Essential UK Pensions News

September 2021

Introduction

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

What's happening this autumn?

October is set to be a very busy month for pensions, with a raft of important new laws coming into force. Here's a quick reminder of the big developments coming up shortly (go to our horizon-scanning table at the end of this briefing for suggested action points):

What's happening?	When?
The Pensions Regulator gets stronger powers	From October 1, 2021
New climate change governance and reporting requirements come in	From October 1, 2021 for master trusts and schemes of £5bn+
DB schemes to publish implementation statement on website	Deadline: October 1, 2021
All DC schemes to report on net investment returns in chair's statement	For scheme years ending after October 1, 2021
Smaller DC schemes (assets of less than £100m): demonstrate value for money (VFM) or wind up	First VFM assessment will be needed in the chair's statement for the first scheme year ending after December 31, 2021
Statutory transfers: new powers for trustees to block suspected scams	Timing still tbc but we understand updated regulations are due imminently and may come into force quickly

A stronger Pensions Regulator

New, stronger powers to come into force from October 1, 2021

Commencement regulations have been made to bring the Pensions Regulator's strengthened powers into force from October 1, 2021. From this date, the Regulator will be able to:

- Bring criminal prosecutions or impose fines of up to £1m for avoiding employer debts or for conduct risking accrued scheme benefits,
- Issue "contribution notices" in a wider set of circumstances (detailed regulations on the "employer resources" test also come into force on October 1, 2021), and;
- Prosecute people who have given it false or misleading information.

It will also have enhanced information gathering powers and will be able to punish breaches of the "notifiable events" regime with fines of up to £1m from this date. However, anticipated extensions to the notifiable events regime are not expected to come into force until a later date, probably April 2022 (see below).

The commencement regulations state that nothing that was done (or indeed not done) before October 1, 2021 will trigger the new penalties, i.e. the powers will not be used retrospectively. However, the Regulator could still potentially take circumstances before October 1, 2021 into account when considering whether it is reasonable to use its powers in connection with something done after that time.

With just two days to go before the new powers come into force, the Regulator has also published an updated policy on how it plans to use its criminal powers, and an updated code of practice and guidance on its wider contribution notice powers. It is also consulting on further policies in respect of its new powers, including how it will approach the new financial penalties and information gathering. We will update you further on these developments shortly.

For more information on the new powers, please see our briefings on the Regulator's new, stronger powers and contribution notices.

Changes to the Pensions Regulator's mandatory notifications regime

The Department for Work and Pensions (DWP) is consulting over draft regulations which set out detailed proposed changes to the Regulator's early warning system, known as the "notifiable events" regime. The changes may not come into force until April 2022 but this has not yet been confirmed.

Two new events have been added to the list of events that the Regulator needs to be formally told about:

- Selling a material proportion of the employer's business or assets, and
- Granting or extending security over the employer's assets, resulting in the secured creditor ranking above the scheme.

An existing event (relinquishing control over an employer) is to be amended and an ineffective notifiable event (wrongful trading) is to be deleted.

Three events (the two new and one amended event) will trigger a new requirement to give a written statement to both the Regulator and the scheme trustees, explaining the transaction and its impact on the scheme.

The point at which the initial notification and subsequent written statement need to be given is very unclear. The first notification has to be given when a "decision in principle" is reached and the written statement follows when "main terms have been proposed". Hopefully these concepts will be clarified through the consultation process or further guidance. We will be responding to the consultation.

Please see our briefing for more information.

Pensions Regulator returns to tough stance on auto-enrolment

The Pensions Regulator recently published a blog warning employers not to neglect their auto-enrolment duties while they adjust to the "new normal". The Regulator temporarily took a softer line on enforcement in the earlier stages of the pandemic but that time has now passed.

The Regulator's compliance and enforcement bulletin for the period January to June 2021 confirms that it is back to business as usual for auto-enrolment enforcement. The use of Regulator powers to punish AE breaches has returned to pre-pandemic levels. Approximately 35,000 AE compliance notices, 7,400 escalating penalty notices and well over 20,000 fixed penalties were issued in the period.

Governance

Pensions Regulator and FCA publish joint paper on value for money

The Pensions Regulator and Financial Conduct Authority (FCA) have published a joint discussion paper inviting views on a suggested framework for assessing value for money in defined contribution (DC) schemes.

