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PENSIONS PLANNER

YOUR GUIDE TO FUTURE DEVELOPMENTS

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Foreword

2020 was undoubtedly a challenging, unpredictable and eventful year, dominated (as we all know too well) by the impact of Covid-19, which has changed the way we live, work and do business, and also by the preparations for Brexit. This *annus horribilis* may be over, however, these themes are likely to continue to dominate the agenda in 2021.

After months of negotiations the UK and the EU finally reached agreement, on Christmas Eve, over the terms of their future trading and security relationship. The Trade and Cooperation Agreement (TCA) provides for tariff and quota-free trade in goods, which will be good news for many businesses. However, many new requirements and restrictions arising from the end of the status quo transition period are now applicable as well as multiple governance, review and termination clauses contained in the TCA which allow for the imposition of tariffs and quotas and, in a worst-case scenario, a WTO exit.

Therefore, while the certainty of the deal has brought some stability to the UK economy, the nature of the deal means that we can anticipate further tensions and flashpoints between the UK and the EU in the years ahead as this grand experiment unfolds. The first flashpoint may well arise towards the end of the first quarter of this year in the context of financial services regulation on which no agreement has yet been reached.

Against the background of these macro-themes, the next twelve to eighteen months looks set to be a defining period for the Pensions Regulator as it is given new powers and as it launches the most

fundamental reform of the defined benefit (DB) funding regime since its introduction in 2005.

By around the middle of this year the Regulator is set to be granted new and enhanced powers, including the power to bring criminal prosecutions and to impose civil fines of up to £1 million on deviant directors, lenders, investors and advisers who take action which is deemed to be, broadly speaking, materially detrimental to a DB scheme (without a reasonable excuse).

The introduction of these new powers at this time is likely to be a double edged sword for the Regulator who will come under pressure to make use of its new powers (particularly when the next high profile corporate failure occurs). At the same time, if it is to support the economic recovery and the sustainable growth of scheme sponsors, the Regulator will need to show pragmatism, creativity and flexibility, with many businesses being forced to restructure and to make difficult decisions due to the challenges that they face.

The Regulator also has a difficult balance to strike as it finalises the contents of its new funding Code, which is due to be published for consultation in the second half of this year. It is clear from the initial consultation that the Regulator wants to ensure that, as a minimum, DB schemes chart a course to 'low dependency' and put in place a funding and investment strategy to ensure this is achieved before the scheme reaches significant maturity. However, the Regulator will need to consider carefully the pace at which it expects schemes to move towards this target, particularly over the short term, and how high it sets the bar for low

dependency to ensure sponsors are given sufficient time to recover from the economic impact of Covid-19, where necessary.

During the course of this year, we can also expect the Government to flesh out its plans to rebuild and restructure the UK economy in a post-Covid and post-Brexit world. Alongside its levelling-up agenda, the Government has indicated its intention to launch a "*green industrial revolution*" and to position the UK at the forefront of green finance globally. It is clear from the DWP's recent consultation paper on managing climate-related risks that the Government sees pension schemes as having a key role to play in this transition and in the fight against climate change.

2020 paved the way for the emergence of so-called DB "superfunds", with the Regulator issuing its interim regulatory regime and related guidance for trustees, sponsors and consolidators. The two main players in this market have said they expect to complete their first transactions in the first half of 2021. If this materialises it could lead to the rapid growth of this sector.

Finally, following the judgment in the second instalment in the Lloyds GMP litigation, trustees of schemes which provide GMPs accrued between 17 May 1990 and 5 April 1997 now know that they need to revisit and, where necessary, top-up historic cash equivalent transfer values (CETVs) that have been undervalued. Most schemes are still grappling with how to equalise the benefits of existing members and pensioners, following the first Lloyds judgment, with the majority of schemes likely to complete this exercise in the next two to

three years. However, these projects will now need to be extended to include former members who have taken a CETV since 17 May 1990.

So, as we say goodbye (and, in many respects, good riddance) to 2020, let's hope that with vaccines being rolled out and a Brexit deal agreed society and the economy will soon return to something more like 'normal'.

And don't forget that as the year unfolds, you can keep up to date with our latest thinking on key developments in pensions law and practice on our [UK pensions blog](#).



Recent podcasts

- [Implementing ESG in DC pensions](#)
- [Perspectives: Diversity in pensions - In conversation with Dana Grey, PPF](#)



Recent pensions blog posts

- [M&A, restructuring, re-financing & dividends set to be hit by new pension offences](#)
- [DWP confirms plans to introduce new climate-related risk requirements for largest schemes](#)

Quarter in review

Judge rules trustees are required to top-up historic cash equivalent transfer values in 2nd Lloyds judgment

The judgment in the 2nd instalment of the GMP equalisation litigation involving Lloyds Banking Group's defined benefit (DB) pension schemes was handed down on Friday 20 November 2020. This confirms that trustees of DB schemes that provide Guaranteed Minimum Pensions (GMPs) accrued between 17 May 1990 and 5 April 1997 are required to revisit and, where necessary, top-up historic cash equivalent transfer values (CETVs) that have been calculated on an unequalised basis.

In respect of individual transfer payments made pursuant to the CETV legislation, the judge held that:

- Where an initial transfer payment was inadequate, due to the fact that it did not reflect the right to equalised benefits, the Trustee is under an obligation to make a top-up payment to the receiving scheme on behalf of the transferred member. A member cannot require the Trustee to provide a residual benefit rather than a top-up payment.
- The obligation to make a top-up payment arises regardless of whether the transfer payment was made to a DB or a defined contribution (DC) occupational pension scheme, a personal pension scheme or an overseas scheme.

