those members with a GMP who leave pensionable service before reaching GMP 'pensionable age' after 5 April 2022.

Scheme returns – asset information: The Pensions Regulator and PPF have issued a response to their consultation on proposed changes to the asset class information to be provided by DB schemes in their annual scheme returns. From 2023, more information will be required than currently.

Pensions dashboards: A Pensions Dashboards Programme progress report confirms that the Government intends to consult on regulations "this winter" on (among other things) the requirements for occupational pension schemes to provide data.

Pensions Ombudsman – communication with members: The Pensions Ombudsman has published a guidance note "Communicating with members", outlining their views on best practice in this area.

Corporate Insolvency and Governance Act 2020: The prohibition on issuing statutory demands and winding-up petitions, where the company has been prevented from satisfying its creditors because of the pandemic, ended on 30 September 2021 but there are new temporary measures to protect small businesses. The moratorium legislation has, as expected, been made permanent.

Gated DC funds: The Pensions Regulator has updated the investment governance section of its online Managing DC benefits guidance for trustees of DC schemes to cover issues around the temporary closure of investment funds.

You may also be interested in the latest edition of Pensions Radar, our quarterly listing of expected future changes in the UK law affecting work-based pension schemes.

Pensions Regulator powers

The Pensions Regulator has finalised its policy on the prosecution of the criminal offences introduced into the Pensions Act 2004 by the Pension Schemes Act 2021 that are in force from 1 October 2021. It has also published:

- a consultation response (see WHiP Issue 88 for the consultation);
- a new consultation on draft policies relating to overlapping Pensions Regulator powers, the new monetary penalties of up to £1 million, and information gathering;
- a response to the consultation on Code of Practice 12 (contribution notice circumstances) and the final new code (subject to Parliamentary approval) and code-related guidance (all found here); and
- updated clearance guidance (relevant only to the Regulator's contribution notice and financial support direction powers).

See our briefing note on the Act for background.

Criminal offences

The prosecution policy is substantially amended and clarified in many respects. It is now clearer that the Regulator will only target the most serious examples of intentional or reckless conduct that were already in scope of the contribution notice powers (or would have been if the person was connected with the employer). The draft overlapping powers policy should be read alongside this policy.

A new Appendix 2 to the policy sets out some common situations in which the Regulator would generally consider someone to have a 'reasonable excuse' defence to the criminal offences. These include where there is a statutory defence to a contribution notice, a debt or liability management arrangement within the employer debt regulations (e.g. a flexible or regulated apportionment arrangement), and some restructuring mechanics (i.e. company voluntary arrangements and restructuring plans under the Corporate Insolvency and Governance Act 2020). The Regulator expects there to be contemporaneous records of this defence and says that factors such as time constraints and the person's skills and experiences will be considered relevant. There is also more detail in the policy about what will be considered adequate mitigation of detriment to the pension scheme, including examples. It appears that late mitigation may not be enough to avoid prosecution.

There is also more reassurance throughout the policy than in the original draft for lenders and advisers (but no content for trustees).

A new, large section of the policy considers a detailed case study. This concerns a financial restructuring of an employer where the parent company is seeking repayment of on-demand lending so that it can pay dividends. This looks at events from the perspectives of the various parties involved, including third party lenders (though again not the scheme trustees) – see Appendix 3.

The Regulator says that it will be updating its broader prosecution policy and compliance and enforcement policies in due course. It confirms that it is working to agree memoranda of understanding and cooperation with the other prosecuting authorities.

Contribution notices

The final code of practice on contribution notice circumstances has only minor changes from the consultation draft but there are several changes to the examples of material detriment (or otherwise) in the accompanying code-related guidance. The Regulator says that it will consider publishing more contribution notice guidance in the future.

The Pensions Regulator (Employer Resources Test) Regulations 2021 have been approved by Parliament and made. They came into force on 1 October 2021. They add detail to the new 'employer resources test' contribution notice ground.

The assessment of employer resources for this purpose is based on normalised profits before tax. One consequence of this is that shareholder distributions such as dividends should not be caught by this test (though they could be caught by the other new contribution notice test – the 'employer insolvency test').

