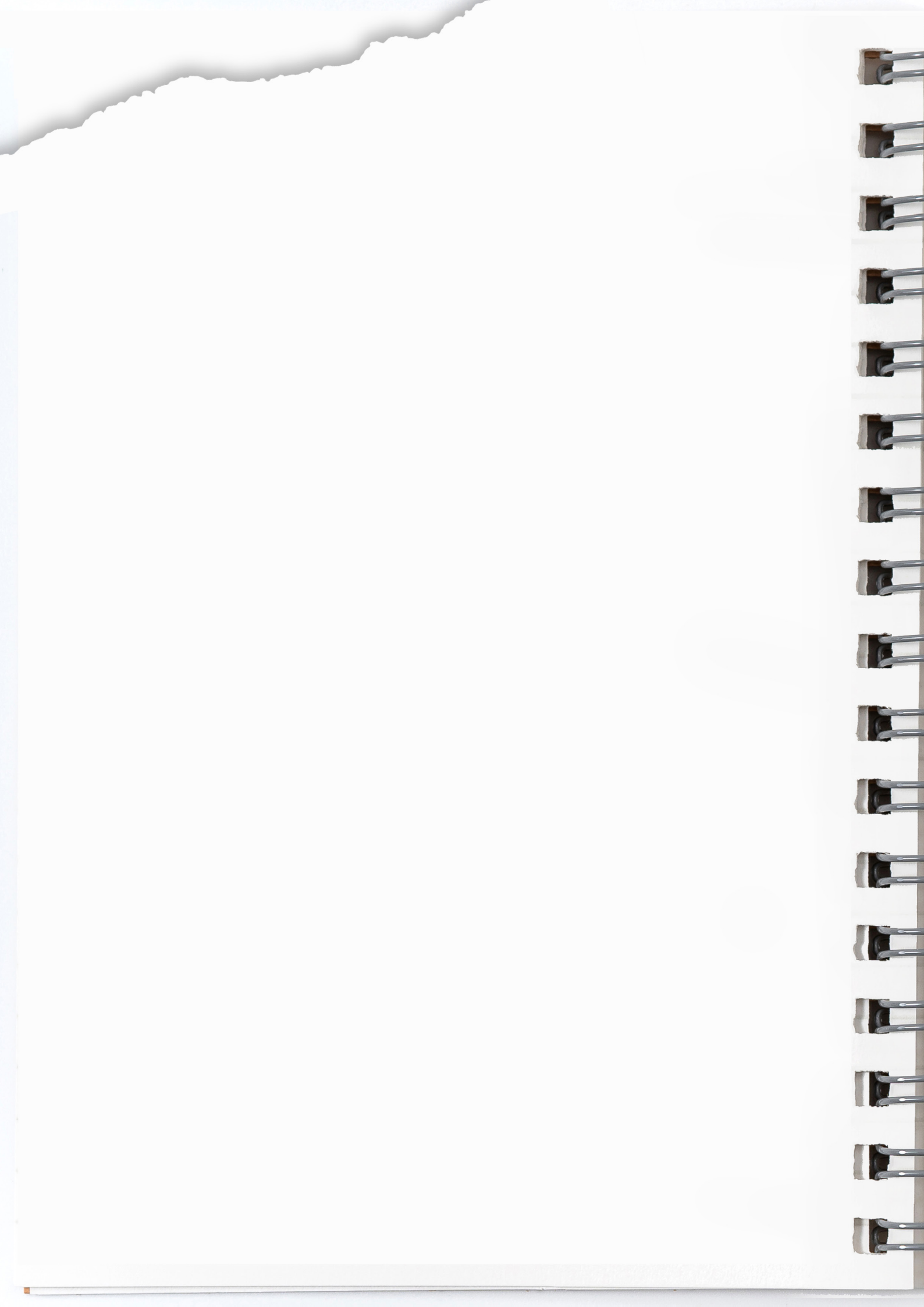


SQUIRE 
PATTON BOGGS

Pensions Lessons for Trustees 2019

Extra Tuition

September 2019



End of Term Report

September 2019

We welcome you to the fifth edition of our annual September back-to-school publication in which we comment on recent and upcoming pensions developments. This publication is produced with trustees in mind, but will also be of interest to sponsoring employers and other pensions professionals.

Our Pensions team would like to award all of its trustee clients grades A and A* for outstanding commitment and achievement. However, legislative amendments, developments in good practice and higher expectations from The Pensions Regulator (TPR) mean that additional study may be required to complete the core trustee syllabus.