Both regulators see value for money as key to maximising DC savers' income in retirement. They aim to enable meaningful comparisons to be made between schemes. For now they are only considering the accumulation phase.

The regulators propose that the framework would look at value through three *"lenses"*:

- Investment performance,
- Customer service/scheme oversight, and
- Costs and charges.

Schemes would have to make data on these areas publicly available. The regulators recognise that "*perfect standardisation is not possible*" and that the cost of these additional disclosures will ultimately be passed on to DC savers. Any additional requirements will therefore need to be proportionate.

If a framework is established, the regulators would "*in due course*" expect scheme oversight bodies, trustees and providers to assess and report on the three key elements

annually. However, the framework would "*complement rather than duplicate*" those areas where VFM assessments are already required.

One such area is the new requirement for smaller DC schemes (below £100m) to carry out an annual VFM assessment and wind up if they do not offer value. The Pensions Regulator has this month published a press release reminding DC trustees of this obligation, which applies for scheme years ending after December 31, 2021.

For medium to large DC schemes, this workstream may in future translate into additional work to produce yet more public disclosures.

PASA working group reports on DC "statements season" proposal

The Working Group set up by the Pensions Administration Standards Association (**PASA**) and the DWP to consider the possibility of a DC "statements season" has published an initial report.

The Group is supportive of the idea but recognises the resourcing constraints for administrators and suggests that 2024 might be the earliest realistic target date if this goes ahead. It considered two options – a common publication date or a common valuation date – and concluded that the common valuation date would be too difficult to achieve without really benefitting members.

The need for annual benefit statements to be published at the same time each year should end once dashboards are up and running.

It remains to be seen whether this idea will go anywhere or whether the DWP will conclude this is an unwelcome distraction from the dashboards project.

Incorrect benefit statements: importance of disclaimers

A recent decision by the Pensions Ombudsman reinforces the importance of disclaimers in benefit statements for protecting the pension scheme.

Background

Mrs D, a deferred member, received a benefit statement from Aon on behalf of the trustee of the GE Capital Pension Scheme in April 2018 which significantly overstated her pension benefits.

The April 2018 quotation included disclaimers saying that the benefits quoted "*are estimates and are not guaranteed*" and that in the event of a conflict between the quote and her actual entitlement, her benefits would be strictly limited to her entitlement under the schemes rules.

Mrs D asked Aon twice to check the figures in the April 2018 quotation and both times Aon told her they were calculated correctly. Aon also confirmed in writing, in July 2018, that the figures quoted were accurate.

Mrs D then decided to sell her consultancy business and retire early.

The mistake came to light in 2019 after Willis Towers Watson had taken over as administrator and sent an updated estimate showing that Mrs D's early retirement benefits were less than half those quoted in April 2018 by Aon.

Mrs D complained to the Pensions Ombudsman.

Decision

The Pensions Ombudsman partly dismissed Mrs D's complaint.

The disclaimers in the benefit statement had clearly said that the figures were only estimates. It was therefore not reasonable for her to rely on these figures and she did so at her own risk.

The Ombudsman also considered that Mrs D should have expressly drawn the discrepancy between the April 2018 quotation and an earlier quotation to Aon's attention, rather than just asking them to check the 2018 figures.

Furthermore, Mrs D had an obligation to try to mitigate her loss, for example by seeking new employment to make up the shortfall in her salary since she sold her business. The Ombudsman was sympathetic to the difficult circumstances Mrs D found herself in, with the ongoing pandemic and suffering poor health. However, he felt her circumstances could change for the better in the future.

The Trustee and Aon were ordered to each pay Mrs D £1,000 for severe non-financial injustice but were not required to compensate her for any financial loss.

Comment
This case once again confirms how effective disclaimers in benefit statements can be to defend against member claims if the information is found to be inaccurate. It also again demonstrates that it is challenging for a member to succeed in this type of claim. The bar for reasonable reliance on the wrong information and for mitigating loss is set high. This is in contrast to some recent overpayments cases, where the Ombudsman has sometimes adopted a more member-friendly approach.

Transfers and scams

Pensions Ombudsman reinforces grace period for adapting to new guidance

The Pensions Ombudsman has dismissed a complaint by a member, Mr Y, that his pension scheme did not carry out appropriate due diligence before transferring his pension to another scheme. The funds were lost after the receiving scheme invested them in high risk ventures (primarily storage pods).

Mr Y had asked the Ombudsman to order that his pension be reinstated by the transferring scheme.