The judge considered whether the Trustee's obligations were limited or otherwise discharged by the discharge provisions in the CETV legislation, the discharge forms signed by the transferring members, the Schemes' forfeiture

provisions or the Limitation Act 1980. He concluded that they were not.

The judgment also reaffirmed the fact that, as well as there being an obligation on the trustees of a transferring scheme to revisit and, where necessary, top-up historic CETV payments, there is a concurrent obligation on the trustees of a receiving scheme (where that scheme is a DB scheme) to equalise the benefits of transferred-in members. Morgan J, left open the question of whether a similar obligation arises where the receiving scheme is a different type of scheme, such as a DC occupational pension scheme or a personal pension plan.

The principles outlined by Morgan J in this judgment would apply equally to other errors in calculating transfer values. Therefore, trustees ought to consider the need to correct other known errors in calculating historic transfer payments in light of this decision.

What should trustees do now?

Trustees carrying out GMP equalisation projects will now need to include historic cash equivalent transfer payments paid out of their scheme and may need to revisit past bulk transfers and individual transfers made under the rules of their scheme.

Trustees of receiving schemes also need to take action to equalise benefits payable to members in respect of historic transfer payments received by their scheme, where those benefits are inadequate due to the effect of GMPs accrued under the transferring scheme.

For more information on this judgment and the implications for DB schemes, listen to our [podcast](#).

Comment: This is another landmark ruling which will affect most DB schemes that provide GMPs accrued between 17 May 1990 and 5 April 1997. Trustees will need to extend the scope of their GMP equalisation projects to include transfers in and out of the scheme. They should also consider the need to revisit and top-up historic transfers where other errors are known to have occurred.

Brexit – what does the UK-EU Trade & Cooperation Agreement mean for UK pension schemes and sponsors?

After months of negotiations, the UK and the EU finally reached agreement, on Christmas Eve, over the terms of their future trading and security relationship. The Trade and Cooperation Agreement (TCA), as it is known, is at its heart a classic, but not very ambitious free trade agreement – providing tariff and quota-free trade in goods, but little mutual recognition and very modest commitments on services.

Although the TCA is complex, now that we know broadly the terms on which UK-EU trade will be conducted, trustees should:

- obtain updated advice on the impact of Brexit on their scheme's investment strategy and any actions they may need to take to mitigate any immediate and longer-term downside risks,

- review the investment funds that are available to members and consider with their investment advisers whether they remain appropriate in light of any material immediate and longer term risks to members' funds, and
- reassess the potential impact of the changes in the UK's legal and trading relationship with the EU on their sponsor's business and how this may affect its support for their scheme, such as the impact of:
 - the introduction of any new legal and regulatory barriers to trade, including restrictions on market access (for example, in relation to financial services, although note that the EU and UK have agreed in a Memorandum of Understanding to establish a framework of financial services regulatory co-operation by March 2021)
 - changes to immigration rules and the labour market, and
 - short and longer term changes in the value of Sterling.

Legal effect of Brexit

Since the transition period ended at 11pm on 31 December 2020, the UK has become a third country for the purposes of EU law rather than being treated as an EU Member State. From this point onwards, relevant EU law which was retained in UK law by virtue of the European Union (Withdrawal) Act 2018 continues to have effect.

There were no material changes to UK pensions law and regulation at the end of the transition period. However, the UK will be able to diverge

from new and existing EU law in future if it chooses to (however, we do not anticipate any radical changes to existing UK pensions law and regulation in the short term). In addition, future decisions of the Court of Justice of the European Union will no longer be binding on UK Courts, although they are likely to be treated as highly persuasive in cases which concern the interpretation and application of retained EU law.

These issues are considered further in our [pensions blog post](#) and [Brexit legal guide](#). You can also follow the key developments and find out what you need to know to prepare for Brexit on our [Beyond Brexit hub](#) and by following our [Brexit blog](#).

Comment: Whilst the effects of Brexit on the pensions industry will take some time to be truly felt, trustees should reassess the potential impact of Brexit on their scheme's sponsor and on their scheme investments and funding arrangements now that the terms of Brexit are known, and take steps to mitigate any material risks.



FCA ban on contingent charging comes into force

The FCA's new rules which ban contingent charging and introduce the option for firms to offer abridged advice on defined benefit (DB) transfers came into force on 1 October 2020.

The FCA introduced a number of measures to improve the DB transfer market including, among other things:

- banning contingent charging in all but a few circumstances
- introducing a new abridged advice process, and
- introducing a requirement for advisers to prioritise transfers to a workplace defined contribution (DC) pension scheme when advising on DB transfers.

These new rules demonstrate the FCA's ongoing concerns about DB transfers and its determination to improve the quality of DB transfer advice. However, they may have unintended consequences. In particular, if, as expected, the new rules result in more good advisers leaving the market, they could undermine the FCA's aim of making it easier for members to access good quality advice.

Comment: Although these measures are designed to improve the quality of DB transfer advice, they could have the opposite effect in some instances. To find out more about the potential unintended consequences and the industry's concerns with these changes, read our [blog](#).

