NORTON ROSE FULBRIGHT

Essential UK Pensions News

July 2021

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

A stronger Pensions Regulator

DWP publishes consultation response and draft regulations on new "contribution notice" triggers and information gathering powers

The DWP has published the response to its consultation on the Pensions Regulator's new "contribution notice" triggers and information gathering powers introduced by the Pensions Schemes Act 2021 (PSA 2021). For more information on those powers and the consultation, please see the entry relating to the same in our March 2021 Essential UK Pensions News.

The PSA 2021 introduced two new circumstances in which the Regulator will be able to impose a contribution notice (CN) against a company or individual. One of these new circumstances is where the "resources of an employer" are materially reduced relative to that employer's estimated Section 75 debt.

The consultation considered the meaning of "employer resources" and how the new contribution notice test should work in practice. Although approximately 50% of consultation respondents suggested that EBITDA (Earnings Before Interest Tax Depreciation and Amortization) would be preferred over a Profit Before Tax (PBT) measure for assessing an employer's resources, DWP's response states that it remains of the view that the approach used should be based on PBT.

In respect of the contribution notice triggers, the response:

- indicates that although the employer resources test itself is narrowly framed, the Regulator will take a holistic view of "all relevant factors which may include a broader assessment of the employer's strength" when applying the statutory test of reasonableness, which must be satisfied in order for a CN to be imposed;
- confirms that the new employer resources and insolvency tests will only apply to acts (or failures to act) from October 1, 2021, and are not retrospective in effect. This will be made clear in the commencement regulations;
- states that the Regulator is confident it has sufficient resources and flexibility to deal with any additional requests for clearance applications that might be generated by the introduction of the new CN tests; and
- confirms that the Regulator is considering producing further guidance in relation to the new tests and its CN powers more generally.

In respect of the new information gathering powers, the response confirms that:

- there will be no minimum notice period prescribed for attendance at interview; but
- the Regulator will ensure that any such period is reasonable and that it would normally look to give at least 10 working days' notice.

Although the confirmation that the Regulator will take a broad view of who to pursue for a CN through its application of the statutory test of reasonableness is helpful, the response has not clarified the meaning of "material reduction" within the context of the employer resources test. It is possible that further clarity on this point will be provided in a future response to the separate consultation over updates to the Regulator's Code of Practice 12, which closed this month.

Transfers and scams

DWP publishes consultation on regulations introducing "stronger nudge" towards members obtaining pensions guidance

The DWP published a consultation on July 9, 2021, on proposed regulations to prompt DC savers with a "stronger nudge" to take appropriate pension guidance.

The consultation seeks views and evidence on the draft Occupational and Personal Pension Schemes (Disclosure of Information) (Amendment) Regulations 2021, which implement section 19 of the Financial Guidance and Claims Act 2018.

The draft regulations propose:

- an "opt out" system that would require scheme trustees or managers to ensure that DC pensions savers aged 50 or above and seeking to access or transfer their pension benefits with the intention of accessing their pension flexibilities either receive appropriate pensions guidance from Pension Wise or opt out of doing so before they can proceed with their application; and
- that trustees and managers explain Pension Wise to the relevant members and assist them to book an appointment as part of the application process.

The DWP hopes this will remove the inertia of savers having to book their own appointments and will increase the take-up of pensions guidance.

These proposals mark a step up from the current requirements for trustees and managers, which stipulate that that they should provide a statement to members that free and impartial pensions guidance is available, that they should access this and consider taking independent advice (as well as information as to how to access guidance).

The consultation closes on September 3, 2021.

PASA publishes counter fraud guidance

The Pensions Administration Standards Association (PASA) published new guidance on countering fraud this month. The guidance is the product of PASA's Cybercrime & Fraud Working Group. It contains information on the various types of fraud affecting UK pension schemes, trustees and providers, including case studies. The guidance also includes a discussion of the nature and cost of the problem as well as the tactics that can be deployed to counter the threat.

Investment

TPR publishes climate-related governance and reporting consultation

The Pensions Regulator has launched an eight-week consultation on its draft guidance on governance and reporting of climate-related risks and opportunities.

The Regulator's guidance is aimed at helping pension scheme trustees to comply with tougher standards of governance arising from the new proposed Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 and Occupational Pension Schemes (Climate Change and Reporting) (Miscellaneous Provisions and Amendments) Regulations 2021. These requirements align in turn with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD).

