Essential UK Pensions News

June 2020

Introduction

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

Corporate Insolvency and Governance Bill 2019-21

The Corporate Insolvency and Governance Bill 2019-21 was introduced in the House of Commons on May 20, 2020. It includes a number of measures aimed at providing flexibility and breathing space to businesses to continue trading during the period of economic uncertainty arising from the COVID-19 pandemic, and is likely to change the way restructurings are dealt with in the future (both for English companies and foreign companies who have or could have a connection to England). The key measures for pension schemes as unsecured creditors are outlined below.

Company moratorium

a new standalone moratorium, where the directors will remain in control of the company under the supervision of a monitor (a licensed insolvency practitioner) whilst they seek to rescue the company. The moratorium will last for an initial period of 20 business days but may be extended without creditor consent for a further period of 20 business days. Further extension for up to a year or more is possible with creditor consent or by a court.

Restructuring plan

new restrictions on certain suppliers to companies in a moratorium or administration terminating contracts, allowing struggling solvent and insolvent companies to propose a rescue plan as an alternative to the liquidation of the business.

Both the new restructuring plan and the new moratorium are aimed at business rescues leaving directors in control and represent a move away from creditor-led insolvency processes. In particular, in relation to the company moratorium proposal, the Bill appears to grant super-priority to certain unsecured debts so that they will rank above pension debts where a company enters into administration or insolvent liquidation within 12 weeks of a moratorium ending.

The Bill also includes temporary measures to combat the business fallout from the COVID-19 pandemic. Parts of insolvency law are suspended until at least the end of June *"to support directors to continue trading through the emergency without the threat of personal liability and to protect companies from aggressive creditor action".* In addition, there are temporary easements on certain company filing obligations and requirements relating to AGMs and other meetings.

The legislation is expected to be fast-tracked through Parliament, with its committee stage taking place on June 18, 2020 and its report stage and third reading scheduled to take place in the House of Lords on June 23, 2020.

Only the Government's own amendments to the Bill were agreed in the House of Commons and an opposition amendment to add a provision to make pension scheme deficits a 'priority creditor' in the event of insolvency was unsuccessful. However, lobbying for amendments relating to pension scheme debt have continued and may be accepted at a later stage.

The Government has been approached by a number of pensions industry groups highlighting concerns that aspects of the Bill will weaken the position of DB trustees and the PPF, whilst strengthening the position of those who lend to companies. In particular, on a restructuring or insolvency, DB pension schemes may suffer materially worse recoveries leading to more pensioners not receiving their benefits in full and the PPF being subject to a greater financial strain when it takes in the schemes of failed employers.

For further detail and commentary, please see detailed guidance from our bankruptcy, financial restructuring and insolvency practice: "*A move to a more debtor-friendly restructuring regime?*".

Comment

Although these measures will no doubt be welcome news for distressed companies, as far as pensions are concerned, in their current form they may weaken the position of both the PPF and pension schemes as unsecured creditors unless amendments are excepted during the later stages of the Bill's passage through Parliament. Without the amendments being lobbied for by the pensions industry, there are concerns that schemes may find it virtually impossible to take action in the short term to enforce debts due from their sponsor as a result of the new moratorium process and restrictions on issuing statutory demands and winding-up petitions. It is also possible that neither DB schemes nor the PPF would have any influence over corporate restructuring plans under the proposed new mechanism. That said, the draft legislation is still very much under review and we understand that further discussions on possible pensions amendments are to take place.

On June 16, 2020, during the committee stage debates in the House of Lords, it was indicated that the Government would bring forward amendments on a number of matters, including pensions.

The amendments would mean that, during a moratorium, the PPF will be given rights to information and the right to challenge the actions of the directors and/or the monitor on a restructuring plan. Both the PPF and the Regulator will be entitled to receive copies of all the information sent out to creditors. On both procedures, creditor rights can be provided to the PPF.

The Government also indicated that it would bring forward amendments so that accelerated pre-moratorium debts triggered in relation to a debtor's financing arrangements will not be afforded super-priority status. Concerns had been expressed that affording priority to finance debts over unsecured creditor claims such as those by pension trustees (even where these have been secured by a floating charge) could not have been intended. A new definition of a "priority pre-moratorium debt" has been put forward which does not include any pre-moratorium debt that is a "relevant accelerated debt".

The positive view for DB schemes and the PPF is that the new law is designed to help viable businesses survive the COVID-19 and economic crises. If this is achieved, DB schemes and the PPF are likely to benefit in the long term from these measures. The probable date for the House of Commons to consider the Lords' amendments is June 25, 2020.