Courts and Ombudsman open door for savers to claim for investment losses

Prior to the decision of the High Court in *Tenconi v James Hay Partnership*, the Pensions Ombudsman had generally found that losses arising from missed investment opportunities were too remote to be recoverable. However, the High Court disagreed in the context of Mr Tenconi's complaint and, when the matter was remitted back to the Ombudsman, he held that James Hay Partnership had to pay £43,700 to Mr Tenconi for investment losses suffered as a result of his delayed transfer, which prevented him from investing in the FTSE100 in the aftermath of the Brexit referendum (*Mr T (CAS-38354-V5L8)*).

The Ombudsman subsequently held in Mr E (*PO-21612*), that SIPP provider, Curtis Banks, would be required to make good investment losses suffered by Mr E as a result of a delay in the transfer of his SIPP, if Mr E could provide it with satisfactory evidence of his losses.

Similarly, in Mr G (*PO-21110*), the Ombudsman directed Willis Towers Watson to pay Mr G £20,022 for investment losses after it failed to

provide the receiving scheme with all the relevant information following Mr G's transfer which meant his fund could not be invested immediately.

Comment: These decisions highlight the growing risk that pension schemes, providers and administrators may be required to compensate members for investment losses where delays to transfers or benefit payments prevent them from taking advantage of investment opportunities. This could add significantly to the cost of such claims.

Scheme member secures net zero commitment from Australian superannuation fund

In Australia, a member had been threatening to take his pension fund, the Retail Employees Superannuation Trust (REST), to court for failures in relation to the Trust's climate-related disclosures (*McVeigh v Retail Employees Superannuation Trust*).

However, having reached a settlement with the member, REST released a statement outlining several steps that it will take to address ESG risks, including measuring, monitoring, and reporting outcomes on its climate-related progress in line with the Taskforce on Climate-related Financial Disclosures (TCFD) recommendations and undertaking scenario analysis.

In securing this commitment, the member achieved his objective of securing behavioural change in the way the fund is addressing climate-related risks.

Comment: This case highlights the growing risk of member complaints and legal challenges where pension schemes are unable to demonstrate that they are taking climate-related risks seriously. As well as impacting the scheme itself, such claims also pose a reputational risk for scheme sponsors, particularly if their scheme's approach to tackling these issues are at odds with the sponsor's corporate values.

Pensions Regulator publishes guidance for defined benefit schemes on corporate distress

The Pensions Regulator has published guidance outlining actions trustees of defined benefit (DB) schemes should take to protect their scheme where their sponsor is experiencing financial distress.

The guidance outlines:

- actions trustees should be taking to protect their scheme against sponsor distress
- a detailed overview of the signs of potential financial distress, and
- what trustees should do if their sponsor is facing the prospect of insolvency.

Amongst other things, the guidance urges trustees to familiarise themselves with the practical steps needed to prepare their scheme for PPF assessment, which are set out in the [PPF's contingency planning guidance](#).

For more details on the guidance, see our [blog post](#).

Comment: All trustees need to consider this guidance and take action early to protect their scheme. A sponsor's covenant can decline rapidly and, once a sponsor has become distressed, it is usually too late for trustees to take action to improve their scheme's position.

Pension schemes urged to get their data "dashboard ready"

The Pensions Dashboard Programme (PDP) recently published key data standards for pensions dashboards. The guide covers the data elements required to find and view basic information about an individual's pension, including:

- **find data** – the information pension providers will receive from the dashboard ecosystem, elements of which they will need to use to match people to their pensions including personal details.
- **view data** – the information pension providers will have to return to individuals to see on the dashboards.
- **income data** – this will provide individuals using the dashboard with an estimated retirement income and the data payable for each pension that they have.

Pension providers have been asked to begin to review and prepare their data to ensure that their date is "dashboard ready", given the volume of data involved.

The guide was published not long after the PDP provided a progress update report, which indicates that it may be mandatory for schemes and providers to supply their data from 2023.

Comment: The dashboard programme continues to gather momentum and 2023 will be here before you know it. Therefore, schemes should review the data standards and take steps to begin to prepare their data.

Pensions Regulator given more extensive data-gathering powers

The Investigatory Powers (Communications Data) (Relevant Public Authorities and Designated Senior Officers) Regulations 2020, *SI 2020/1037*, which came into force on 25 September 2020, have given the Pensions Regulator more extensive data-gathering powers in connection with investigating potential criminal offences.

In particular, the Regulator has been empowered to request authorisation to obtain 'communications data', ie information about the time/date/method by which a communication (including a telephone call or email) was sent.

Comment: These new powers may prove helpful in tackling pension scams or where the Regulator is investigating a potential infringement of the new criminal offences introduced by the Pension Schemes Act.

Pensions Regulator publishes new long-term strategy

In October, the Pensions Regulator launched a discussion paper on its new 15 year corporate strategy in which it emphasises that its main objective over this period will, unsurprisingly, be to protect pension scheme members and their saving outcomes.

The Regulator's proposed strategy reflects the shift in retirement provision that will take place over the coming years, with individuals retiring today receiving the majority of their benefits from DB schemes while those retiring in future years will be increasingly reliant on savings in DC schemes.

The discussion paper also outlines the Regulator's five strategic priorities:

- security
- value for money
- scrutiny of decision making
- embracing innovation, and
- bold and effective regulation.

The Regulator will be looking to drive the way schemes and trustees administer savers' pensions, protect the promises made to members of DB schemes and from scammers, promote diversity among decision-makers and ensure the delivery of efficient services and administration.