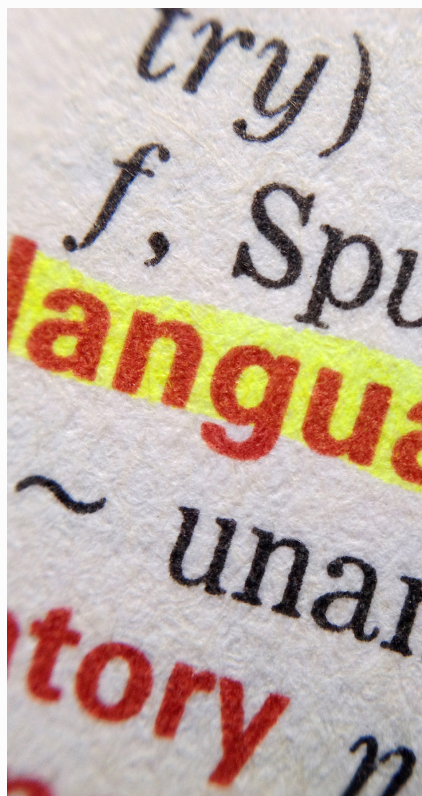
In this communication, we aim to offer extra tuition to ensure that trustees achieve and maintain excellent standards. We hope that you find this special coaching session entertaining and informative.

Keep up the good work!

Squire Patton Boggs

Core Subject: Foreign Languages

We have a raft of new transparency and disclosure regulations! Trustees will require good translation and communication skills to help members understand a whole new language. Hakuna matata? No problema? We hope so. Help is at hand below.



Teacher's Tip

Review TPR's [updated DC investment governance guidance](#), which includes expanded topics on ESG, social impact investing, patient capital, taking account of members' views, sustainability and stewardship.

Transparency and Disclosure

Statement of Investment Principles: "Vive la Révolution"!

Amendments to regulations will revolutionise the way trustees prepare and disclose their pension scheme's statement of investment principles (SIP).

From 1 October 2019, all trustees who are required to prepare a SIP will have to adopt a policy on financially material considerations and include that policy in their SIP. Financially material considerations include environmental, social and governance (ESG) factors. Climate change receives a special mention in the new requirements, but there are other ESG factors that trustees should also consider – for example, air and water quality, a company's corporate governance structure and the way in which businesses treat their staff (all of which might have a financially material impact on a particular type of investment).

Trustees will also have to include a policy in their SIP on the extent to which they take account of non-financial matters, by which the government means the extent to which trustees take account of members' views. Legislation now clarifies that trustees may take account of members' views in relation to social impact investments, but there is no safe harbour if they do so. (*Oh là là!*) Therefore, any such investments must not pose a risk of significant financial detriment to the fund.

By 1 October 2019, trustees must have expanded their stewardship policy in their SIP.

Trustees of defined contribution (DC) schemes must make their SIP available in a free and publicly available format online from 1 October 2019. From 1 October 2020, they must produce a report reflecting on how they have implemented the various policies in their SIP, which must also be publicly available online.

The scale of the changes does not stop there. From 1 October 2020, trustees of defined benefit (DB) schemes must publish their SIP and produce a shorter-form implementation report (although the latter does not need to be published until 1 October 2021).

Finalement (finally), from 1 October 2020, trustees of both DB and DC schemes must have a detailed policy on their arrangements with asset managers, which must be included in the SIP. It is unlikely that any existing policies will contain sufficient detail.

Action 1. Review parts [1](#) and [2](#) of our investment communications for more details on the steps that need to be taken and associated deadlines, *s'il vous plaît*.

The Cost Transparency Initiative Aids the Interpretation of Costs and Charges Reporting

You may say “*cuánto cuesta?*” on the Costa del Sol, “*quanto costa?*” in the Algarve, or “*ow much?*” in Yorkshire. The translation for “how much?” is a key term in any phrasebook and an important consideration in pension savings. The Cost Transparency Initiative (CTI) announced the launch of templates and guidance enabling trustees to assess standardised costs and charges information across different investments and asset classes. The new [tools](#) for both DB and DC schemes should help trustees to analyse investment costs as part of the drive to ensure members are receiving good value.

The CTI expects trustees to engage with their investment managers promptly, and asset managers are expected to be in a position to report against year-ends from December 2019, using the new tools. The new standards have been described as “helpful” by TPR.

Action 2. Trustees should familiarise themselves with the CTI templates and guidance, and consider how to make best use of the additional costs information.

“Achtung”! Pooled Fund Disclosures

Since 6 April 2019, a new disclosure of information requirement has applied to pension schemes that provide money purchase benefits (with some exceptions). Trustees are required to disclose specified information about pooled funds, including the name and international securities identification number allocated to each collective investment scheme in which assets are directly invested on behalf of the member. The information should be supplied on request to members and recognised trade unions within two months of a request and the annual benefit statement should state how the information can be obtained.

Action 3. Trustees of affected schemes should make sure that they are able to supply this information. *Danke schön.*