Update on the Pension Schemes Bill

The next stage for the Pension Schemes Bill on its progress through Parliament is on June 30, 2020 when it reaches the Report Stage in the House of Lords. In the intervening period from March 4, 2020 when the Bill was last considered, it seems there has been much lobbying from various quarters regarding the detail and the scope of the sanctions and the Regulator's new powers. There are rumours that substantial changes to the Bill could be in the pipeline.

Update on the Finance Bill 2020 - changes to annual allowance announced at Spring 2020 Budget agreed

On June 9, 2020, provisions were debated and agreed in the Finance Bill 2020, implementing changes to the operation of the annual allowance announced at the Spring 2020 Budget. From April 6, 2020, the annual allowance taper applies to an individual who meets both the following criteria in a tax year:

- They have "adjusted income" for the tax year that is more than £240,000 (as opposed to £150,000 previously); and
- They have "threshold income" for the tax year that is more than £200,000 (as opposed to £110,000 previously).

In addition, the tax-free annual allowance that is available to a person affected by the taper is reduced from £10,000 to £4,000.

These changes have been introduced primarily to address concerns about the impact of the taper on highly paid clinicians who are members of the NHS Pension Scheme, but they apply to everyone.

COVID-19: CJRS updated and employers to pay graduated furlough pension contributions from August 2020

On May 29, 2020, HM Treasury confirmed changes to future payments from the Coronavirus Job Retention Scheme. The scheme currently enables eligible employers to claim up to 80 per cent of wages up to a cap of £2,500 as well as employer National Insurance contributions and pension contributions.

Changes effective from August 2020 reflect broader alterations to the scheme, designed to reflect employees returning to work, including a gradual tapering of Government support. The key changes include:

- From August – the Government will continue to pay claims up to 80 percent with a cap, but employers will pay employer NICs and pension contributions under the CJRS.
- From September - the Government will pay 70 percent of wages up to a cap of £2,187.50. Employers will pay employer NICs and pension contributions and 10 per cent of wages (up to a cap of £312.50) to make up 80 per cent total up to a cap of £2,500.
- From October - the Government will pay 60 per cent of wages up to a cap of £1,875. Employers will pay employer NICs and pension contributions and 20 per cent of wages (up to a cap of £625) to make up 80 per cent total up to a cap of £2,500.

The CJRS will close to new entrants on June 30, 2020. From July 1, 2020, employers can choose to bring furloughed employees back to work on a part-time basis. Employers would then be responsible for paying employees while they are at work, with the Government paying wages for the furloughed hours.

Employers will now need to consider their workforce requirements and lockdown begins to ease. Whether the closure of the CJRS at the end of October will trigger a wave of redundancies is something to watch.

COVID-19: Pensions Regulator to resume reporting requirements from July 1

In a update published on June 16, 2020, the Regulator has stated that Reporting requirements for pension schemes that were paused in response to COVID-19 will resume from July 1.

Reporting requirement changes - trustees and administrators

Due to the COVID-19 situation the Regulator paused certain reporting requirements for trustees and administrators. From July 1, reporting requirements will resume as normal, including for:

- Suspended deficit repair contributions - trustees will need to submit a revised recovery plan or report of missed contributions.
- Late valuations and recovery plan not agreed.
- Delays in cash equivalent transfer quotations and payments.
- Failure to prepare audited accounts.
- Master trusts, where the Regulator expects formal reporting to resume.

Reporting late payment changes - pension scheme providers

There is one exception to the return to business as usual on reporting. Providers will continue to have 150 days to report late payments of contributions (other than deficit repair contributions), where normally the Regulator requires information on late payments within 90 days. This will be reviewed at the end of September 2020.

Enforcement - chair’s statements and failure to prepare audited accounts

The Regulator will continue not reviewing until after September 30, 2020 any chair’s statements received. Any chair’s statements received (including in relation to master trusts) will be returned unread, so this should not be taken as any indication that the statement in question complies with the requirements.

The Regulator will take a pragmatic approach to late preparation of audited accounts and will accept delays to September 30, but the legislation on chair’s statements does not give the Regulator any discretion about imposing fines where the trustees have not prepared the chair’s statement (which must be included in the annual report and accounts, but can be prepared and signed off separately) on time.

Enforcement - investment governance

The Regulator does not expect to take regulatory action if a review of a SIP (or statement in relation to any default arrangement) is not delayed beyond September 30, 2020.

Pension transfers

Trustees should continue to issue a letter template to all members requesting a CETV quote and monitor requests for concerning patterns.