The DWP has issued its own draft statutory guidance associated with these new regulations. The Regulator's draft guidance is intended to complement and be used alongside the DWP guidance.

The Regulator's guidance indicates that trustees subject to the requirements must take steps to identify, assess and manage climate-related risks and opportunities and publish a climate change report describing the actions they have taken. Further information on how to carry out the assessment and draft the report are found in the DWP guidance.

Only schemes with £5 billion or more in relevant assets, authorised master trusts and authorised schemes (once established) providing collective money purchase benefits face the new requirements from October 1, 2021. However, schemes with £1 billion or more in relevant assets are potentially subject to the governance requirements from October 1, 2022. The Regulator's draft guidance also points out that trustees who are not subject to the requirements may wish to start following the guidance to improve the governance and resilience of their schemes in relation to climate change or to assist with voluntary reporting in any case.

The consultation also covers the publication of the Regulator's proposed appendix to its monetary penalties policy (MPP). This outlines the Regulator's approach to imposing penalties for non-compliance with the new regulations.

The draft appendix notes that a mandatory penalty of no less than £2,500 and a maximum of £5,000 where some or all of the recipients are individuals (or £50,000 in any other case) will apply to a breach of the requirement to publish a climate change report. The appendix states that where the scheme has a professional trustee in place a penalty of £5,000 will generally be issued, as the Regulator expects higher standards from professional trustees. When determining the amount of a penalty, the Regulator will also take into account the impact of the breach and the reasons for the failure, as well as whether a higher penalty might be more effective in changing the behaviour of the person in breach.

In addition to the mandatory penalty, the draft appendix states that the Regulator may consider issuing a discretionary penalty in all other cases where they believe a person has contravened the new regulations. The Regulator may also consider taking other regulatory action including investigation and exercising other powers (which may result in further penalties).

The consultation is open for responses until August 31, 2021.

DWP publishes public responses to consultations on tackling climate risk and aligning your pension scheme with the TCFD recommendations

The DWP has published the public responses to its consultation on "*taking action on climate risk: improving governance and reporting by occupational pension schemes*." These include responses from a range of organisations including the Institute and Faculty of Actuaries (IFoA), the Pensions and Lifetime Savings Association (PLSA), the Association of Professional Pension Trustees (APPT) as well as a range of professional advisory organisations, professional bodies and pension schemes.

The DWP has also published the public responses to an associated consultation on "*aligning your pension scheme with the TCFD recommendations*".

GMP rectification and equalisation

PASA publishes GMP equalisation guidance on conversion

PASA published new GMP equalisation guidance on conversion this month.

The *Lloyds Banking Group Pension Trustees* decision on GMP equalisation in 2018 confirmed that GMP conversion is a legal means by which to carry out GMP equalisation. The underlying legislation creating the option to convert guaranteed minimum pensions into "normal" pension has been around since 2007 but is acknowledged even by the DWP to need changes to make it work in practice. Combine that with HMRC's failure to publish its views on the tax treatment of conversion and there are some risks with choosing the conversion route.

The guidance is the result of the work of a cross-industry working group established by PASA. In the absence of clear legislation and tax guidance it takes a different approach to previous PASA notes in this area, examining a number of approaches which have been adopted by early movers.

The PASA guidance contains information on how schemes could use GMP conversion, which schemes are likely to do so, and worked examples of the application of GMP conversion to equalise for GMPs by individual schemes. It looks at the thought processes a trustee board might follow in developing a conversion plan and what would be involved in implementing the project. Where the legislation is flawed, the guidance includes suggestions for how to solve the problem, and the differing views that might apply.

It also contains detailed consideration of the potential pensions tax implications of GMP conversion – this is particularly useful in light of the absence of HMRC guidance in this area. The key recommendation is to seek non-statutory clearance from HMRC to any plan you develop, to avoid the risks of inadvertently prejudicing individual members, having to unpick calculations or meeting additional tax sanctions from scheme funds.

Comment

As usual, the PASA guidance is not a substitute for the actual law, and the guidance strongly recommends taking individual advice on the trickier aspects. However following industry-wide guidance, even if it is not endorsed by the Government, court or regulators, is likely to help in any defence to a complaint from members.