“Arrivederci” to Signposting Uncertainty

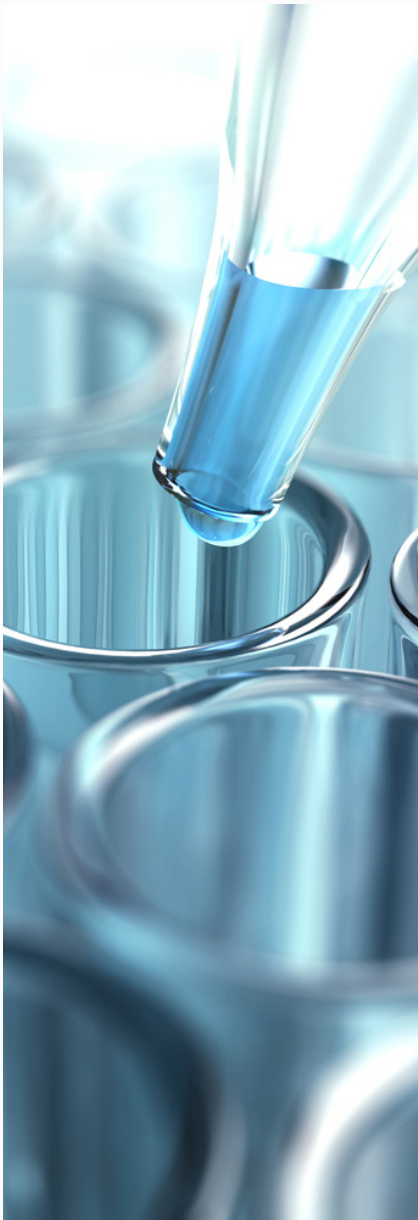
The question of where to refer members for help became surprisingly complicated for a period of time. Staff from the Early Resolution Team at The Pensions Advisory Service (TPAS) were transferred to The Pensions Ombudsman’s office last year. The remainder of TPAS became part of the Single Financial Guidance Body, which was subsequently renamed the Money and Pensions Service. *Mamma mia!* Thankfully, pensions legislation has now been amended to reflect these updates.

Action 4. Trustees should make sure that their scheme literature (including internal dispute resolution material) uses up-to-date terminology.



Core Subject: Science

Our next lesson takes place in the laboratory, where we dissect the latest regulatory developments and examine their contents under the microscope. There are a number of elements for trustees to observe.



Teacher's Tip

Trustees may wish to investigate whether they have adequate indemnity cover from the scheme employer in the event that the trustees incur regulatory fines.

Regulatory Updates

The Centre of Gravity – New Dynamics for TPR

In February 2019, TPR published its [outcome](#) of consultation on strengthening TPR's powers. Inertia is not anticipated and it is widely expected that the government will introduce the legislative changes in the next pensions bill, including:

- The introduction of two new notifiable events. The first type will be where there is the sale of a material proportion of the business and assets of a scheme employer which has responsibility for funding at least 20% of a scheme's liabilities (Notifiable Event One). The second type is where the employer grants security on a debt to give it priority over debt owed to the pension scheme (Notifiable Event Two). These will be employer-related notifiable events.
- A person planning a corporate transaction (usually a scheme's sponsoring employer or its parent company) will be required to issue a declaration of intent to the trustees of a DB pension scheme in certain situations. This will apply where there is a proposed sale of a controlling interest in a sponsoring employer and/or where Notifiable Event One or Notifiable Event Two would be triggered. The declaration of intent will set out an explanation of any proposed corporate transaction, confirmation that the trustees have been consulted and how any detriment to the scheme is to be mitigated. The declaration of intent will need to be shared with TPR.
- Financial support directions will become a single-stage process, known as financial support notices. As a default, support would need to be provided in the form of cash or a guarantee and changes will be made to the "insufficiently resourced" test. Controlling shareholders who are individuals will be caught by the financial support regime. Changes will also be made to the "material detriment" test used for contribution notices.
- Possibly the biggest change is the increase in TPR fines. Once the changes are introduced, TPR will be able to fine up to £1 million in certain specified circumstances. There will also be two new criminal offences carrying unlimited fines. The first one carries an additional punishment of imprisonment and will apply in respect of wilful or reckless behaviour in relation to a pension scheme. The second offence is failing to comply with a contribution notice.

Action 5. Trustees (and employers) should familiarise themselves with the events that they are required to notify to TPR and review their reporting protocols. Our [#meetPAUL factsheet 3](#) contains more detail.

The Nucleus of the Pensions Bill

The forthcoming pensions bill was demoted on the parliamentary agenda due to other political issues reaching a melting point. Uncertainty remains in terms of when this legislation is expected and what exactly it will now cover.

We expect the pensions bill to include the following elements:

- New powers for TPR (described above)
- Legislation to facilitate the introduction of the pensions dashboard
- A definition of what constitutes a collective defined contribution (CDC) scheme and the regulatory regime that will govern these schemes

It is now understood that the pensions bill will not include requirements for commercial DB consolidator vehicles, as the government needs more time to work on the mechanics of these.

The DNA of Pension Scams

The Pension Scams Industry Group issued version 2.1 of “Combating Pensions Scams: A [Code of Good Practice](#)” in June 2019. This is an update to the existing voluntary code.

Key changes since the previous version include the introduction of the pensions cold-calling ban in January 2019 and the evolutionary tactics of claims management companies that are encouraging scam victims to take action against transferring schemes.

TPR and the Financial Conduct Authority’s joint ScamSmart public awareness campaign was launched in December 2018, evolving from TPR’s earlier “scorpion” campaign. TPR’s [website](#) contains up-to-date resources for all parties involved in a pensions transfer and sets out TPR’s expectations for trustees and administrators.

