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Essential pensions news

Updater

August 2018

Introduction

Essential pensions news covers the latest pensions developments each month.

The Pensions Regulator consults on its draft policy on master trust supervision and enforcement

The master trust authorisation regime is due to come into force on *October 1, 2018*, and existing schemes will have a period of six months from that date to apply to the Pensions Regulator (TPR) for authorisation, failing which they will be forced to close.

TPR will be responsible for the supervision of master trusts and its draft Master Trust Supervision and Enforcement Policy, published on *July 26, 2018*, sets out its intended approach and an explanation of how it will exercise its enforcement powers.

TPR's aim on supervision is to operate in the same risk-based manner as it does for other pension schemes, while being aware of the issues faced by master trusts. This (it says) will mean acting early to prevent member detriment and focusing on any systemic risks it identifies in the master trust landscape. In return, TPR expects those running master trusts to be open and honest in their dealings with it, as is appropriate to the role they carry out. Efficient processes to run the schemes, as well as effective governance, will be expected. TPR will carry out risk monitoring of all master trusts, but also of individual trusts to assess their impact on master trusts as a whole.

Where a master trust no longer satisfies the authorisation criteria or its wider obligations, TPR may use one or more of its powers, including enforcement. Such action could be taken against the trustees, scheme funder, scheme strategist or any other relevant third party or persons depending on the nature of the breach. This could also include withdrawal of authorisation.

TPR seeks views from party to which the Pension Schemes Act 2017 applies, and to those involved with master trusts. This includes trustees as well as scheme funders, scheme strategists, service providers, employers, professional advisers and members of master trusts. The consultation closed on *August 23, 2018*.

View the draft policy.

TPR has also published a short document (seven pages) detailing its decision-making procedure in the master trust authorisation process. The procedure document includes a useful flow chart of the process at page six.

View TPR's master trust Authorisation Decision-making procedure document.

The Pensions Regulator publishes master trust data

TPR has started publishing a monthly report containing data about master trusts operating in the UK.

In The current master trust market: latest facts and figures, TPR reveals it has identified 90 master trust schemes overall, nine more than had been previously identified at the start of the year. TPR expects the introduction of the authorisation and supervision regime under the Pension Schemes Act 2017 to lead to consolidation of the master trust market, and says it is already seeing evidence of this. In addition, the legal press has reported that six further master trusts have notified TPR of their master trust status, and it is understood that some of these were traditional DB schemes which now provide some DC benefits (other than AVCs).

Three master trust schemes have wound up and a further 18 have decided not to apply for authorisation. These schemes are winding up (or are about to do so) and transferring their members to an alternative master trust scheme or other appropriate vehicle. According to TPR, the remaining 69 master trust schemes expect either to apply for authorisation or trigger their exit from the market in the coming months.

TPR has received voluntary draft applications from 33 master trusts as part of its recent "readiness review". A further (unidentified) number of master trusts have indicated that they intend to apply for authorisation, despite not having submitted a draft application.

The Department for Work and Pensions (DWP) expects TPR to receive between 40 and 45 formal authorisation applications in total.

TPR's intention is to publish updated master trust figures each month. From October, these will include the number of schemes that have applied for authorisation.

Regulator publishes its annual report and accounts

TPR has published its annual report and accounts for the 2017/18 year, in which it notes that the year has been both a challenging and successful one and that TPR has emerged stronger and more capable as a result.

Its performance summary indicates that

- More than 9.5 million eligible jobholders have been automatically enrolled into a pension scheme to date.
- Over 1.1 million employers have now completed their declaration of compliance with their auto-enrolment duties, and more than 41,000 employers have completed their re-declarations of compliance.
- In excess of 460,000 phone calls, emails and letters were answered by TPR's Brighton and Birmingham contact centres.
- 36,137 fines were issued for non-compliance.
- TPR exercised its trustee appointment powers 534 times.
- Ten section 89 intervention reports were published.
- TPR's caseload during the year was 132,653.
- Its overall staff levels increased by 9.1 per cent.