For more details on the corporate strategy, check out our [blog](#).

Comment: The Regulator's analysis of the changing needs of pension scheme members and savers shows how its priorities will need to change in the years ahead. Trustees and administrators play a key role in protecting these different groups of savers by providing accurate and efficient services and maintaining good practice.

High Court confirms that scam arrangement can claim compensation from the Fraud Compensation Fund

In *Board of the Pension Protection Fund v Dalriada Trustees Ltd* [2020] EWHC 2960 (Ch), the Board of the PPF sought a determination on a number of legal issues concerning the operation of the Fraud Compensation Fund (FCF). A key issue was whether a pension scheme that was a scam arrangement could claim compensation from the FCF for losses to the scheme connected with an offence involving dishonesty following the appointment of an independent trustee to the scheme in question by the Pensions Regulator.

The defendant, Dalriada Trustees Ltd, had been appointed as an independent trustee of a pension scheme and had applied to the FCF for compensation.

The High Court confirmed that the scheme was entitled to claim compensation and the appointment of an independent trustee meant that the scheme was no longer a scam.

Comment: While this decision will likely only have a narrow impact on the wider pension industry, the impact on the FCF may be significant; it was noted in the judgment that the PFF are currently on notice for 150 applications in relation to claims of this description. The outcome may also lead to an increase in the FCF levy that occupational pension schemes are required to pay.

Lack of means can justify discriminatory treatment

The Court of Appeal, in *Heskett v Secretary of State for Justice (Rev 1)* [2020] EWCA Civ 1487, held that when deciding whether indirect discrimination by an employer could be justified, there was a difference between an employer seeking to justify its decision based solely on cost, and one which was based on a lack of means, the latter being a legitimate aim to justify indirect discrimination.

The dispute related to the introduction of a new incremental salary scheme for probation officers, that had the effect of older employees close to or at the top of the band earning significantly more in salary and accruing greater pension benefits than those lower down the band, for as long as the policy persisted. The claimant, Mr Heskett, brought a claim for indirect age discrimination, arguing that the new pay policy put those aged 50 and under (including himself) at a significant disadvantage compared with those aged over 50.

In rejecting the appeal, the Court of Appeal held that a distinction needed to be made between an

absence of means and a respondent seeking to place reliance solely on cost. The Court held, affirming the EAT's decision in *HM Land Registry and Benson & Ors* [2012] IRLR 373, that an employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books could constitute a legitimate aim.

In addition, the fact that the discriminatory effect of the policy had been noted by the respondent, and that steps were being taken to address it within a short period were, legitimate considerations to have regard to. The Court recognised that an employer may sometimes need to take urgent measures which indirectly discriminate against one group of its employees and an employer can, as a matter of principle, justify those measures on the basis that they represent a proportionate short term (ie temporary) means of responding to the issue at question.

Comment: The Courts have consistently held that cost-saving alone cannot be used to justify indirect discrimination. The justification which succeeded in this case looks remarkably close to that line. However, it may offer some assistance to employers that are having to make difficult decisions at the present time.

High Court orders rectification of successive definitive deeds and confirms position on unilateral amendment powers

In *SPS Technologies Ltd v Moitt* [2020] EWHC 2421 (Ch), the High Court ordered rectification of three

successive deeds concerning the early retirement provisions for transferred members that governed the SPS Technologies UK Pension Plan.

Rectification was granted in this case despite the error being obvious and despite over 9 years having passed between the error first being discovered (in 2009) and the claim being issued (in December 2018).

Chief Master Marsh confirmed the law on rectification can now be regarded as settled as a result of the extensive review by the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361.

Comment: Although this case concerned unilateral amendment powers, Chief Master Marsh confirmed that the difference of approach between unilateral and bilateral powers of amendment is only likely to be significant in practice where the evidence shows a difference of intention between the principal employer and the trustees. In addition, this decision is noteworthy for confirming that the 'obvious' nature of errors is not a bar to rectification.

DB schemes braced for 120% increase in General Levy

The DWP has published a further consultation on revised proposals for the General Levy in which it is proposing substantial increases in the levy rates and changes to the structure of the levy itself.

The DWP is already facing a deficit of £80m in its budget by 2021 due to historic shortfalls between the amount recovered via the levy and the costs of funding these bodies to date. Those costs are set to increase in the coming years, due to the expanding roles of all three bodies, and the DWP estimates that if levy rates remained unchanged, there would be a deficit of around £230m by April 2024.

The DWP has outlined three different options to cover the increased costs associated with these developments. Its preferred approach would see a substantial increase in the levy for DB schemes, which the DWP believes is justified due to the level of supervision required or such schemes and the extended role and powers being given to the Pensions Regulator.

For more information on the consultation and the options being considered, see our [blog](#).

Comment: Although the timing of these proposed increases is far from ideal, it is clear that the levy rates (which have not been increased for over a decade) need to be adjusted. However, the Government may face opposition from DB schemes which will bear the brunt of the proposed increases (as it did from master trusts earlier this year). This time, however, we expect the Government to press ahead with its plans having already taken time to reconsider its options.

FCA and Pensions Regulator intervene over concerns about DB transfers following redundancies

In a **joint statement** issued by the FCA, the Pensions Regulator and the Money and Pensions Service, the FCA confirmed it had issued a number of data requests to advisers who advised members on transfers out of the Rolls-Royce DB pension scheme following the announcement of redundancies by the company.