TPR’s material and best practice standards have also been examined by The Pensions Ombudsman, which expects “robust and compliant pensions transfer procedures to reflect the regulatory guidance”. In a recent determination by The Pensions Ombudsman (PO-12763), a member’s complaint was upheld because the police authority responsible for his scheme had failed to conduct adequate checks in relation to the transferee scheme and had not sent a copy of TPR’s warning material to the member, (putting a copy of TPR’s warning material on its website was not sufficient).

We expect consultation on a genetic change to the statutory transfer legislation later this year. Can we ever succeed in making pension scammers an extinct species?

Action 6. Trustees should make sure that their administrators are operating in line with anti-scam regulatory and industry best practice standards.



Expertise in Distillation Required

The Court of Appeal judgment in *Bic v Burgess* is a timely reminder that whilst it is sometimes possible to amend a scheme retrospectively, this must be done in an appropriate manner in order to be effective. In this instance, the trustees had been administering the scheme on the basis that non-statutory inflation-linked pension increases had been granted since 1992. However, it came to light in 2011 that the scheme rules had not been validly amended to reflect these non-statutory increases. The new trust deed and rules, put in place in 1993, were stated to be retrospective to 1990 and allowed amendments to be made in a different manner. The court considered whether the retrospective 1993 deed and rules could be used to remedy the position but concluded that this would be rewriting history to an impermissible extent. The Court of Appeal overturned the High Court’s earlier ruling on this point. (It took a lot of boiling and condensing to reach a conclusion.)

Action 7. Trustees should fully understand the specific requirements of their amendment power and should take legal advice when making scheme amendments.

A Possible Chain Reaction

A recent advocate general opinion could have an interesting effect on the level of compensation payable by the Pension Protection Fund (PPF). The case relates to the compensation payable by the German equivalent of the PPF in respect of pension top-up payments made directly by the employer, which became insolvent. The advocate general’s opinion is not binding, but is a good indication of the direction that the Court of Justice of the European Union (CJEU) might take. In his view, Article 8 of the EU Insolvency Directive imposes an obligation on member states to protect all of the old-age benefits affected by an employer’s insolvency, not just part or a designated percentage of these benefits. The PPF has recently accepted that PPF compensation should be at least 50% of the benefits that the member would have received from the scheme. If the CJEU follows the advocate general’s opinion, the PPF may have to further increase its compensation levels.

Core Subject: Geography

We focus the attention of our readers on two specific parts of the geography syllabus – earthquakes and mountains. Read on for tips on how to avoid shaky ground and conquer seemingly insurmountable tasks.

DB Issues

PPF Contingency Planning – Preparing for an Employer Earthquake

The PPF has issued [guidance](#) for trustees on contingency planning so that they are better prepared for the seismic shift to a DB pension plan caused by the earthquake of employer insolvency. The guidance is relevant to trustees of all schemes eligible for the PPF, not just those already alerted to unstable employer covenants. The guidance suggests various action points for trustees, as simple steps, taken now, could prevent significant delay and difficulties for a scheme facing PPF entry in the future. For example, all trustees should ensure that they have a complete set of governing documentation for their scheme. Other key preparatory actions recommended by the PPF include:

- Reviewing payroll arrangements – if these are dealt with in-house, consider setting up a separate bank account and holding three months' worth of payroll.
- Reviewing statutory employers (most trustee boards will have done this in order to complete their scheme return accurately).
- Maintaining up-to-date member records and backing these up electronically – it may be difficult to obtain this information from the employer's offices post-insolvency.
- Reviewing the steps necessary to realise any contingent assets.
- Educating the trustee board on regulated apportionment arrangements and how these operate.
- Considering the potential conflicts of interest that might occur on an employer insolvency event and putting in place a plan to manage these.
- Planning prompt member communications in the event of employer insolvency and the scheme entering a PPF assessment period. One way to enable prompt member communications is to keep member tracing up to date.
- Putting in place a media strategy for dealing with entry into a PPF assessment period. The level of concern among pension scheme beneficiaries and external media interest in the event of employer insolvency should not be underestimated.

Action 8. Trustees of schemes potentially eligible for the PPF should consider the guidance and assess what action may be required for their scheme as a matter of good practice.



Climbing to the Summit of Guaranteed Minimum Pensions Equalisation

Since the landmark *Lloyds* judgment (discussed in our previous [publication](#)), trustees whose schemes provide guaranteed minimum pensions (GMPs) face the task of adjusting scheme benefits to remedy inequalities between male and female members resulting from unequal GMPs. Many trustees are waiting for guidance from a variety of sources – a PASA-led GMP Equalisation Working Group (GMPEWG), HMRC and the Department for Work and Pensions (DWP) (as well as a further court hearing) – to point them in the right direction before making big decisions.

In the meantime, inspired by the recently published GMPEWG [Call to Action](#), we list below five questions that trustees should ask themselves in the short term (and where legal input may be required).

The task ahead may feel like climbing a mountain; allow us to be your Sherpa and guide you through the process!

• Is Your Data in Good Enough Shape?