The key themes of TPR's report are

- An emphasis on the regulation of master trusts and ensuring they are ready for authorisation in October 2018.
- The improvement of governance standards under the 21st century trusteeship campaign.
- A welcome reception of the DWP White Paper on "Protecting defined benefit pension schemes" and a statement that TPR will work closely with the Government to develop the proposals, including criminal sanctions, to ensure they are "proportionate, effective and work in practice".
- An acknowledgement that "at times we should have intervened more quickly to ensure employers were paying more into pension schemes".
- Its joint regulatory strategy in working with the FCA, which will be published later in 2018.

View the report and accounts (120 pages).

Comment

Chief executive, Lesley Titcomb, says in her foreword to the report that the culture of TPR as an organisation is changing and the "clearer, quicker and tougher" approach is in evidence, with TPR becoming more "vocal and visible".

In our July 2018 update, we reported on the first of the DWP's consultation papers emerging following the March 2018 DB pensions White Paper, on the new powers and sanctions regime to build a stronger regulator. It is clear that there is a busy time ahead for TPR as it begins to implement the Government's intended changes.

In our client seminar on Tuesday September 18, 2018, we will look at the changing face of TPR and the proposals to increase its powers and sanctions regime. To book a place please click here.

CMA publishes provisional decision in investment consultancy market investigation

On *July 18, 2018*, the Competition and Markets Authority (CMA) published the provisional findings of its market investigation into the supply and acquisition of investment consultancy services and fiduciary management services to and by institutional investors and employers in the UK. The market investigation reference was made by the Financial Conduct Authority (FCA) on September 14, 2017.

In general, the CMA found that both investment consultancy and fiduciary management are useful services for pension schemes, helping them manage their investments on behalf of scheme members. However, the CMA also provisionally found some competition problems in investment consultancy and more serious concerns in the fiduciary management sector. In particular, the CMA found a low level of engagement from pension scheme customers in choosing and monitoring their provider, and difficulties for pension scheme customers in evaluating the cost and quality of providers.

The CMA also their found that fiduciary management firms had material incumbency advantage, that investment consultants often steered customers towards their own fiduciary management provision, and that there were high and non-transparent switching and exit fees in the fiduciary management market.

The CMA provisionally found that these features are likely to result in an adverse effect on competition, and proposed eight "remedies" to address its concerns. These remedies include

- Mandatory tendering for the first supply of fiduciary management services.
- The development of cross-selling warnings.
- The dis-aggregation of fees.
- The development of objectives and performance reports.
- Greater FCA oversight.
- More detailed guidance from TPR to help pension schemes run tender processes.

The CMA considered whether it would be appropriate to impose structural remedies preventing investment consultants from offering fiduciary management services, but considered this would not be an effective or proportionate method of addressing the competition concerns.

The FCA welcomed the report and considered its findings significant to the pensions market. It agreed the remedies should address the potential harm, and noted it would work with the CMA as the report was finalised.

The CMA is consulting on its provisional findings and invites responses by *August 24, 2018*, with a view to publishing a final report by *March 13, 2019*.

View the CMA's consultation.

Comment

The CMA has suggested some practical remedies to the perceived competition issues. In particular, the competitive tender remedy reflects the CMA's wish to address its concerns relating to what it sees as a lack of comparative information available on fiduciary management services which are sold by firms already supplying investment consultancy services to pension schemes.

The CMA's provisional report has been welcomed by the FCA and the wider pensions industry, and it is expected that the resultant final report next year will result in an improved standard of service for both schemes and their members.

HMRC publishes Pensions schemes newsletter no. 101

On *July 31, 2018*, HMRC published the latest edition of its Pension schemes newsletter. Contents include

- A reminder about the new authorisation regime for master trusts coming into effect on October 1, 2018, from which date all operating master trusts must apply for authorisation from TPR within six months from that date. Failure to obtain authorisation will necessitate winding-up of the trust, and HMRC will de-register (or refuse to register) a scheme without authorisation.

- HMRC reminds scheme administrators that there is no time limit on the period which HMRC may take to decide whether or not to register a scheme. If it becomes necessary for HMRC to seek further information from the applicant, this period may exceed six months. If HMRC has not made a decision within six months, the applicant may appeal to the tribunal as if their application had been refused.

- A confirmation that new sections have now been added to the guidance on the current process relating to accessing flexible pension drawdown payments.