The FCA is scrutinising the advice being given and where the FCA sees unsuitable advice or bad practice, it has said it will take action.

Comment: The FCA and the Pensions Regulator are clearly wanting to be on the front foot to prevent another British Steel-type transfer fiasco unfolding. Employers considering making large-scale redundancies (and trustees of any associated DB schemes) should be aware that the FCA and the Pensions Regulator may get involved to protect scheme members from being targeted by unscrupulous advisers.

Pensions Regulator calls on industry to pledge to combat scams and updates scam guidance

As part of a new campaign, the Pensions Regulator has urged pension providers, trustees and administrators to publicly pledge to combat pension scams. The pledge contains six commitments, including to:

1. Regularly warn members of the risk of scams.
2. Take appropriate due diligence measures and document pension transfer procedures.
3. Clearly communicate concerns to members if high-risk transfers must be made.

Trustees, advisers and providers can sign up through the Regulator's website. The Regulator has made available resources, including an online education tool to help trustees understand what they can do to protect savers.

The Pensions Regulator has also updated its **scam guidance**, to reflect the new tactics that scammers are using following the ban on cold calling. This includes making contact through social media, using friends and family to reach clusters of people and offering a free pensions review.

Comment: Trustees, providers and administrators should take note of these regulatory expectations because these standards could become industry norms by which schemes are judged, even if they don't sign-up to the pledge.

Pension scams pledge

Six commitments

1	Regularly warn members of risk of scams.
2	Encourage members asking for drawdown to get impartial guidance from the Pensions Advisory Service.
3	Get to know the warning signs of a scam and best practice by ensuring all relevant staff or trustees complete the scams module in the Regulator's trustee toolkit and by studying and using FCA and PSIG resources.
4	Take appropriate due diligence measures and document pension transfer procedures.
5	Clearly communicate concerns to members if high-risk transfers must be made.
6	Report concerns about a scam to the authorities and alert the member.

Timeline

1 January 2021

ESG

For accounting periods starting on or after this date UK premium listed companies must confirm in their annual report whether their disclosures are TCFD aligned

End of Feb/early March

Policy

TPR expected to publish its final corporate strategy

Q1 2021

Regulatory

TPR expected to publish draft guidance on its approaches to its new powers granted under the Pension Schemes Act 2021

1 April 2021

Regulatory

New framework for calculating General Levy for occupational pension schemes and master trusts expected to come into force

Early 2021

ESG

FCA due to publish further consultation on extending requirement for TCFD aligned disclosures to asset managers and other organisations

11 February 2021

Policy

Pension Schemes Act 2021 received Royal Assent

Q1 2021

Transfers

FCA's final guidance on DB transfers due to be published

3 March 2021

Tax

The Chancellor is due to publish his Spring Budget

31 April 2021

Covid-19

Date on which protection afforded by Coronavirus Job Retention Scheme is currently due to end

Spring/Summer 2021

Policy

DWP due to issue draft regulations for consultation to implement new regulatory, funding and ESG requirements contained in the Pension Schemes Act 2021



2021

Spring/Summer 2021

ESG

TPR expected to publish its climate change strategy

Summer/Autumn 2021

TPR

New criminal offences and civil fines for failures in relation to DB schemes likely to come into force

1 October 2021

ESG

New governance and reporting requirements on climate-related risks due to come into force for largest UK pension schemes

2021

Climate change

UK Government set to issue first sovereign green bond subject to market conditions

1 October 2022

ESG

New governance and disclosure requirements on climate-related risks due to come into force for largest UK pension schemes

1 August 2021

Disputes

New Pensions Ombudsman set to be appointed

Autumn 2021

Funding

Pensions Regulator due to consult on contents of new DB funding Code

2021

Dashboard

Pensions Dashboard Programme due to begin on-boarding suppliers for dashboard and build digital architecture

Spring/Summer 2022

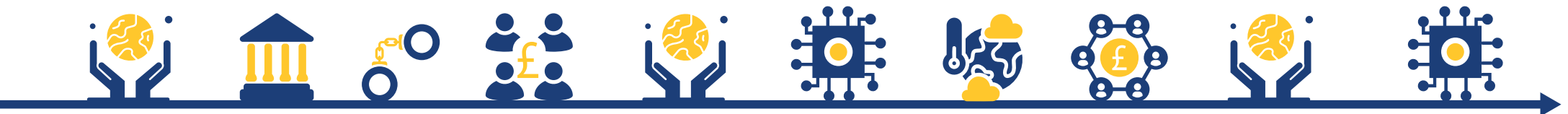
Scheme funding

New DB funding Code and requirement for schemes to set a long-term objective likely to come into force

2022

Dashboard

Pensions Dashboard Programme to connect with volunteer pension schemes and providers to use real data



2022

In the spotlight

Next 3 months

New regulatory powers and funding requirements to come into force

The Pension Schemes Act 2021 received Royal Assent on 11 February 2021.

The Act was first introduced into Parliament in October 2019. Its passage through Parliament has been delayed first by the 2019 General Election, then by Brexit and, more recently, by the constraints on Parliamentary time caused by the actions needed to manage the spread of Covid-19.