Background
The transferring scheme received Mr Y's transfer request on March 5, 2013, less than a month after the Pensions Regulator had issued its Scorpion guidance (February 14, 2013) which recommended that schemes significantly increase the amount of scams due diligence they undertake before a transfer. The scheme did not point out any warning signs and did not carry out all of the additional checks recommended by the Scorpion guidance and the transfer payment was made on March 8, 2013.

Decision
The Ombudsman decided that no further action was required by the transferring scheme. The complaint must be considered in the context of the regulatory obligations which applied at the time of the transfer. Although the Scorpion guidance had been issued before the transfer, it had been published less than a month before the transfer request was made and the payment was made. It would not be reasonable to expect the transferring scheme to have fully updated its transfer process that quickly. The Ombudsman considered "*a one-month period, from 14 February 2013, a reasonable timeframe to do so*".

Comment
The Ombudsman's decision to allow the transferring scheme a one-month grace period to review and update its transfer procedures in response to new Pensions Regulator scams guidance is consistent with another recent decision, Mr R (see our June edition of Essential UK Pensions News). It was noted that there was very little providers can do to stop a transfer where a legal right exists and the Scheme administrator had a statutory and contractual duty to effect the transfer upon receipt of the documentation unless there were indications of why the transfer should not go ahead.

While it is good news for schemes that the Ombudsman considers a grace period to update processes to be reasonable, this case once again illustrates the difficulties faced by administrators who acted on transfer requests in the period shortly following the issuance of the Scorpion guidance in February 2013.

The full determination is here.

Investment

Opperman's Taskforce on pension scheme voting makes recommendations

A taskforce set up by the pensions minister, Guy Opperman, in December 2020 has published its recommendations on how to get pension schemes voting more and voting better at the general meetings of the companies in which their money is invested.

The Taskforce on Pension Scheme Voting Implementation sees voting as an important tool for securing better financial returns for pension savers. Schemes currently tend to delegate stewardship and voting to their asset managers but this system is coming under pressure as schemes are called upon to do more, for example on climate change and other environmental, social and governance (ESG) issues.

The Taskforce identified that:

- When pension schemes invest in pooled funds, they effectively surrender their voting rights,
- Pension schemes generally rely on asset managers' own voting policies, which are not always top quality or transparent, and
- Most asset managers who are in charge of pooled funds have not been willing to listen to their clients' voting preferences.

The report makes three main recommendations:

1. Pension scheme trustees should either set a voting policy of their own, or explicitly accept responsibility for policies exercised on their behalf by their asset managers.
2. All asset managers should allow asset owners to set an "expression of wish" indicating how they would like shares to be voted on their behalf.
3. The FCA should:
   a. clarify the legality of acting on an expression of wish, and
   b. set expectations of asset managers for better disclosure of voting policies and better reporting on votes cast.

The Taskforce does not want pension schemes to be forced to write detailed voting policies. Whilst this is "*very desirable, our hesitancy reflects the limited resources available to many schemes*". It adds that "*DWP or TPR should provide guidance on what good quality voting policies look like*." It also recommends a vote disclosure reporting template for asset managers.

It is now up to the DWP to decide which recommendations to take forward.

Some of these recommendations could increase the governance burden for schemes. However, calls for asset managers to be more transparent about their voting are likely to be welcomed by trustees, many of whom will recently have needed voting information from their asset managers in order to write and publish their implementation statements.

Working Group publishes recommendations for facilitating investment in longer-term assets

A working group co-chaired by the Governor of the Bank of England, the Chief Executive of the FCA and the Economic Secretary to HM Treasury has published recommendations for how to increase investment by DC pension schemes in longer term, less liquid assets.

The idea behind the group is that investing in "productive UK assets", such as research and development, technology and infrastructure, can benefit DC schemes by generating better investment returns while also promoting growth and innovation to help the UK recover from the pandemic and transition to a greener economy.

The Productive Finance Working Group has published four main recommendations:

- **Shifting the focus from cost to long-term value:** DC schemes should consider how increasing investment in less liquid assets could generate better value for their members in the long term. This will mean working with asset managers to accommodate performance fees within the charge cap.
- **Building scale:** It is significantly more challenging for small DC schemes to invest in less liquid assets. DWP should continue with its DC consolidation agenda and DC schemes should consider whether their scale is a barrier to good member outcomes.
- **A new approach to liquidity management:** To give DC schemes the confidence to invest in less liquid assets, industry needs to develop guidance on good practice for liquidity management at a fund level (not just at the DC scheme level).
- **Widening access to less liquid assets:** The FCA should consult on changing its rules for investment in illiquid assets through unit-linked funds and reviewing its rules for distribution to appropriate retail clients.