- Notification that HMRC's annual allowance calculator is now back online. Any chargeable amounts exceeding the annual allowance must be included in the member's self-assessment tax return.

- Information on how to check the residency status to claim relief at source for existing and new scheme members.

- Confirmation of the quarterly official statistics on flexible pensions access for the period April 1 to June 30, 2018. The total amount repaid between these dates was just under £29 million.

- Newly published annual data for transfers to qualifying recognised overseas pension schemes (QROPS) for the tax year 2017/18. Figures show a significant decline in the number and value of transfers, with 4,700 transfers totalling £740 million in 2017/18, compared with 9,700 transfers with a value of £1,220 million the previous tax year. The drop is likely to be linked to the new 25 per cent tax charge on transfers to QROPS introduced in March 2017.

View the Newsletter.

HMRC publishes Countdown Bulletins 35 and 36

Of interest to schemes which were formerly contracted-out on a DB basis is the publication by HMRC of the next two instalments of its Countdown Bulletin.

Issue 35, which was originally published on *June 29, 2018*, was updated on *August 14, 2018*, includes items on the

- Scheme cessation guidance for Pension Scheme Administrators.
- New automated solution for 2R local authority schemes liability part period.
- New automated solution for change of responsible paying authority.
- Guaranteed Minimum Pension checker.

Issue 36, also published on *August 14, 2018*, includes updates on

- Phase seven automation.
- Scheme Reconciliation Service data re-runs and queries.
- Not in scheme Contributions Equivalent Premium.
- The new automated solution for change of responsible paying authority.

View Countdown Bulletin no. 35 and no. 36.

The Privacy and Electronic Communications (Amendment) Regulations 2018 – draft regulations banning pensions cold-calling published for consultation

On *July 20, 2018*, HM Treasury published a consultation on draft regulations that will bring into force the Government's promised ban on pensions cold calling. Originally announced in the Autumn Budget 2016, the draft Privacy and Electronic Communications (Amendment) Regulations 2018 will amend the Privacy and Electronic Communications (EC Directive) Regulations 2003 to prohibit pensions cold calling unless the caller is regulated either by "an FCA-regulated person" or "a TPR-regulated person", with the latter having the meaning given in section 355(1) of the Financial Services and Markets Act 2000. However, no such meaning is given there, (as that section defines PRA-regulated person) and TPR does not actually "regulate persons." It appears that the Treasury is already aware that this definition needs re-drafting. However, a more significant issue with the draft regulations is that, as currently drafted, they do not limit the ban to calls to an individual, so business-to-business calls would be caught which we understand is not the Treasury's intention.

At the Autumn Statement in 2016, the Government committed to consulting on a ban on pensions cold calling, and subsequently launched a consultation in December 2016. The draft regulations to ban pensions cold calling in Annex A of the current consultation paper are based on the proposals outlined in the Government's response to its original December 2016 consultation in August 2017, and the further consultation undertaken with stakeholders following the publication of that response.

The following conditions also apply

- The customer must consent to such calls being made by, or at the instigation of, the caller.
- The recipient of the call must have an existing client relationship with the caller or instigator of the call and the relationship must be such that the recipient envisages receiving unsolicited calls for direct marketing in relation to pension schemes.

Next steps

The consultation closed on *August 17, 2018*, following which a consultation response and revised regulations will be published. The Government intends to lay the regulations before Parliament "in autumn 2018".

Ahead of the ban, TPR and the FCA have launched a "ScamSmart" multi-media-based campaign to increase awareness of pension scams. The FCA's ScamSmart website, which includes information on how to identify and report scams, can be accessed here.

Once the ban comes into force, the Government will "proactively communicate" with the public in announcing its introduction. The consultation seeks feedback on how best to publicise the ban and how best to use existing industry and consumer group networks and media channels.

The ban will be enforced by the Information Commissioner's Office (ICO) using powers under data protection legislation. The ICO will have the power to fine offenders up to £500,000 and to enforce bans on lead generators. The Government will also work closely with initiatives aimed at tackling pensions liberation to ensure news of the ban reaches consumers when it comes into force.

View the consultation paper and draft regulations.