The Act contains some significant reforms including provisions which will:

- **introduce new criminal offences and regulatory sanctions (including fines of up to £1 million) for pension failures** – these sanctions could be imposed, broadly, where directors or other parties take action which is materially detrimental to a DB scheme or which breaches key legislative requirements
- **introduce two new contribution notice triggers** – these will apply where, broadly, a party engages in an act or course of conduct which reduces the amount that may be available on the insolvency of a sponsor or which reduces the value of a sponsor to a material extent
- **introduce new scheme funding requirements for DB schemes** – this includes requirements for trustees to put in place a long-term funding and investment strategy for their scheme and to set their scheme's technical provisions by reference to this, and
- **pave the way for new requirements relating to the management of climate-related risks** – the

Bill contains regulation-making powers for the Secretary of State to require trustees to take action to manage climate-related risks and to publish information relating to this.

The Government has confirmed that the regulatory powers and sanctions contained in the Bill, which are not expected to come into force until Autumn 2021, will not be applied **retrospectively** by the Pensions Regulator.

For more on these measures read our blogs on the **new criminal offences** and sanctions, the **new funding requirements** and the **DWP's consultation** on new governance and disclosure requirements relating to climate-related risks.

Action: Sponsors and trustees should be prepared for these new offences, sanctions and statutory requirements to come into force during the course of this year. In addition, it is important that directors, investors and lenders take account of the new offences and sanctions immediately in relation to corporate transactions, re-financing and restructuring.

Covid-19: Chancellor extends CJRS until April 2021

Back in December, Rishi Sunak announced that the Coronavirus Job Retention Scheme (CJRS) or 'furlough' scheme, will be extended until the end of April 2021, for all parts of the UK.

The Government's commitment under the scheme will remain unchanged with the Government

continuing to cover 80% of employees' salaries for hours not worked (up to a maximum of £2,500 per month). Employers will also continue to be required to pay National Insurance Contributions (NICs) and employer pension contributions for hours not worked as well as wages, NICs and employer pension contributions for hours that furloughed employees actually work.

Following the introduction of a third national lockdown, the CIPD and CBI have both argued that the Government should act now to extend the scheme to the end of June 2021 (potentially with reduced levels of wage support from the beginning of May).

Employers whose businesses will be impacted (once again) by the latest national lockdown and their employees will no doubt have welcomed the extension of the CJRS. Although the terms are not quite as generous as they were back in March, the Government is still committed to underwrite up to 80% of the salaries of furloughed employees.

According to the Pensions Regulator, the first lockdown and the economic disruption this caused did not lead to a significant spike in missed employer automatic enrolment contributions. However, the cost of employer auto-enrolment contributions was picked up by the Government under the CJRS during the first lockdown (up until the end of July 2020). Therefore, there is a risk that the default rate may be higher this time around as businesses, some of which may already be in financial distress, are required to continue to cover this cost for furloughed employees.

To find out more about the various regulatory changes due to Covid-19, see our **Covid-19 hub** on our pensions blog.

Action: Employers should monitor any further extensions and changes to the CJRS, and consider how these may impact their pension contributions, other employee benefits and salary sacrifice arrangements. Trustees and providers should continue to monitor employer and member contributions to ensure that they are received on time and in full.

How will the Spring Budget impact pensions?

The Chancellor has announced that the next Budget will take place on 3 March 2021. In light of Covid-19 pandemic, the Treasury decided to cancel the Autumn 2020 budget, and to give the Chancellor more time to consider his options for dealing with the national deficit which has ballooned during this crisis (to roughly over £2 trillion), the next phase of tackling the pandemic and how to protect businesses and jobs.

The Government has already **announced** that the state pension will rise by 2.5% next year which is in line with the Conservative's manifesto pledge back in 2019. Whilst this may come as a relief to state pensioners, it remains to be seen for how long the triple lock system will remain in place, given the economic fallout and high levels of borrowing resulting from Covid-19. In addition, state pensions are paid from the national insurance contribution pot, which is likely to have been hit by the

increasing levels of unemployment, reduced hours and furlough pay.

The Government also recently **confirmed** that the current automatic enrolment trigger will remain at £10,000 for 2020/2021, despite various calls from the pensions industry to lower the threshold or to scrap it completely. However, the upper limit for qualifying earnings will increase to £50,270 (from £50,000) for the 2021/22 tax year.

There remains speculation as to whether the Chancellor will announce any reform to pensions tax relief. This would impact higher and additional rate taxpayers but would likely produce a cost saving for the Treasury, and the Chancellor may see this as a necessary step to help rebalance the books.

Action: Monitor developments. Employers with schemes that calculate pension contributions using qualifying earnings need to ensure that their payroll systems are updated to reflect the increase to the upper threshold.

FCA's final guidance on DB transfers due to be published

Alongside the FCA's **new rules** on DB transfer advice that came into force on 1 October 2020, the FCA also published draft guidance which seeks to explain how firms can comply with the FCA's new and existing rules. The guidance also sets out (at Annex 2) the FCA's views on the support trustees and employers can give to their members/employees without needing to be authorised by the FCA.

Giving regulated advice without obtaining FCA authorisation carries financial and reputational risks. It is also a criminal offence. The draft guidance confirms that trustees and employers can *"give information to members that presents a balanced and factual view of the general advantages and disadvantages of keeping safeguarded benefits or transferring/converting those benefits"*. It also makes clear that *"to avoid giving advice, employers and trustees should not give information that suggests whether or not a member should transfer/convert their safeguarded benefits into flexible benefits"*.