There are also measures to address issues for employers that do not seek profits, namely charities and not-trading-for-profit organisations.

Clearance

The clearance guidance has been updated in relation to employer-related events in light of the new contribution notice grounds. It now looks at the concept of a "detrimental event" in that light. A significant change is that there can now be an employer-related "type A event" (meaning a materially detrimental event) even where there is no "relevant deficit" in the pension scheme. The Regulator will only consider an application for a clearance statement where there would be a type A event. This change therefore increases the circumstances in which clearance can be sought.

Clearance cannot be sought as protection against criminal prosecution or the civil penalties and the Regulator says in the prosecution policy that any clearance given in relation to its contribution notice and/or financial support direction powers does not automatically mean that a person has a 'reasonable excuse'. The same mitigation may, however, may be relied upon.

Climate change and stewardship

Portfolio alignment metric / stewardship

The Government is consulting on amending the Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 (see WHiP Issue 90) to require trustees subject to those regulations to calculate and disclose an additional portfolio alignment metric, setting out the extent to which their investments are aligned with the Paris Agreement goal of limiting the global average temperature increase to 1.5 degrees Celsius above pre-industrial levels.

The current regulations apply to schemes with relevant asset values over £5 billion and authorised master trusts and (in future) collective DC schemes from 1 October 2021, with schemes with relevant asset values over £1 billion affected from 1 October 2022.

The new requirements are proposed to apply to all in-scope schemes from 1 October 2022. They would mean that schemes will be required to calculate four, rather than three, climate-related metrics on their investments. The proposed portfolio alignment metric would be mandatory, alongside absolute emissions and emissions intensity metrics.

The consultation also proposes amendments to the statutory guidance that accompanies the regulations (also see WHiP Issue 89), reflecting these proposed legislative changes.

In addition, in order to improve stewardship by occupational pension schemes including voting and engagement, the Government seeks views on:

- draft non-statutory guidance explaining best practice in relation to statements of investment principles; and
- draft statutory guidance explaining the Government's expectations for implementation statements.

The consultation closes on 6 January 2022.

TCFD disclosures for large companies and financial services firms

The Government has announced the detail of mandatory TCFD-aligned requirements for large companies and financial firms to report on climate-related risks and opportunities. Subject to Parliamentary approval, these will apply from 6 April 2022 to over 1,300 of the largest UK-registered companies and financial institutions.

Affected companies are listed companies (including AIM listed companies), banks and insurers that (in each case) satisfy various conditions, including having more than 500 employees. Other companies with an annual turnover of over £500 million are also affected.

Draft regulations have been laid before Parliament. Following consultation, the proposed requirements are now more closely aligned with the recommendations of the TCFD, to ensure coherence with the associated requirements introduced by the Financial Conduct Authority (for authorised firms, including investment managers and personal pension providers) and the Department for Work and Pensions (for occupational pension schemes).

The regulations are proposed to apply in respect of accounting periods starting on or after 6 April 2022. The Government will issue non-statutory guidance before the end of the year.

See our briefing note New mandatory TCFD reporting for more UK companies for more detail.

Climate adaptation reports

Financial regulators have published climate adaptation reports under the Climate Change Act 2008.

The Pensions Regulator's report sets out the risks from climate change that are most relevant to occupational pensions schemes and the approaches it is taking to them both in its regulatory functions and in its own operations. It sets out relevant legal requirements and the obligations now being imposed on schemes, and then considers the results of recent research.

The Regulator concludes that too few schemes are paying proper attention to climate-related risks and opportunities. It notes, however, that the largest schemes, including authorised master trusts, are generally more engaged. Stewardship is a particular area of concern, with low levels of signing up to the 2020 UK Stewardship Code – which the Regulator recommends.

The Regulator will publish guidance clarifying what it will look for from the larger schemes and authorised master trusts as they assess, manage and prepare to report on climate-related risks and opportunities. The forthcoming single code of practice will include several climate change modules and the proposed internal controls provisions include a requirement that schemes assess climate-related risks and opportunities.