The report also says that the working group has "*developed the key elements*" of the Long-Term Asset Fund (LTAF). This is the new open-ended fund structure that the Chancellor has committed to launch in order to help DC schemes invest in illiquids. The FCA expects to publish a policy statement and LTAF rules this autumn.

Restructuring

Insolvency protections are gradually lifted

The Government has announced that temporary restrictions on statutory demands and winding up petitions are to be phased out. These restrictions were originally brought in by the Corporate Insolvency and Governance Act from March 2020 to give companies affected by the pandemic some protection from insolvency. They have been repeatedly extended since then, most recently until September 30, 2021.

More limited protections will be in place for small companies until March 31, 2022. Winding up petitions will not be possible where the debt owed is £10,000 or less and creditors will need to ask companies for proposals about debt repayments and give them 21 days to respond before proceeding with winding-up action.

Temporary restrictions on evicting commercial tenants for non-payment of rent will also be in place until March 31, 2022.

It remains to be seen whether the phasing out of insolvency protections and the ending of furlough will translate into a sharp increase in company insolvencies. Trustees should continue to monitor covenant regularly, particularly if their employer is in a sector that has been badly affected by the pandemic.

PPF confirms extension of levy payment window

The Pension Protection Fund (PPF) has confirmed it will continue to allow levy payers impacted by the pandemic up to 90 days interest free to pay their 2021/22 levy bill. This will be the second year where schemes and employers can apply for a payment extension within 28 days of receiving their levy invoice.

Industry trends

State pension triple lock becomes a double lock

The Government has decided to suspend the state pension triple lock temporarily despite a manifesto pledge to keep it. This follows a sharp rise to the earnings element linked to furlough. For the year 2022/23, the earnings element will not apply.

Pensions issues in the pipeline

Development	Expected timing	Suggested action*
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	First wave schemes to ensure they have a plan for producing their first report on time. Second wave schemes to finalise and follow project plan for implementing governance structures and reporting. Smaller schemes to consider whether to comply on a voluntary basis.
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 finalise implementation statement for 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 £100m) annually to assess the value provided to their members and, where they conclude value not provided, to consider winding up	October 1, 2021 (for scheme years ending after December 31, 2021)	Trustees to consider whether their DC scheme is in scope for the new requirements. 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 1, 2021 (for scheme years ending after October 1, 2021)	Gather relevant information and prepare for reporting.
DC charge cap amendments to allow smoothing of performance fees	October 1, 2021	Discuss with investment advisers.
Introduction of Long Term Asset Fund	Autumn 2021?	Discuss with investment advisers.
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. Look out for revised regulations expected imminently.
Climate change risk governance and disclosure requirements start to apply for: • asset managers, life insurers, FCA-regulated pension schemes • standard listed companies	From January 1, 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.
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 ran 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.
Ensure members of occupational pension schemes aged 50+ have taken or opted out of guidance before they flexibly access or transfer DC benefits.	April 6, 2022? Consultation published July 2021 and closed on September 3, 2021.	Look out for final regulations and liaise with administrators to update transfer processes and prepare the necessary communications. Similar obligations will apply to personal pension schemes.
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	April 2022? Consultation on detailed regulations launched on September 8, 2021, closing on October 27, 2021.	Update or implement a notifiable events protocol for employers and trustee to minimise risk of breaches. Train key people on the new requirements. Review trustee confidentiality agreements.
Regulator's new single Code of Practice comes into force, including a requirement for an annual "own risk assessment"	Summer 2022? Interim response to consultation published August 24, 2021	Check scheme and employer are compliant with the Code's requirements. Consider planning first "own risk assessment", if relevant.
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. DWP expects to share its vision for a regulatory regime in autumn/winter 2021.
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, and draft regulations expected late 2021. Develop action plan for getting data ready for dashboard.

Reforms to auto-enrolment – lower minimum age to 18 and remove lower earnings limit.	"Mid 2020s" So far this is only the Government's stated intention but no firm steps taken.	Look out for a consultation and draft regulations.
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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