Right now, trustees may feel as though they are at the base camp of Mount Everest – with a long journey behind them but a difficult climb ahead. The capture of historical data and verification is described in the Call to Action as a “very significant part of the project”, which “will involve obtaining data going well beyond what is held for the normal operation of a pension scheme”. Legal assistance may be required in deciphering historic scheme rules, obtaining old member records from former advisers and adopting pragmatic solutions to address “data gaps”.

• Have You Decided on Timings for Rectification?

As trustees complete GMP reconciliation projects, they will need to decide when to rectify any over or under payments of GMP benefits that have been uncovered. Should they wait until any further adjustments for GMP equalisation have been calculated so that members’ benefits are only altered once? This part of the journey should not be too difficult once the options have been assessed fully – more of a low-level Alpine hike.

• Have You Agreed a Strategy Regarding Transfers?

Strict statutory time limits for the processing of transfer requests meant this issue required immediate attention. We have seen trustees adopt approaches ranging from paying unequalised amounts now with a top-up payment later, to making a one-off GMP equalisation adjustment to transfer values. From a legal perspective, a key consideration is how the selected method ties in with transfer legislation and the scheme’s rules, including at what point the scheme is discharged from all liability to pay the member’s benefits. Practical issues can also arise regarding whether or not the receiving arrangement will accept any top up. Which is the best route for the scheme? Like the seven ascents of Kilimanjaro, there are different ways to reach the same goal.

Have the trustees considered whether the scheme has accepted, or will in the future accept, transferred-in benefits, which include GMPs?

The issue regarding whether the receiving scheme or the transferring scheme is responsible for equalising transferred benefits for the effect of GMPs was not addressed directly in the *Lloyds* judgment and is due to be tackled in a future court hearing.

• What About Commutation Payments?

Two obvious examples of commutation payments potentially affected by GMP equalisation are trivial commutation lump sums and serious ill health lump sums.

The calculation of trivial commutation lump sums is not straightforward where the benefits include GMPs. For example, the Finance Act 2004 provides that the trivial commutation lump sum must extinguish the member’s benefits and the value of the member’s pension rights must not exceed £30,000. It will be difficult to demonstrate conclusively that these tests have been met if there is uncertainty regarding the GMP equalisation uplift to which the member is entitled. However, unlike transfer values, members do not generally have a right to trivial commutation lump sums. One option could be to cease paying trivial commutation lump sums pending the conclusion of the GMP equalisation exercise (but check the scheme rules first). With the right preparation, this decision should be more within the comfort zone of trustees – like a walk up Mount Snowdon on a clear day.

The position is not so straightforward for the payment of serious ill health lump sums. Waiting for the conclusion of the GMP equalisation exercise to calculate the lump sum could give rise to hardship. Trustees wishing to adopt a pragmatic solution should consult their advisers.

• What About Back Payments?

This is a challenging quest in our GMP journey. The trustees are now required to scale the “mountaineer’s mountain” itself, K2.

Lloyds considered how back payments should be made where benefits put into payment should have been subject to a GMP equalisation uplift. The period of time that trustees should look back in calculating back payments will depend on the rules of the scheme. Legal advice may be required on the interpretation of the rules and the point from which any look-back period should begin.

And then there is the question of interest. In *Lloyds* the parties agreed that interest should be paid on the arrears and the court ruled that the arrears should bear simple interest at 1% over base rate. However, trustees should consider whether they have the power to pay interest and whether their own scheme’s rules prescribe any specific interest rates.

Action 9. GMP equalisation is potentially a complex project, but the total financial impact for schemes and their members may be relatively modest. Trustees should take preparatory steps now including taking legal advice, to ensure that the project runs efficiently.

Core Subject: Mathematics

Managing a pension scheme involves a lot of number crunching, but actuaries and auditors can be called upon for specific areas of expertise. However, there are a few new equations that trustees should solve over the coming months. (Do not forget to show your working out!)

Investment Strategy

Fiduciary Management – an Exercise in Percentages (20% = 1/5th)

The Competition and Markets Authority (CMA) undertook an investigation into the investment consultancy and fiduciary management market. It published its final order on 10 June 2019. The order contains some significant changes for fiduciary managers, but also imposes duties on pension trustees. These relate to competitive tendering for fiduciary management services and putting in place strategic objectives for investment consultants. The government has just closed consultation on new governance regulations, which will integrate the order into legislation, and TPR is consulting on guidance for trustees, which will complement the terms of the order and new regulations.

The order requires that where 20% or more of a fund's assets are under fiduciary management (or the trustees are looking to increase the level under fiduciary management to 20% or more), a competitive tender exercise must have been entered into. If 20% or more of the assets were already under fiduciary management as at 10 June 2019, trustees must undertake a competitive tender exercise in respect of any arrangements that were not awarded as a result of such a process before the deadline specified in the order. The deadline is the later of 9 June 2021 and five years from the commencement of the first arrangement.

The requirement to hold a competitive tender exercise will have been met where the trustees have used reasonable endeavours to obtain three bids from fiduciary management providers who are independent of each other. The trustees should provide written confirmation to the successful fiduciary manager(s) that their appointment is as a result of a competitive tender exercise.