PO-12763: Mr N – Ombudsman determines trustees have duty of care to provide adequate warnings on pension scams and to carry out sufficient checks on receiving scheme

The Pensions Ombudsman (PO) has upheld the complaint of a police officer (Mr N) that his pension was transferred from the Police Pension Scheme (the Scheme) by the Northumbria Police Authority (the Authority) to a new scheme without adequate checks or sufficient warning about scams. The PO ordered that the scheme should reinstate Mr N's accrued benefits and pay the complainant £1,000 for distress and inconvenience.

Facts

Mr N had opted out of the Scheme in December 2012 and had become a deferred member. He hoped to retire at age 55, but was concerned that under the Scheme rules, he may not be able to retire until age 60, or later if the normal pension age was subsequently raised. He therefore sought advice regarding a transfer in August 2013 and following advice from several firms, finally transferred his pension fund of over £112,000 to the receiving scheme in August 2014.

In 2015, Mr N became concerned that he had signed up to a high risk investment strategy under the receiving scheme. A complaint against his financial adviser was rejected by the Financial Ombudsman on the basis that no regulated activity had been carried out, as no advice had been provided to Mr N. He then brought an unsuccessful internal complaint against the Authority, and subsequently complained to the PO.

The Authority argued that they had established that the receiving scheme was registered with HMRC and, as there were no signs of cash incentives or time-limited offers being made to transferees, no suspicions of a pension liberation scam had been raised. The Authority also claimed that, even if it had provided direct warning to the member about the potential risks of his transfer, he would have proceeded in any event, in reliance on his financial adviser's advice. It also argued that providing TPR's "scorpion" documentation was merely a recommendation and not mandatory, and none of the features TPR warned about were relevant to Mr N. It also argued that the Authority's duties to its employees did not require it to protect Scheme members from their own bad decisions.

The PO's determination

The PO upheld Mr N's complaint against the Authority as it failed

- To conduct adequate checks and enquiries in relation to Mr N's new pension scheme.
- To send Mr N TPR's "scorpion" transfer warning leaflet.
- To engage directly with Mr N regarding the concerns it should have had with his transfer request, had it been properly assessed.

The PO was satisfied that but for the Authority's maladministration, Mr N would not have proceeded with the transfer and subsequently have suffered loss. Although the Authority had followed TPR's "things to look out for" guidance, the PO disagreed with all its conclusions. The Authority had failed to make sufficient enquiries regarding the receiving scheme, which should have included obtaining a copy of its trust deed and rules. He determined that the Authority should reinstate Mr N's accrued benefits in the Scheme, or provide equivalent benefits, adjusting for any revaluation that applied since the transfer. To avoid "double counting", the Authority was entitled to recover from Mr N the amount of his pension fund that the trustees of the receiving scheme were able to retrieve for him, if any.

The Authority was also ordered to pay Mr N £1,000 to reflect the significant distress and inconvenience suffered as a result of appropriate checks not having been made by it, and the recommended warning information not having been given directly to Mr N.

On *August 14, 2018*, the FCA and TPR announced their "ScamSmart" campaign which is aimed improving members' awareness of potentially fraudulent investments and bogus schemes. The ScamSmart website can be accessed here.

Comment

This is the first case where the PO has ordered reinstatement of a member's benefits in the transferring scheme. Until now, transferring trustees have been protected by the statutory discharge provisions and members who are victims of pension scams have had no redress. There are concerns that this decision has the potential to put transferring trustees in an invidious position: they are required by law to action a member's transfer request but must also make detailed enquiries of the receiving scheme, and may still be liable for reinstatement of the member's benefits if the member subsequently suffers loss.

However, there is some comfort for trustees in the fact that the PO's determinations are not precedents for subsequent cases. Each case turns on its own facts and here, the fact that TPR's scorpion warning documentation had been issued in 2013, the year before the application to transfer was effected. Nonetheless, Trustees have now been put on alert that the PO's view is that they have a clear duty to warn members about potential scams and to draw members' attention to such risks.

Pension developments in the pipeline

Below is a summary of pension changes expected in the near future in addition to those outlined above. Changes since the last update are in *italic*.