Industry trends

Occupational Pensions Stewardship Council formed

Around 28 pension schemes responsible for managing over £550 billion in assets have signed up to form a new Occupational Pensions Stewardship Council to work to fight climate change.

The Council has been established by the DWP following recommendations made by a Treasury-led investing report which called for a council of UK pension schemes to promote high standards of pension asset stewardship. The DWP has indicated that it will provide a platform to enable information on best practices and research to be shared, and to support participating schemes to understand how stewardship facilitates sustainable financial returns and improved outcomes for pension savers.

DWP publishes Draft CDC regulations and consultation

The DWP has launched a consultation on draft regulations to complete the legislative framework to implement collective defined contribution (CDC) schemes. The draft regulations detail how a CDC scheme becomes authorised, and the regulatory restrictions that will apply to them once in operation. The regulations would sit under the CDC provisions contained in the Pension Schemes Act 2021.

Similarly to the master trust authorisation regime, the DWP states that the proposed system is "designed to protect members and to build confidence in this new form of money purchase occupational pension provision by ensuring only soundly designed and well run schemes are able to operate."

The development marks a tangible step forwards in the development of CDC schemes as an alternative to DB and DC arrangements. The consultation is seeking views on the requirements set out in the draft regulations, and opinions as to whether the regulations deliver the intended outcomes. It closes on August 31, 2021.

EIOPA consults on development of pensions dashboards

The European Insurance and Occupational Pensions Authority (**EIOPA**) has launched two consultations relating to pensions dashboards. Following the European Commission's request for technical advice on best practice for national pensions tracking systems, EIOPA has prepared a best practice paper for the setting up a national pension tracking tool, an online application that will provide citizens with an overview of their future retirement income, based on their entitlements from all pension schemes in which they participate.

EIOPA is also consulting on a second paper specifically on dashboards (i.e. the actual tool that will display the data gathered by the tracking system to individuals).

The consultation seeks input from stakeholders on various areas including how expensive they anticipate it will be to collect different types of data, and what indicators and projections they think should be made available to members.

The consultation closes on September 8, 2021.

Government response to consultation on increasing the Normal Minimum Pension Age

HM Treasury has published the Government's response to the consultation on how to implement the increase to normal minimum pension age (**NMPA**) from age 55 to age 57 on April 6, 2028, and the proposed protections framework. NMPA is the age when most members can take their benefits without incurring unauthorised payment charges. The proposed increase to NMPA was originally announced in 2014 and was confirmed earlier this year. HMRC has also published draft legislation and a policy paper on increasing NMPA for pensions tax.

No major changes have been made to the proposal as a result of the consultation from a policy perspective, however, it does contain new protections that the Government intends to put in place for some individuals beyond those originally proposed. The protections against the increase to NMPA will still depend on whether a pension scheme's rules gave members an actual or prospective right to take their benefits below age 57 as at February 11, 2021, but this protection is now also available for members who join such a scheme by April 5, 2023. This protection will be retained if a relevant individual transfers to another scheme via an individual or a bulk transfer (although for an individual transfer, the protection will only apply to the benefits actually transferred meaning that these will need to be ring fenced in the receiving arrangement).

Comment

No detailed guidance has been issued yet on what constitutes an "unqualified right" to take benefits before age 57 under HMRC's Pensions Tax Manual. This could mean that careful legal analysis of the scheme rules is required in each case to determine whether the protection exists.