There is a separate requirement in the order for trustees to set "strategic objectives" for their investment consultancy provider on or before 10 December 2019. More information about what is meant by "strategic objectives" can be found in our "Turkey and tinsel" [blog](#).

The draft regulations propose that TPR should be responsible for monitoring and enforcing trustees' compliance with the new requirements.

Action 10. Trustees should add up the assets under fiduciary management. Where that amount is 20% or more of fund assets, they should check the terms on which such arrangements were put in place and assess whether a competitive tender exercise should be carried out.

Action 11. Trustees should consider strategic objectives for their investment consultants and take advice as appropriate.

Finding the Right Formula for Illiquid Investments

Illiquid investments (sometimes referred to as patient capital) and social impact investments often go hand in hand. Many forms of social impact investments are, in fact, relatively illiquid. In its updated DC investment governance [guidance](#), TPR encourages trustees to focus on the long-term when monitoring investment strategy performance and illiquid investments are, therefore, likely to play a greater role in trustees' investment decision-making.

Social impact investing involves taking positive action to invest in socially valuable activities, such as encouraging healthier lifestyles. Whether or not trustees could/should take account of social impact when making investment decisions has been a difficult consideration for a long time but has been partially resolved in legislation. Amendments to investment regulations clarify that trustees may take account of members' views (which would include views relating to social impact investments), but the regulations do not set out the Law Commission's test that trustees should apply when taking account of non-financial factors. The test is (1) trustees should have good reason to think that members would share the concern; and (2) the decision should not involve a risk of significant financial detriment to the fund. The Society of Pension Professionals has published a [white paper](#), which makes recommendations to the government for clarifying trustees' duties on social impact investing. In the meantime, a degree of uncertainty remains.

Action 12. Trustees should consult with their investment managers before making illiquid/social impact investments to ensure that the investment would not pose a risk of significant financial detriment to the fund.



Assessing the Probability of Investment Risks

The "gating" of investment funds, or, in lay terms, temporarily stopping investors from taking money from a fund, has made news headlines in recent months. Trustees should be aware of such risks in their investment portfolios.

It is sometimes possible to negotiate and minimise such risks before an investment agreement is signed. If a risk is not subject to negotiation, trustees should determine whether that risk is acceptable and take legal advice. While Murphy's Law ("anything that can go wrong will go wrong") is not a mathematical rule, it should come into the equation when assessing the possibility of an investment risk crystallising. Even when the risk appears small, if the effect on the scheme could be material, trustees should seek contractual protections. Depending on the size of the investment, the benefits of segregated versus non-segregated investments should be considered.

The Matrix of the European Market Infrastructure Regulation

The European Market Infrastructure Regulation (EMIR) was further amended in June 2019 through "EMIR Refit". EMIR now provides that pension scheme arrangements are exempt from being required to centrally clear specified OTC derivatives for a further two years (until 2021), provided certain tests are satisfied. Of further interest to pension trustees is the introduction of the concept of a small financial counterparty into EMIR. A small financial counterparty can benefit from certain important exemptions under EMIR. However, to qualify for such exemptions, pension trustees must submit position reports to the Financial Conduct Authority. We expect that it is possible for the majority of schemes to fall within this category.

Action 13. Trustees should consider asking for information from their liability-driven investment manager. Seek specialist legal advice if there are any specific concerns.

Teacher's Tip

Trustees may wish to review their processes connected with risk assessment and take legal advice before entering into investment contracts.

Handwritten mathematical notes on a blackboard:

$$pe(S) = \frac{y_1 - y_0}{x_1 - x_0} = \frac{g(x+h) - g(x)}{(x+h) - x} = \frac{g(x+h) - g(x)}{h}$$

$$f'(x) = \lim_{h \rightarrow 0} \frac{f(x+h) - f(x)}{h}$$

$$f(x) = \lim_{h \rightarrow 0} \frac{(x+h)^2 - x^2}{h}$$

$$= \lim_{h \rightarrow 0} \frac{x^2 + 2xh + h^2 - x^2}{h}$$

$$= \lim_{h \rightarrow 0} \frac{2xh + h^2}{h}$$

$$= \lim_{h \rightarrow 0} (2x + h) = 2x$$

$$f(x) = \lim_{\Delta x \rightarrow 0} \frac{f(x+\Delta x) - f(x)}{\Delta x}$$

$$f(a) = \lim_{h \rightarrow 0} \frac{f(a+h) - f(a)}{h}$$

$$\frac{df}{dx} \left[\frac{d}{dx} (x^n) = nx^{n-1} \right]$$

A graph on the left shows a curve $y = g(x)$ with a secant line connecting points $(x, g(x))$ and $(x+h, g(x+h))$. A tangent line is also shown at the point $(x, g(x))$.

Core Subject: Physical Education

Trustees need to be “fit and proper”, and extra requirements now apply to trustees of master trusts. Our next lesson takes place on the athletics field, where our programme of physical education is designed to improve overall levels of trustee fitness. Trustees may also wish to consider department or elocution classes, if appropriate, to increase their “properness”.