Annual benefit statements

the Regulator is continuing to take a pragmatic approach to annual benefits statements accepting that the impact of COVID-19 means schemes need additional time to issue these to members.

Schemes in Relationship Supervision

Many relationship-managed schemes will have already spoken with their named supervisor. In light of the current exceptional events, the Regulator is refocusing its relationship-managed supervisory activity, focusing more on near-term risks rather than the standard activities in our supervisory cycle. The Regulator will be speaking to schemes that have been assessed as presenting risks directly to better understand their position and the risks and issues that have arisen.

Where there are immediate concerns due to the current situation, the named supervisor should be contacted to discuss.

Other schemes

The Regulator will continue to take a risk-based approach in its regulatory activity, reviewing and assessing incoming requests against a range of risk indicators.

COVID-19: Regulator confirms "pragmatic approach" if redirection of closed fund contributions triggers default arrangement

The Pensions Regulator has confirmed it will take a "pragmatic approach" where trustees create a default arrangement by redirecting member contributions from a self-selected fund that is "gated" due to the COVID-19 crisis to an alternative fund, chosen by the trustees. On May 21, 2020, the Regulator updated its COVID-19 DC scheme management guidance with a new section entitled *"When does the temporary closure of funds create a default arrangement?"*

This comes as a result of trading in some property funds due to an inability to accurately value the property portfolio owned by the fund in the current social distancing circumstances.

The Regulator's guidance states that a default arrangement could be created inadvertently whereby a member has self-selected a fund that is gated and the trustees, having taken investment advice, are redirecting scheme contributions into alternative funds until the gated funds re-open. The alternative funds could then become default arrangements, making them subject to legal requirements such as the charge cap (if the scheme is used for automatic enrolment) and the requirement to have a statement of investment principles for that default arrangement.

The Regulator states that the only circumstances where a default arrangement would not be created are if either:

- Members were made aware before they selected the original fund that contributions could be diverted to another fund in certain situations; and
- Trustees contacted the members before diverting contributions and obtained their consent.

The Regulator says that if trustees discover that they have unintentionally created a default arrangement by diverting funds, they should take steps to ensure this arrangement meets the legal requirements. However, it also says it will continue to take a pragmatic approach to decide whether it would be appropriate to take action in individual circumstances.

COVID-19: TPR publishes blog on challenges for trustees

On May 26, 2020, the Regulator published a blog entitled "*COVID-19: Transfer your attention*", which brings together its guidance concerning transfer values in light of the COVID-19 pandemic.

Written by chief executive Charles Counsell, the blog confirms the Regulator's flexibility in relation to defined benefit (DB) transfers. The Regulator has said that it will not take enforcement action where trustees have been unable to meet the statutory deadlines for issuing a statement of entitlement or paying a DB transfer due to issues resulting from COVID-19. However, Mr Counsell stresses that this easement is only in effect until the end of June 2020 and it "isn't a blanket pause"; if trustees can process the requests, they should do so.

The same flexibility does not apply to defined contribution (DC) transfers, which are core financial transactions. Mr Counsell notes that DC members may be vulnerable to market volatility during this period and as a result, these transfers should be given priority along with other core processes.

The blog also highlights the importance of due diligence to protect members against scams during the COVID-19 pandemic, and refers to the Pension Scams Industry Group's code of good practice, which contains practical steps for carrying out due diligence on transfer requests.

COVID-19: pensions bodies produce collaborative guide for members concerned about retirement implications of pandemic

On May 26, 2020, a new guide, *"COVID-19 and your pension, Where to get help"*, was published jointly by the Financial Conduct Authority, Financial Services Compensation Scheme, Money and Pensions Service, Pensions Ombudsman, Pensions Regulator and Pension Protection Fund.

It sets out the role of each body and provides information for members on their pensions during the current health crisis, including how members' pensions are protected, what happens to pension contributions for furloughed members and how members can protect themselves from scams during the COVID-19 pandemic.

COVID-19: amended Treasury CJRS Direction clarifies position of furloughed employees who act as trustees

In our May 2020 update, we reported on HM Treasury's publication on a direction in relation to the Coronavirus Job Retention Scheme (CJRS), and this has now been updated by a Further Direction published on May 22, 2020.

Among other things, the Further Direction clarifies the position of employees who act as trustees. Work undertaken by an employee for the sole purpose of fulfilling their duties as a trustee of an occupational pension scheme will be disregarded for the purposes of determining whether the individual is a furloughed employee.