In this context, the draft guidance states that:

- trustees should not give information to individual members based on their personal circumstances,
- where an employer or trustee gives scheme members illustrative figures that compare the outcomes a member might get if they remain in their DB scheme or take a transfer, this is likely to constitute regulated advice or an inducement, as it might steer a member towards a specific course of action, and
- if an employer or trustee provides a transfer value comparator (**TVC**), in accordance with the FCA's rules, they should consider whether they are doing so by way of business and need FCA authorisation (**note:** a TVC is a comparison of the cash equivalent transfer value offered by the scheme versus the cost of buying the same income via an annuity at retirement).

It has become increasingly common for trustees to include transfer values in retirement packs. However, if the final guidance (due to be issued in Q1 2021) is unchanged on these points, trustees

will need to reconsider whether to continue providing unsolicited transfer values in this way. In addition, if an employer or trustee provides a TVC, in accordance with the FCA's rules, they should consider whether they are doing so by way of business and need FCA authorisation.

To find out more about the draft guidance, read our **blog**.

Action: When the final guidance is published trustees should take legal advice and review their scheme's approach to communicating with members about transfers and the tools and support they provide to ensure that they remain the right side of the line.

Next 3 to 12 months

Pensions Regulator to publish DB funding code for consultation in H2 2021

The Pensions Regulator has **confirmed** that it plans to publish the second consultation on its proposed defined benefit (DB) funding code in the second half of 2021 (having originally planned to launch it in Autumn 2020). This is to allow time for the Regulator to consider the responses to the first consultation and to allow for the passage of the Pension Schemes Bill through Parliament and the DWP's consultation on draft regulations, which are currently expected to be published in the first part of this year.

In its interim response to the first consultation, the Regulator has indicated that the second consultation will cover:

- a full summary of the responses to its first consultation and the approach it has taken in light of the responses received and the final legislative package
- the draft code of practice for consultation and its proposed regulatory approach, including developing thinking around:
 - the process to review and update Fast Track guidelines
 - the Regulator's approach to assessing valuations
 - engagement with DB schemes, and
 - enforcement
- an impact assessment and supporting analysis.

Separately, in a **recent blog**, the Regulator recognised that some of the proposals may need to be adjusted to reflect the current economic conditions. In particular, the Regulator is considering the different economic scenarios schemes may face post-Brexit and post-Covid, and how these may impact the parameters it sets for the new Fast Track approval route.

Action: Trustees and sponsors should assess the potential impact of the new funding regime on their scheme's funding arrangements and, in particular, the rate of deficit repair contributions and the length of their recovery plan. They should also look out for the second phase of the consultation process to see if there are any changes in approach, particularly in light of the economic fallout from Covid-19.

More climate-related disclosures in the pipeline

The DWP recently **confirmed** its plans to introduce new requirements relating to the management and disclosure of climate-related risks for the largest UK pension schemes. The proposed plans were broadly supported by the industry. However, the DWP has made some changes in light of the consultation responses it received. Most notably, adjusting the deadline for schemes to publish the new climate-related disclosures and reducing the frequency with which schemes need to monitor their performance against their chosen metrics and targets and undertake scenario analysis.

In September 2020, the DWP launched a **consultation** seeking views on proposals to require trustees of large occupational pension schemes, authorised master trusts and schemes offering collective money purchase benefits to have an effective system of governance, monitoring and risk management relating to climate-related risks and opportunities in place from 1 October 2021.

The DWP also sought views on whether in scope schemes should be required to report in line with the Task Force on Climate-related Financial Disclosures' (TCFD) 11 recommendations, by the end of 2022.

Following on from the consultation, the DWP has confirmed that it plans to press ahead with the introduction of these new requirements. However, it has made some changes to the scope and timing of the new requirements and the frequency with which certain activities need to be carried out. For example, the DWP has decided to:

- change the requirements for schemes to report and measure the performance of the scheme's assets against targets, from quarterly to annually, and
- change the requirement that scenario analysis must be carried out annually, to require trustees to undertake analysis in the first year and every three years thereafter.

In response to the consultation concerns were raised about the ability for trustees to access the data that they will need to meet these new requirements. The DWP recognises these challenges, which is why it has proposed only

requiring trustees to comply with some of the requirements "*as far as they are able*". In addition, the challenges that trustees may face in obtain relevant data should ease with the FCA's plans to introduce TCFD reporting requirements for asset managers, by the end of 2023. The DWP is also calling on pension scheme trustees to recognise their role in unlocking and improving the flow of quality data.

Alongside its consultation response, the DWP has also published draft implementing regulations and draft statutory guidance for consultation. It has also published **industry guidance**, produced by the Pensions Climate Risk Industry Group (PCRIG) to help trustees evaluate how climate-related risks and opportunities can affect their strategies.

We strongly recommend that trustees refer to this guidance when deciding the steps they need to take to effectively manage climate-related risks and to comply with the new legislative requirements.

For more information on the DWP's response and a recap of the key proposals check out our recent **blog**.

Action: Trustees of in scope schemes should start preparing now by reviewing their scheme's approach to addressing climate-related risks and determining the steps they will need to take to comply with these new requirements, which will apply to the largest schemes from 1 October 2021.

UK Government to initiate “green industrial revolution”

Back in December, the Chancellor confirmed plans to issue the UK’s first ever sovereign green bond in 2021 which will form part of the UK’s blueprint to meet the legally-binding target to produce net zero carbon emissions by 2050. Subject to market conditions, the Chancellor indicated that the Government intends to follow this with a series of further issuances to meet growing investor demand, including from pension funds, many of which have expressed an interest in green gilts.