Sustainability disclosures

The Government has published a policy paper "Greening Finance: A Roadmap to Sustainable Investing" setting out its plans for aligning the financial system with the UK's net zero commitment. New UK Sustainability Disclosure Requirements will require companies, some financial institutions and occupational pension schemes to prepare and disclose sustainability-related information.

For pension schemes, it is proposed that the TCFD climate-related requirements (see above) will be widened to cover sustainability-related risks and opportunities. The new measures would apply in two to three years' time for schemes with relevant assets of more than £5 billion and to schemes with relevant assets above £1 billion after that – after measures applicable to certain companies and FCA-regulated organisations. A consultation will follow.

For more information, see our Financial Services & Markets department's briefing note. See also our Sustainable Business Hub, including our blog post on this development.

Normal minimum pension age

The following had just been announced at the time of going to press. We will report in more detail in the next issue.

The Government has confirmed that normal minimum pension age under the Finance Act 2004 will be increased from 55 to 57 from 6 April 2028 but the protections will be different from those most recently proposed (see WHiP Issue 90).

Normal minimum pension age is the lowest age at which benefits can generally be taken without incurring an unauthorised payments tax charge. Individuals will be protected against the increase if, immediately before 4 November 2021 (the date the outcome was announced), they had an existing unqualified right (i.e. not subject to consent) to take benefits from earlier than age 57 pursuant to scheme rules in place on 11 February 2021 (the date of the original consultation about the increase). There will also be protections in respect of future block transfers. Protected members will retain their protection following a future individual transfer but on a ring-fenced basis.

There will not now be a window of opportunity for individuals to transfer from a scheme with no such unqualified right to take benefits from before age 57 into a scheme that confers such a right, and thereby benefit from that right. The exception to this is for transfers that follow requests made before 4 November 2021.

The increase will not apply to members of the police, fire service and armed forces pension schemes.

The Finance Bill published on 4 November includes the relevant provisions.

DC scheme annual benefit statements

The Government has laid the expected regulations requiring short benefit statements for members of DC automatic enrolment qualifying schemes but commencement has been pushed back to 1 October 2022.

There is also finalised statutory guidance, including an illustrative template statement, and a consultation response.

Affected schemes will have to meet the existing disclosure of information requirements for annual benefit statements in (when printed) one double-sided A4 sheet of paper. Additional information (for example as to charges) can be given in separate documents, if desired.

The change will not apply to hybrid DB/DC schemes, even where the member only has DC benefits under the scheme, but the Government strongly encourages such schemes to apply the principles of brevity and simplicity set out in the guidance and illustrative statement template.

DC regulations

The Occupational Pension Schemes (Administration, Investment, Charges and Governance) (Amendment) Regulations 2021 have amended DC governance and disclosure requirements as follows:

- The annual chair's governance statement for 'relevant schemes' (i.e. schemes providing money purchase benefits other than just from AVCs) now has to report investment returns net of charges for all default and member-selected funds. This provision took effect from 1 October 2021.
- In order to encourage the consolidation, where appropriate, of smaller DC schemes, trustees of schemes with less than £100 million in assets that have been operating for at least three years are required to undertake an annual detailed "value for members" (VfM) assessment of costs and charges. They will have to report on the assessment in the chair's governance statement in their annual report and also in the annual scheme return to the Pensions Regulator. If the trustees conclude that the scheme does not offer good value, they must outline what they intend to do about that – for example, make improvements or take steps to consolidate. The first of these assessments is required in respect of the first scheme year that ends after 31 December 2021.

Hybrid schemes with DB as well as DC benefits are in scope if their total assets are valued at less than £100 million - but in that case the assessment is only required in relation to the DC element of those benefits. Schemes in winding-up are exempt but only if they have notified the Pensions Regulator of the winding-up before the chair's statement is due.

The Pensions Regulator announced that it has revised its guidance to take into account the VfM requirements. The Regulator says that several pages of its guidance have been updated to reflect the new requirements, including its guidance on value for members, communications and winding-up.