The exemption does not apply if the trustee is an independent trustee (as provided by the Pensions Act 1995), or where the business activities of the employee's employer include the provision of trustee services.

View the Further Direction.

COVID-19: joint guidance published on preparing pension scheme annual report and accounts during the pandemic

Joint guidance aimed at trustees preparing their pension scheme reports and financial statements during the COVID-19 pandemic was published on June 2, 2020 by the Institutes of Chartered Accountants of Scotland and England and Wales, and the Pensions Research Accountants Group.

The guidance is to be used in conjunction with existing accounting standards and Pensions Regulator guidance, and covers the key issues that trustees need to consider, including:

- The impact of COVID-19 on the control environment of pension schemes.
- Recording any governance impact of COVID-19 in the trustees' report and the chair's statement.
- Consideration and the trustees' assessment of going concern, particularly any material uncertainty relating to COVID-19.
- Accounting for scheme investments, for example, where obtaining asset valuations for periods ending on or after March 31, 2020 has not been possible for assets such as commercial property or private equity investments.
- Reflecting events after the end of the reporting period, particularly where this is December 31, 2019, including "non-adjusted events".
- Audit issues, such as materiality in its planning and performance, subsequent events, and the auditor's own risk management arrangements.
- Whether the auditor's statement about contributions will need to address issues such as a reduction or suspension in deficit reduction contributions, changes in pensionable earnings, or the furloughing of employees.

Comment

The Regulator has welcomed the guide as a useful tool for trustees and auditors as they face the challenges of producing financial statements during the pandemic. Consideration of going concern in the preparation of scheme financial statements will require greater focus due to COVID-19. The guide is relevant for occupational DB and DC schemes, including hybrid schemes and master trusts, and their auditors should communicate closely with trustees as they navigate the additional challenges they are likely to face.

FCA update: banning contingent charging on transfers; policy statement and guidance consultation

On June 5, 2020, the Financial Conduct Authority published a package of measures designed to address weaknesses in the defined benefit pension transfer market.

The FCA has published a policy statement (PS20/6) setting out final rules and guidance on pension transfer advice, which focuses on DB to DC transfers. The FCA confirms its intention to proceed with a ban on contingent charging (where advisers only get paid if the transfer goes ahead), and the final rules and guidance are set out in an appendix to the statement. However, carve-outs will remain and contingent charging will still be allowed for those whose health means they are not expected to live until they are 75 or people who are in "serious financial difficulty". Following the original consultation in July 2019, the FCA decided to proceed with the ban as it felt there was a conflict of interest for DB transfer advice where the only two outcomes are to transfer or not to transfer. There had been concerns that advisers could recommend a transfer to receive payment, rather than it being in the best interest of the consumer.

The FCA also said that most consumers would not be materially harmed by remaining in their existing DB scheme and the carve-outs mean that only a small number are likely to benefit from a transfer but cannot afford advice.

In the main, the new rules come into force on October 1, 2020, except for guidance on triage services and estimated transfer values, which came into force on June 15, 2020. However, those who have agreed contingent charges and started work before October 1, 2020 may charge contingently, providing a personal recommendation is given before January 1, 2021.

The FCA has also published a guidance consultation on advising on pension transfers (GC20/1). GC20/1 sets out the FCA's expectations of how firms should apply the existing Handbook rules and guidance when giving DB transfer advice, as well as the new rules made in PS20/6, through best practice and case study examples of suitable and unsuitable advice. The deadline for responses to GC20/1 is September 4, 2020.

Finally, the FCA has published an update on its work on pension transfers, outlining its findings in its recent assessment of firms. It sets out its key findings on material information gaps in firms' fact-finding processes, and the outcome of the latest suitability review following a data request of all firms with the permission to advise on DB transfers. The FCA has observed that although standards of advice are improving, they are still well below the ideal level, and sets out its next steps. These include a further data request to all firms with the pension transfer permission, which will help to inform where the FCA targets its assessments.

HMRC publishes Countdown Bulletin no. 53

On May 28, 2020, HMRC published the latest edition of its publication for formerly contracted-out defined benefit schemes. In this month's short bulletin, HMRC confirms:

Final data cuts for GMPs

HMRC plans to issue the final data cuts by the end of July 2020 to those schemes that engaged with the Scheme Reconciliation Service, or which have been reconciled as part of the Scheme Cessation process. This timeline is dependent on any changing priorities, which would be communicated through a subsequent Bulletin. In the absence of any delays, schemes not receiving their final data cuts by the end of July should contact HMRC; and

GMPs

final data cut GMP amounts received should be checked against schemes' own records, and the online checker service used if required.