Governance

Pole Vaulting Over the High Bar of Trusteeship

On 2 July 2019, TPR issued a [consultation](#) on the “future of trusteeship and governance”, which covers a wide range of issues with the overall objective of improving standards. TPR will also “seek to facilitate and encourage scheme consolidation as a way of supporting efficiency and closing the quality gap” for schemes that do not meet the expected standards.

Some of the key issues raised are:

- Should there be a legal requirement for trustees to demonstrate a minimum level of knowledge, understanding and skills and to complete a continuing professional development programme? And is TPR’s educational support for trustees (such as the toolkit) effective?
- How can trustee boards become more diverse, inclusive and able to demonstrate that they have the right mix of skills, knowledge and understanding for running the scheme? To what extent should TPR be involved in monitoring diversity?
- Should it become mandatory, in due course, for each trustee board to appoint an accredited professional trustee?
- Is TPR right to be concerned about potential conflicts of interest and decision-making procedures where there is a sole trustee?
- What more can be done to facilitate the winding-up of DC schemes that are unable to meet the required governance standards? How can barriers be overcome for winding-up DC schemes with guarantees?

The outcome of this consultation could have widespread impact. In the meantime, we are promised an increase in TPR’s activity, including one-to-one supervision of a greater number of large schemes and regulatory initiatives designed to probe schemes’ governance and administration standards. TPR also plans to review the Trustee Knowledge and Understanding code of practice and scoping guidance. As part of this review, it may include revised standards expected from professional trustees, which are supported by the voluntary industry standards that are now in place (see next lesson).

Action 14. Some trustees may wish to respond to the consultation, which closes on 24 September 2019. Trustees should monitor developments connected with this consultation.

Professional Trustees Sprint for Gold

In February 2019, voluntary [standards](#) for professional trustees were published and had immediate effect. They are intended to apply to anybody who meets [TPR’s definition](#) of a professional trustee. The standards are divided into three parts, covering general standards; standards when acting as chair of trustees; and standards when acting as sole trustee.

Under the standards, sole traders should not act as sole trustee of a pension scheme. Corporate trustees who act as sole trustee should ensure they have appropriate governance processes in place, with at least two accredited professional trustees directly responsible for the scheme. The corporate trustee should also undertake AAF reporting each year.

The standards will be accompanied by an [accreditation system](#) in due course. This was originally expected to be launched in July 2019 but has been delayed. It is likely that the accreditation process will involve (1) a skills-based requirement, such as completion of the trustee toolkit and the level 3 award in pension trusteeship offered by the Pensions Management Institute; (2) the provision of evidence that a trustee is a fit and proper person; and (3) an assessment demonstrating that the trustee has appropriate soft skills for the job. There will also be an ongoing learning requirement, including 25 hours of continuing professional development each year.

The professional trustee standards and accreditation process apply to individuals. Where a corporate acts as trustee, the standards and accreditation will apply to the directors of that corporate.

Action 15. Trustee boards should assess whether any individuals fall within TPR’s definition of a professional trustee and should notify TPR accordingly on the scheme return. Professional trustees may wish to demonstrate that they meet the standards.

TPR Takes a Long Jump Into Code Consolidation

TPR issued a [statement](#) saying that it will update and consolidate its codes of practice to reflect legislation introduced as a result of the IORP II Directive requiring trustees to establish and operate an effective system of governance. Consultation is expected later this year. Trustees will need to be able to demonstrate to TPR that they have an effective system of governance, compliant with the new requirements, within 12 months of the publication of the updated code of practice. It is expected that well-run pension schemes will already be meeting many of the new requirements.

Action 16. Trustees should review the updates to the code of practice and assess what further action should be taken.

The Team Relay of Data Subject Access Requests

According to the latest [annual report](#) of the Information Commissioner's Office (ICO), the mishandling of Data Subject Access Requests (DSARs) is the primary source of data protection complaints. Trustees cannot blindly hand the baton to their advisers, as they have ultimate responsibility as "data controllers" of the personal data and will be held to account by the ICO if a DSAR is not handled correctly.

We consider here some key issues that trustees should confirm with their administrators. Note that many of these points also apply to other service providers that process personal data on behalf of the trustees.

• Are Procedures in Place to Identify and Act Upon DSARs?

An individual does not have to state that he or she is making a DSAR, mention the GDPR, or give reasons for requesting the information. In fact, the request does not even have to be in writing – it can be made verbally. It is important that those with direct contact with scheme members and beneficiaries know how to spot a DSAR. Training may be required.

• How Will the Scheme Administrators Notify the Trustees of a DSAR?

Does the agreement with the administrator include obligations to notify the trustees of a DSAR promptly? It is vital trustees are quick off the starting blocks, as they are required to respond without delay and in any event within one month (subject to limited circumstances where the deadline can be extended). The DSAR may also be an indication that an individual is gathering data to pursue a complaint, which may itself require speedy attention.

• What Assistance Will the Administrators Provide?

The GDPR requires the agreement with administrators to stipulate that they will assist the trustees "by appropriate technical and organisational measures". These measures should be recorded in the agreement.