On 18 November 2020, the Government also set out its ten point plan for what it is calling the “green industrial revolution”, following the UK’s departure from the EU.

According to the Government, the plan will create and support up to 250,000 jobs in the UK. Of the £12 billion the Government says it will spend on the plan, £4 billion is new funding.

Together, these announcements demonstrate the Government’s intention to launch a green recovery following the economic impact of the Covid-19 pandemic. It also reflects the Government’s ambition to position the UK at the forefront of green finance globally. The Chancellor has described the plan as “a new chapter in the history of financial services and renewing the UK’s position as the world’s pre-eminent financial centre”.

The plan to issue green bonds will be welcomed by pension schemes and insurers which are now

required to focus much more closely on their climate-related risks and credentials. The Government’s ten point plan also demonstrates how Government spending and the wider economy is being tilted towards a green agenda.

For more details on the Government’s plans for a green recovery and the ten point plan, see our [blog](#).

Action: Trustees and insurers should consider the impact of this transition on their investment strategies and on the short and long-term value of the underlying assets that they are invested in.



Court of Appeal to decide extent of duties and obligations on SIPP providers who carry out “execution only” business in landmark appeal

In September, the Court of Appeal granted Mr Adams permission to appeal against the decision of the High Court in *Adams v Options SIPP UK LLP* (formerly *Carey Pensions UK LLP*) [2020] EWHC 1229 (Ch). The High Court dismissed all of Mr Adams’ claims against self-invested personal pension (SIPP) provider, Carey Pensions, and held that a SIPP provider that operates on an “execution-only” basis is not liable for loss of value on high risk investments held within a SIPP operated by the provider.

A key factor, when considering the extent of the SIPP provider’s duty in this case was the agreement the parties entered into, which defined their roles and functions in the transaction and which made clear that Carey did not owe any duty to advise Mr Adams on his investment and that Carey was acting on an execution-only basis.

The Court of Appeal is due to hear the appeal on 2 March 2021 and it is hoped the decision will finally clarify the duty and obligations of SIPP providers carrying out execution-only business.

Action: The High Court’s decision was welcomed by SIPP providers. All eyes will now be on the Court of Appeal to see whether it reaches a similarly favourable conclusion.

CMA Order – two year deadline for competitive tender exercises

Trustees of schemes that had appointed a fiduciary manager to manage 20% or more of their scheme’s assets without a competitive tender prior to the introduction of the CMA Order on 10 June 2019 have to run a competitive tender within five years of a fiduciary manager’s appointment or within two years of the Order being made, whichever is later. Therefore, time is ticking and schemes that have to run a competitive tender by 9 June 2021 should take steps (to the extent they haven’t done so already) to consider how they will run a tender before this deadline, allowing extra time for the practical obstacles that may be faced in the current climate.

The Pensions Regulator has issued **guidance** for trustees on running competitive tender exercises which trustees should have regard to when they are designing their own tender process.

Action: Trustees of schemes that have to complete a tender process by June 2021 should not delay in designing and implementing the process for their scheme, particularly as the arrangements are likely to be more complex and time consuming in the current climate.

Pensions Ombudsman set to be replaced this Summer

The current Pensions Ombudsman, Anthony Arter, is due to be replaced when his term expires on 31 July 2021. Stephen Timms MP, Chair of the Work and Pensions Select Committee has **written** to the DWP to ask what steps they will be taking to attract the widest possible pool of applicants and to what extent the remuneration for the post will change to reflect the new responsibilities given to the Ombudsman since the last appointment process.

On the horizon

RPI set to be reformed in 2030

As part of the Treasury's Spending Review, the Chancellor issued the Government's response to the consultation on the reform of RPI and confirmed that:

- in order to minimise the impact of the UK Statistics Authority's proposal to reform RPI on the holders of index-linked gilts, the Chancellor will not consent to the implementation of a proposal to reform RPI (such that the Authority intends to make) before the maturity of the final specific index-linked gilt in 2030, but
- the Authority would be able to legally and practically implement its proposal to reform RPI in February 2030.

Whilst the methodology for calculating RPI will not be updated to bring the methods and data sources of CPIH into the RPI until February 2030, we anticipate that the Authority will press ahead with its proposed reform from that time, as the response confirms that it remains the Authority's policy to address the shortcomings in RPI in full "at the earliest practical time".

The Government does not intend to compensate holders of index linked gilts for the losses that they will suffer as a result of the reform of RPI. However, it is possible that this decision may be challenged in the Courts.

For more information on the Government's response, see our [blog](#).

Immediate actions for trustees of DB schemes

Urgently revisit any inflation assumptions to be used as part of a valuation that is in progress

Consider the need to suspend transfer value quotations in order to review the inflation assumptions

Review your scheme's inflation hedging arrangements and consider the impact on your scheme's investment strategy

Review the impact on any de-risking policies and triggers

Consider whether to review commutation and other factors used in member benefit calculations

Consider suspending any pension increase exchange options that are currently offered to members and any GMP equalisation/conversion exercises that are planned or underway to allow time for the inflation assumptions to be revisited.

Immediate actions for sponsors

Urgently consider the impact on your end of year company accounting figures

Engage with your scheme's trustees on appropriate inflation assumptions for any valuations in progress

Consider whether your scheme rules require or enable a switch to CPIH (or CPI) indexation earlier than 2030

Review the impact on any de-risking exercises that are in the pipeline

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