View the Countdown Bulletin.

Pension Schemes Newsletter 120 published and Newsletter 119 updated

On June 2, 2020, HMRC updated its April 2020 newsletter. Where employees with protected pension ages have been re-employed in certain circumstances owing to coronavirus, the suspension of the application of the relevant tax rules (ordinarily leading to loss of that protected pension age) now applies until November 1, 2020.

Pensions Schemes Newsletter No. 120 which was published on May 27, 2020, sets out advice on how to raise queries on pensions tax, and also provides details of some further temporary changes to certain pension processes to help scheme administrators during the current pandemic:

- There is a reminder for scheme administrators that HMRC expects enquirers first to try to solve pension tax queries by referring to the Pensions Tax Manual and Pension scheme administration pages. The next stage is to use HMRC's standard central contact processes, and next to use the clearance process, rather than attempting to contact individuals in the HMRC team.
- A reminder about the July 5, 2020 deadline for scheme administrators of "relief at source schemes" to submit the 2019/20 annual return of information; and notification of some small changes made to the annual statistical return, which can now be submitted without a signature.

Template published for DC chair's statement

The Pensions and Lifetime Savings Association has published a template to assist defined contribution scheme trustees in their production of the annual chair's statement. There are legal requirements for the statement to be produced within seven months following the end of each scheme year, and its contents must also satisfy certain requirements under the Occupational Pension Schemes (Scheme Administration) Regulations 1996.

Concerns were raised by the PLSA about how some of the legislative requirements are being applied in practice, and the Regulator has issued several fines for various breaches. The template has been produced following input from a number of legal firms and advisers. Its aim is to act as a good starting point where trustees may be uncertain about meeting the relevant statutory obligations and to simplify the production time and cost of the statement. The template can be used alongside the Regulator's detailed communicating and reporting guidance and also its quick guide to the Chair's statement.

Adams v Options Sipp UK LLP (formerly Carey Pensions UK LLP) and Financial Conduct Authority [2020]: High Court dismisses claims against SIPP provider in landmark ruling

The High Court has delivered its judgment in the landmark case of *Adams v Options Sipp UK LLP* (known as *Adams v Carey Pensions UK LLP*), dismissing the claim made against the self-invested personal pension (SIPP) provider on all grounds.

The case, which was originally heard in March 2018, related to a claim made by Mr Adams against Carey Pensions for the loss of value of an investment held within a SIPP. The long-awaited outcome clarifies the degree of due diligence that is expected from SIPP providers in agreeing investments, particularly with regard to the restrictions of execution-only instructions, conveying implications for the rest of the industry.

The Judge stated his view of the differences of the Carey case to that of the high profile *Berkeley Burke* case (*Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Services Ltd* [2018]). He highlighted the very different facts in *Berkeley Burke* and *Carey*, in particular that *Berkeley Burke* was concerned with an investment into a fraudulent arrangement and the main argument was whether sufficient due diligence had been carried out by the SIPP operator. In *Carey*, the Judge considered Carey had undertaken appropriate due diligence, hence the decision in their favour.

Comment

Essentially, the decision is that SIPP operators are not responsible for the investment decisions of their members, as long as the roles and responsibilities of the SIPP operator, any intermediaries and the member are set out clearly. The clarity of the agreement between the SIPP operator and the member is key.

SIPP operators should make sure that all agreements with members, are clear in setting out the roles and responsibilities of the provider, the member and any intermediaries. Full due diligence should be undertaken, particularly where non-standard assets are concerned, and this should be documented along with decisions taken by the member. Authorisation checks should also be run on intermediaries, and again, records should be kept of the checks in case of future challenges.

Revenue and Customs v Sippchoice Ltd [2020]: Upper Tribunal confirms tax relief not possible on in-specie contributions

The Upper Tribunal (Tax and Chancery Chamber) has confirmed that, in the context of tax relief for contributions to self-invested personal pension schemes (SIPPs), the expression "contributions paid" in the Finance Act 2004 is restricted to contributions of money, whether in cash or other forms, and does not encompass transfer of non-monetary assets, even if the transfer was made in satisfaction of an earlier obligation to contribute money.

The tribunal confirmed that schemes should follow the relevant provisions of the Finance Act 2004 in respect of the tax relief applicable to pension contributions, noting that, if the legislation bears a different meaning to that found in HMRC's Pensions Tax Manual, the legislation must be preferred.

This case could have significant tax consequences for both members and SIPP providers, and is likely to result in claims for repayment of previously claimed tax relief.

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