The trustees should agree with the administrator the protocol to be followed. For example:

- Will the administrator acknowledge receipt of the request and confirm the identity of the individual? Should a standard communication be agreed?
- Will the administrator review records containing the personal data of the individual to assess what should be excluded or redacted (for example, any privileged material or personal data relating to other individuals), or will the trustees do this?

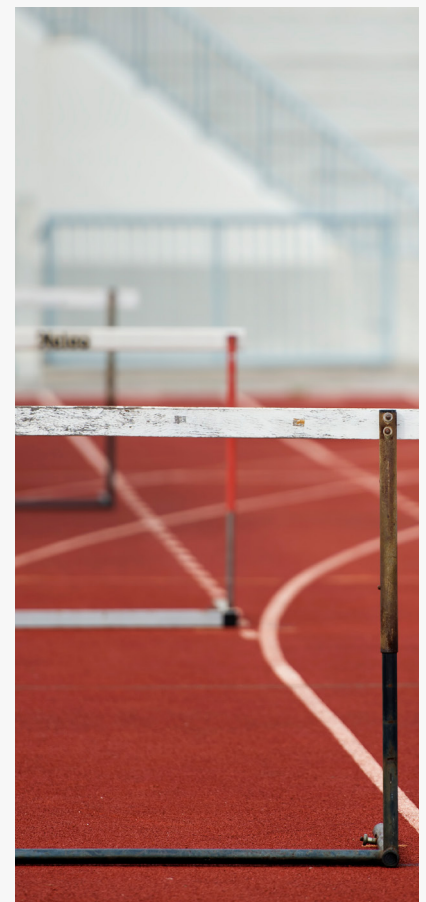
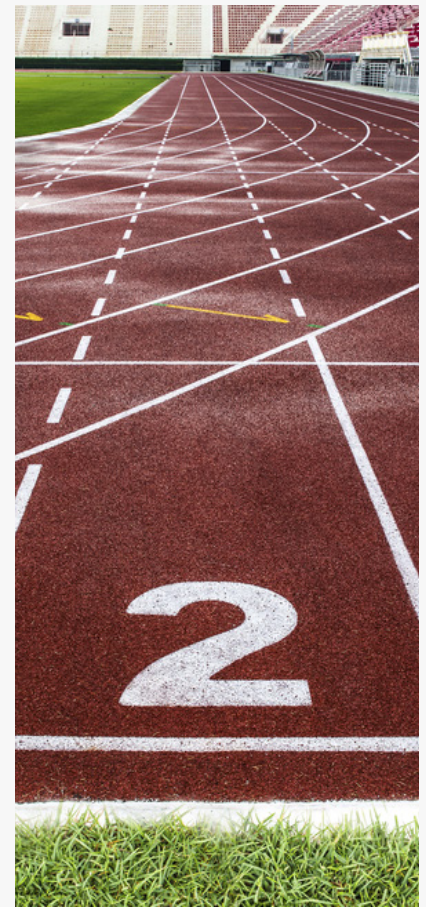
• Are Appropriate Safeguards in Place for Data Transfers?

The transmission of personal data between the administrator, trustees and the individual should be secure to minimise the risk of a data breach, using methods such as encryption.

Finally, the GDPR prescribes specific information that trustees must provide when responding to a DSAR concerning what personal data the trustees hold, what they do with it and the individual's rights. Much of this will be generic information and trustees can, therefore, prepare template communications incorporating the relevant details.

Advance preparation will help ensure that trustees fulfil their obligations under the GDPR, meet the tight deadlines and work effectively with the scheme's service providers.

Action 17. Ensure that service providers processing personal data on behalf of the trustees understand their role and responsibilities, and check that these obligations are reflected in service agreements.



Core Subject: Physical Education

Self-defence Training

Certain communications and documents shared between a lawyer and a client for the purpose of seeking or giving legal advice, or created for the purpose of litigation, will be protected by privilege. If a document held by the trustees of a pension scheme attracts privilege then the trustees can usually prevent it being disclosed to another party, including the sponsoring employers of the scheme or members/beneficiaries, TPR and the ICO. This can be an important protection in the event of a dispute, receipt of a DSAR or regulatory action. However, privilege can inadvertently be lost if a document is not handled correctly.

Action 18. Trustees should consider adopting protocols to maximise their ability to protect confidential, privileged materials from disclosure and ensure that their advisers are aware of (and adhere to) these self-defence measures.

Teacher's Tip
Consider training on privilege.



Final Words

The coming academic year is set to be a busy one! In addition to the issues already covered in this publication, we are expecting consultation from TPR on scheme funding and the setting of long-term objectives; an increase in DC transfers to master trusts; implementation of the fifth money laundering directive by 10 January 2020; the outcome of the Women Against State Pension Inequality (WASPI) judicial review; and, of course, Brexit.

See our [Homework Planner](#) for a summary of the action points in this publication.

For further information, please contact any of the partners listed or your usual contact in our Pensions team.

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For the latest on pensions risk mitigation, see our #meetPAUL (Protect Against Unmitigated Liabilities) [factsheets](#).

We were proud to win the Educational Initiative of the Year at the Pension and Investment Provider Awards 2019 for our pensions communication materials, including our #How2DoPensions [quick guides](#).

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