Separately, the Pensions Regulator and the FCA have published a joint discussion paper on developing a "holistic framework" and related metrics for assessing value for money in DC schemes in the accumulation phase. Responses can be submitted until 10 December 2021.

- Amendments to regulations now allow DC schemes to smooth any performance fees over a five year period when assessing their default arrangement charges against the charges cap.

  In addition, the Chancellor of the Exchequer's Budget and Spending Review 2021 promised a consultation before the end of 2021 on further changes to the charges cap in relation to performance fees in illiquid investments, to help unlock institutional investment. It says: *"The consultation will specifically consider amendments to the scope of the cap to better accommodate well-designed performance fees and enable investments into the UK's most productive assets, while continuing to protect savers"*.

The statutory guidance on reporting of costs, charges etc. has now been updated, among other things to reflect the 1 October 2021 legislative changes noted above.

Long-term asset fund regime

The FCA has announced finalised rules for long-term asset funds (LTAFs). This new type of open-ended authorised investment fund is intended to help support investment in assets including venture capital, private equity, private debt, real estate and infrastructure. The FCA says that it is aimed at DC pension schemes but will also be of interest to sophisticated private investors.

The FCA has set a minimum notice period of 90 days and a requirement that LTAFs cannot offer redemptions more frequently than monthly.

Pension protection levy

The Pension Protection Fund is consulting on proposals for the 2022/23 pension protection levy. An overall smaller anticipated levy charge is proposed: £415 million compared with £520 million for 2021/22.

Though updated PPF valuation assumptions will affect levies, the PPF estimates that 82% of schemes' risk-based levies will be lower this year.

The methodology for calculating insolvency risk scores will remain unchanged. A strong PPF funding position (see also the PPF's latest annual report) means that the PPF board considers that it can afford to wait longer to see the impact of the COVID-19 pandemic, rather than anticipating now the likelihood of future insolvencies due to the withdrawal of Government financial support.

There is a proposal to bring together the levy rules for Consolidator Schemes and Schemes Without a Substantial Sponsor (SWOSS). A new categorisation, "Alternative Covenant Schemes", is proposed. As currently drafted, there is a risk that this will include occupational pension schemes that have undergone a traditional-style merger, which is presumably unintended.

The consultation closes on 9 November 2021.

CPI and RPI

The key price inflation figures for the year to September 2021 have been published. These are the annual figures taken into account in the assessment of increases to state pensions, GMPs and many occupational pension scheme pensions. The increases are:

- CPI: 3.1% (CPIH: 2.9%)
- RPI: 4.9%

The suspension of the earnings element of the 'triple lock' means, subject to Parliamentary approval of the amending legislation, that state pensions will increase by 3.1% next April.

GMP equalisation guidance

The PASA-chaired GMP equalisation industry working group has published two new guidance notes:

- Guide to GMP Communications - Implementation Stage: This comprises:
  - Introduction to explain what the guidance includes (and does not) and how to use it
  - Broad principles schemes can follow when implementing their communications to members
  - The member's perspective and the normal context of other scheme communications
  - Timing communications activity and the delivery milestones
  - Who to communicate with, what to tell them and why
  - Planning for data to use in communications
  - Post equalisation considerations for 'business as usual' communications
- Allowing for Anti-franking when achieving GMP Equality: The group's Methodology Guidance issued in September 2019 included a short section on anti-franking (see WHiP Issue 78). This supplement to that guidance examines the interaction of anti-franking and GMP equalisation in more detail, considering why anti-franking is important and which schemes will be most affected, and suggesting approaches to deal with key areas of uncertainty.

  The guidance looks at three possible approaches but in examples it focuses on the 'ring-fencing' method set out in the original guidance.

GMP fixed rate revaluation

The Government is consulting on reducing the level of fixed rate GMP revaluation from 3.5% to 3.25% per annum. This would be available in respect of those members with a GMP who leave pensionable service before reaching GMP 'pensionable age' (age 60 for women and 65 for men) after 5 April 2022 (so not a large cohort).