Pensions issues in the pipeline

Development	Expected timing	Suggested action*
Deadline for requesting final GMP data cuts from HMRC	July 31, 2021	Contact HMRC asap if final data cut not yet received.
Climate change risk governance and disclosure requirements start to apply	October 1, 2021, for first wave of schemes (assets of £5BN and above and all master trusts) October 1, 2022, for second wave of schemes (assets of £1BN and above) Requirements may be extended to smaller schemes (assets under £1BN) from late 2024 or early 2025 – TBC	Final regulations now available (subject to parliamentary approval). Develop project plan for implementing governance structures and reporting. Smaller schemes to consider whether to comply on a voluntary basis. Consultation on TPR's draft guidance running from July 5, 2021, to August 31, 2021.
Requirement for trustees to publish an implementation statement online	For DB schemes: October 1, 2021 For DC and hybrid schemes (100+ members): As soon as accounts have been signed after October 1, 2020 (and no later than October 1, 2021)	Liaise with investment consultants and managers to gather relevant information to begin preparation of implementation statement and plan website publication.
New stronger powers for the Pensions Regulator (under the Pension Schemes Act 2021), including new criminal offences, come into force	October 1, 2021	Employers and trustees to carefully consider pension scheme ramifications of any corporate activity from point of view of new powers. Carefully document decisions. Review governance structures and policies/protocols to minimise risk of breaches.
Requirement for trustees of smaller DC schemes (assets of less than £100 million) annually to assess the value provided to their members and, where they conclude value not provided, to consider winding up	October 2021 (for scheme years ending after 31 December 2021)	Trustees to consider whether their DC scheme is in scope for the new requirements (final regulations now available, subject to parliamentary approval). Prepare for value assessment (if relevant) and for reporting in chair's statement and scheme return to the Pensions Regulator. If value assessment unlikely to be met, consider options for DC members.
Trustees of all DC schemes to report on net investment returns in the chair's statement	October 2021 (for scheme years ending after October 1, 2021)	Gather relevant information and prepare for reporting (final regulations now available, subject to parliamentary approval).

Statutory transfers: additional requirements	Autumn 2021	Review processes and assess trustee legal risk, in the light of the draft regulations, published for consultation May 14, 2021.
Compliance report for Competition and Markets Authority (CMA) regarding objective-setting for investment consultants and tendering of fiduciary manager appointments	January 7, 2022	Prepare the necessary documentation in good time and ensure it is submitted to the CMA before the deadline. In future, compliance may need to be confirmed to the Pensions Regulator, instead of to the CMA, through the annual scheme return. However, the regulations required to make this change have been delayed, probably to the first half of 2022.
New simpler annual benefit statements for DC schemes used for auto-enrolment	April 6, 2022	Keep watch for final rules and prepare new form of statement in time for April 2022 (if applicable). Consultation running from May 17 to June 29, 2021.
Reporting non-taxable pension death payments to HMRC using Real Time Information	April 6, 2022	Check scheme administrators are aware of and prepared for this new requirement.
Introduction of the £100 "de minimis" threshold, below which flat fees cannot be charged for DC auto-enrolment schemes	April 2022?	This is still TBC.
Notifiable events: changes to current regime	Spring 2022? Consultation on detailed regulations expected "later in 2021".	Update or implement a notifiable events protocol for employers and trustee to minimise risk of breaches
Regulator's new single Code of Practice comes into force, including a requirement for an annual "own risk assessment"	2022? Consultation ended May 26, 2021	Check scheme and employer are compliant with the Code's requirements. Consider planning first "own risk assessment", if relevant.
Climate change risk governance and disclosure requirements start to apply for: • asset managers, life insurers, FCA-regulated pension schemes • standard listed companies	2022 Consultations published June 22, 2021; final rules expected Q4 2021.	For noting only. Information from asset managers and investee companies may become more readily available which would help trustees with their own disclosures.
DB scheme funding: changes to requirements	Late 2022/2023	Consider scheme's long term objective and journey plan and discuss with employers. Look out for second consultation, expected late 2021, and consider implications with advisers.

Legislative framework for superfunds	2022/23	Look out for draft regulations and a consultation in due course.
Statutory framework for Collective DC schemes	2022? 2023? Consultation launched on July 19, 2021, closing on August 31, 2021.	Target timing for regulations to come into force TBC
Pension Dashboards	From April 2023 Compulsory staged on-boarding of schemes, starting with the largest schemes with 1,000+ members	Look out for consultation, expected late 2021. Develop action plan for getting data ready for dashboard.
Rise in normal minimum pension age from 55 to 57	April 6, 2028	Draft legislation published July 20, 2021. Take advice on which members benefit from the new protected pension age (of 55). Update member communications.
RPI reform and switch to CPIH	2030	Take advice on implications for DB schemes and necessary actions.

*** This table sets out some indicative action points that trustees and employers may wish to consider but should not be read as a comprehensive plan of action or client-specific advice. Should you wish to discuss these issues further, please contact the Norton Rose Fulbright LLP pension team who will be happy to assist.**

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