Steria (Pension Plan) Trustees Ltd v Sopra Steria Ltd and others: High Court claim seeking declaration regarding the requirement to obtain a section 37 certificate. The case was heard on May 22, 2017. The claim has been stayed until *June 18, 2018*, with both parties having been ordered to update the court before *April 5, 2018*.

Clarification of trustees' fiduciary duties in relation to longer term investment risks – the DWP has published its full response to the 2017 Law Commission report, *Pension funds and social investment. The FCA intends to consult on a single package of rule changes relating to the Government's suggested changes in the first quarter of 2019.*

EMIR – new requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. If an investment manager uses over the counter derivatives, schemes should check that arrangements are in place for trustees to comply with the new regime. A further EMIR temporary exemption extension for pension scheme arrangements applied to *August 16, 2018 and has now expired. On August 8, 2018, the European Securities and Markets Authority (ESMA) published an updated communication on clearing and trading obligations for pension scheme arrangements (PSAs).*

ESMA is aware of the challenges that certain PSAs would face to start clearing their OTC derivative contracts and trading them on trading venues on August 17, 2018. With two extensions already granted, there is no possibility of further extending the temporary exemption. However, as there is not yet a suitable technical solution, the European Commission's May 2018 legislative proposal to amend EMIR (known as the EMIR Refit Regulation) includes a further extension of the temporary exemption for PSAs. The positions adopted by the European Parliament and the Council of the EU on the EMIR Refit Regulation appear to support the view that a further extension of the temporary exemption is necessary.

Negotiations on the EMIR Refit Regulation have not finished, and the resulting text is not expected to start applying by the time the temporary exemption applies. This means there would be a timing gap during which PSAs would need to start clearing their derivative contracts before they are, once again, no longer required to do so.

During the limited period of time that the temporary exemption does not apply, ESMA expects national competence authorities not to prioritise their supervisory actions towards entities that are expected to be exempted again in a relatively short period of time. They should generally apply their risk-based supervisory powers in their enforcement of applicable legislation in a proportionate manner.

The Pension Schemes Bill 2017 received Royal Assent on April 27, 2017. The legislation is concerned principally with provisions relating to the authorisation of master trusts. The new regime for master trust regulation, upon which the Government's response to the consultation is awaited, is likely to be brought fully into force on *October 1, 2018*.

The DC scheme Chair's annual governance statement must be completed within seven months of the end of the scheme year. For example, schemes with a March 31 year end must submit the statement by *October 31, 2018*. TPR issued trustee guidance on the statement in November 2017 and the guidance was updated in June 2018.

IORP II – the expected transposition date is *January 12, 2019*.

Brexit should be achieved by *March 29, 2019*. The UK will then leave the EU from the effective date of withdrawal agreement or, failing that, two years after giving Article 50 notice unless European Council and UK unanimously decide to extend period.

New regulations – DC bulk transfers without member consent – the Occupational Pension Schemes (Preservation of Benefit and Charges and Governance) (Amendment) Regulations 2018 came into force on *April 6, 2018*. The easements are the removal of

- The need to obtain an actuarial certificate stating that the transfer credits in the receiving scheme are broadly no less favourable than the rights to be transferred Coming into force *October 1, 2019*, to allow current transfers time to complete).

- The requirement for there to be a scheme relationship.

New regulations – the Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018 came into force *April 6, 2018*, setting out new requirements to improve transparency on DC benefit costs and charges to members. They do not apply to DB schemes providing only DC AVCs. Members must be provided with access to information via a website with seven months of the scheme's year-end date – meaning the earliest date is *November 6, 2018*, for schemes with year-end *April 6,2018*.

VAT – HMRC's existing practice on VAT and pension schemes is to continue indefinitely. Employers should consider taking steps to preserve (or enhance) their pensions-related VAT cover.

Auto-enrolment – cyclical re-enrolment now applies within a six-month window related to the employer's staging date. e.g. employers with a July 1, 2015, staging date must complete the cyclical re-enrolment process between April 1, 2018, and September 30, 2018. Total minimum contributions were increased to five per cent (of which minimum employer contribution of two per cent) from *April 6, 2018*. Total minimum contributions will increase to eight per cent (of which minimum employer contribution of three per cent) from *April 6, 2019*.

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