The rate is reviewed every five years. The consultation closes on 18 November 2021.

Scheme returns – asset information

The Pensions Regulator and PPF have issued a response to their consultation on proposed changes to the asset class information to be provided by DB schemes in their annual scheme returns. As expected, more information will be required than is currently the case. The changes will apply from 2023.

Information will be requested at three levels of detail, depending on a scheme's PPF-basis liability value. There will be a basic level required for schemes with liabilities of up to £30 million. More detail will be required of schemes with liability values between £30 million and £1.5 billion. Schemes of £1.5 billion or more will be expected to provide information on the sensitivity of portfolios to investment stresses.

Scheme returns will also ask for bonds to be shown split into investment grade and sub-investment grade and, for some schemes, by duration.

Pensions dashboards

A Pensions Dashboards Programme (PDP) progress update report confirms that the Government intends to consult on regulations "this winter" on (among other things) the requirements for occupational pension schemes to provide data and the staging process.

It says that the Government's aim "is to lay draft regulations before Parliament for debate in 2022, to remain on schedule to support the delivery plan set out by PDP, which indicated that the first pension schemes will be compelled to make data available to users via dashboards in 2023."

Pensions Ombudsman – communications with members

The Pensions Ombudsman has published a guidance note "Communicating with members", outlining their views on best practice in this area.

The note says that many enquiries and complaints to the Ombudsman stem from poor communication and failings in customer service. It lists 13 tips on how to avoid the Ombudsman and links to a new website section: "How to avoid the Ombudsman".

Corporate Insolvency and Governance Act 2020

Statutory demands and winding-up petitions

The Government announced that the CIGA 2020 prohibition on issuing statutory demands and winding-up petitions, where the company has been prevented from satisfying its creditors because of the pandemic, will not be extended again and so has ended on 30 September 2021. Regulations achieve this.

It added, however:

> *"New measures will be brought in to help smaller companies get back on their feet to give them more time to trade their way back to financial health before creditors can take action to wind them up. This will particularly benefit high streets, and the hospitality and leisure sectors, which were hit hardest during the pandemic.*
>
> *The new legislation will:*
>
> *i) Protect businesses from creditors insisting on repayment of relatively small debts by temporarily raising the current debt threshold for a winding up petition to £10,000 or more.*
>
> *ii) Require creditors to seek proposals for payment from a debtor business, giving them 21 days for a response before they can proceed with winding up action.*
>
> *These measures will be in force until 31 March 2022."*

See WHiP Issue 83 for background.

Moratoriums

Regulations make the moratorium provisions in the Corporate Insolvency and Governance Act 2020 permanent, effective from 1 October 2021. This was always expected. See WHiP Issue 83 for details of this regime.

Gated DC funds

The Pensions Regulator has updated the investment governance section of its online Managing DC benefits guidance for trustees of DC schemes to cover issues around the temporary closure of funds.

When a DC investment option is closed to new contributions (or "gated"), as happened with some property funds as a result of the COVID-19 pandemic, the redirection of contributions to another arrangement can make that arrangement a "default arrangement" for the purposes of legislation, including that regarding the charges cap. When the gated fund reopens, a switch of contributions back to that fund can also cause issues (though less frequently). The guidance covers these scenarios and also what trustees should consider if a member in a gated fund makes a transfer request.

Guidance on this topic previously appeared in the Regulator's Covid-19 guidance for trustees.

'Net pay' and 'relief at source'

The tax relief issue that adversely affects low-paid members of 'net pay' schemes (generally occupational pension schemes, including some master trusts) is to be addressed from April 2024, at least in England and Wales, by the Government allowing affected individuals to claim a 20% "top-up" payment.

The Government's response to its July 2020 call for evidence says that the claim system will not be in place until 2025/26 and payments will be made after the end of each tax year. It appears that the "top-up" will be a payment to the individual rather than to the pension scheme.

See WHiP Issue 83 for an explanation of the issue and details of the call for evidence.

The response also says that the Government intends to improve the 'relief at source' system, which is typically used by personal pension providers and some master trusts.

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