SQUIRE PATTON BOGGS

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Pensions Lessons for Trustees

The Lockdown Year

September 2020

Our annual "back to school" themed publication contains a useful reminder of recent developments and what to expect in the coming months. This is to help trustees with business planning, ensure that nothing fundamental has been overlooked, and to assist with trustee knowledge and understanding requirements.

It is stating the obvious to say that 2020 has a unique feel about it. We reflect on some of the educational differences in this year's publication, for both parents and children, as home-schooling winds down and more students return to classrooms.

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Legislation – More Than Playground Politics

Our MPs faced "back to school" trauma on the first Tuesday after the Easter recess when the Houses of Parliament were eerily quiet, with only a limited number of MPs attending in person. Lockdown, however, has not meant that MPs have been able to play out all day long. They have been very busy homeworking. MPs have learnt the art of meeting up with colleagues via video conferencing – some more successfully than others.

Pension Schemes Bill – The Timetable Is a Struggle

The pension schemes bill has continued to make its way through parliament. It has passed through the House of Lords and is now awaiting its second reading in the House of Commons (on a date yet to be scheduled). The bill covers a wide spectrum, including collective money purchase benefits, the pensions dashboards, amendments to the scheme funding provisions in the Pensions Act 2004 and changes to the individual transfer regime.

The bill was amended during its transit through the House of Lords, including a new provision that would allow the government to require pension trustees to take account of the recommendations made by the Taskforce on Climate-related Financial Disclosures (TCFD). See our blog for more information.

Perhaps the most interesting provisions relate to the additional powers proposed for The Pensions Regulator (TPR). These powers would allow TPR to levy financial penalties of up to £1 million and have generated a lot of comment from the pensions industry. The pension schemes bill also introduces two new offences of "avoidance of employer debt" and "conduct risking accrued scheme benefits", both of which carry the maximum civil penalty of up to £1 million. More worryingly for those involved with restructuring companies, the offences also carry criminal penalties of up to seven years in prison and an unlimited fine.

Unless the bill is amended at a later stage, the reach of these two new offences would not be restricted to employers and their connected parties. Pension trustees and advisers, as well as employers, could fall foul of this legislation.

Failure to comply with section 72 of the Pensions Act 2004 (which requires information to be provided to TPR following the issue of a notice) is currently a criminal offence only, which makes it onerous for TPR to take action. When the bill is enacted, TPR will be able to issue civil penalties (a much easier process) not exceeding £50,000, along with escalating penalty notices.

Knowingly or recklessly providing false information to TPR in connection with either a section 72 notice, an information gathering interview or an inspection of premises also carries the new civil penalty of up to £1 million. Knowingly or recklessly providing false information covers the whole remit of information that TPR might expect to rely on in the exercise of its functions. TPR can also fine anyone who knowingly or recklessly provides false information to pension trustees in connection with certain statutory obligations or where it is known that information provided will be relied upon (for example, information provided by an employer in connection with covenant monitoring).

The proposed new powers for TPR have not changed during the bill's passage through parliament. There is more in our blog – along with changes to the notifiable events regime and the introduction of the concept of a "declaration of intent" that employers must issue to TPR and trustees before entering into certain types of corporate transactions.

Action

Once the bill has been enacted, trustees should:

- Familiarise themselves with the new notifiable events and consider updates to their notifiable events framework.
- Consider whether any of their proposed actions might constitute avoidance of an employer debt or conduct risking accrued scheme benefits, and take legal advice as appropriate.
- Ensure that those persons likely to take receipt of a section 72 notice (if one were issued by TPR), understand its importance and the need to forward it to an appropriate person for timely action.
- Update their risk registers.
- Keep up to date with regulations issued under powers contained in the Act.

Corporate Insolvency and Governance Act 2020 – A Reprieve From Detention

The concept of a "declaration of intent" introduced by the pension schemes bill does not sit easily with the new easements available to employers under the Corporate Insolvency and Governance Act 2020 (CIGA), which came into force on 26 June 2020. CIGA introduces two new permanent measures that could have an impact on defined benefit (DB) pension schemes. These are the new moratorium provisions and the new restructuring plan.

The moratorium provisions are similar to a chapter 11 process in the US. They effectively introduce social distancing measures, giving companies a breathing space, during which no pre-moratorium debts that become due during the moratorium period are payable (with certain exceptions, such as wages).

The moratorium process does not require court or creditor agreement – it is instigated by the directors filing papers at court. An insolvency practitioner is appointed as monitor but directors generally retain control of running the business. A moratorium period lasts for 20 business days but can be extended by the directors for a further 20 days, or up to a further 12 months with creditor approval and/or a court order.

During the moratorium period, creditors cannot enforce security, but, conversely, the company could sell property over which there is a charge without a creditor's agreement. Floating charges cannot be crystallised during the period.

Ongoing contributions to an occupational pension scheme are payable during a moratorium period. Deficit recovery contributions, however, would cease during that period. The trustees' bargaining power is eroded during a moratorium. There is no power to make a statutory demand or enforce security. Certain types of contingent assets, such as Type B contingent assets, might become less valuable as a result of the new legislation. Not only is this a covenant issue, but the Pension Protection Fund (PPF) may look to reduce the levy credit it grants for contingent assets and/or tighten up its standard form documentation.

The restructuring plan is similar to a scheme of arrangement – it requires both creditor and court approval. Creditors are separated into different classes of a similar type. Each class has to vote in favour of the restructuring plan in order for it to proceed.

A vote will be carried if 75% or more of the creditors in value in each class vote in favour of the plan. In certain circumstances, the court will approve a plan without the agreement of all classes of creditor if the alternative (and that means the alternative the court thinks the company would have to implement) would mean the dissenting classes were no worse off. This is referred to as the "cross class cram down".

There is an interesting clash here with the provisions of the pension schemes bill. Just because these new processes are permitted under CIGA, it does not mean that TPR would not use its anti-avoidance powers against a company or its directors (or even perhaps – we have heard suggested by Counsel – a judge who approves a restructuring plan?).

Our series of blogs contain more information.

Action

- Trustee boards that include senior company personnel should closely monitor the potential for conflicts of interest. A moratorium period can be initiated by directors without first informing creditors. A trustee who is aware that the company is about to enter a moratorium would have a duty to disclose that information to their co-trustees.
- Trustees should check the pension scheme rules to assess whether a moratorium period or restructuring plan would trigger scheme wind up – this information could shape funding negotiations.
- A fixed charge could be more susceptible to a challenge that it is a floating charge.
- Trustees should take advice on the likely impact of the new moratorium provisions and restructuring plan process on the employer covenant.
- The new insolvency provisions favour the employer. Trustees should remain alert to potential employer insolvency and update their risk registers accordingly.

Finance Act 2020 – A Spot of Revision and Retrospection

The Finance Act 2020 received Royal Assent on 22 July 2020. It contains a few provisions that affect pension schemes.

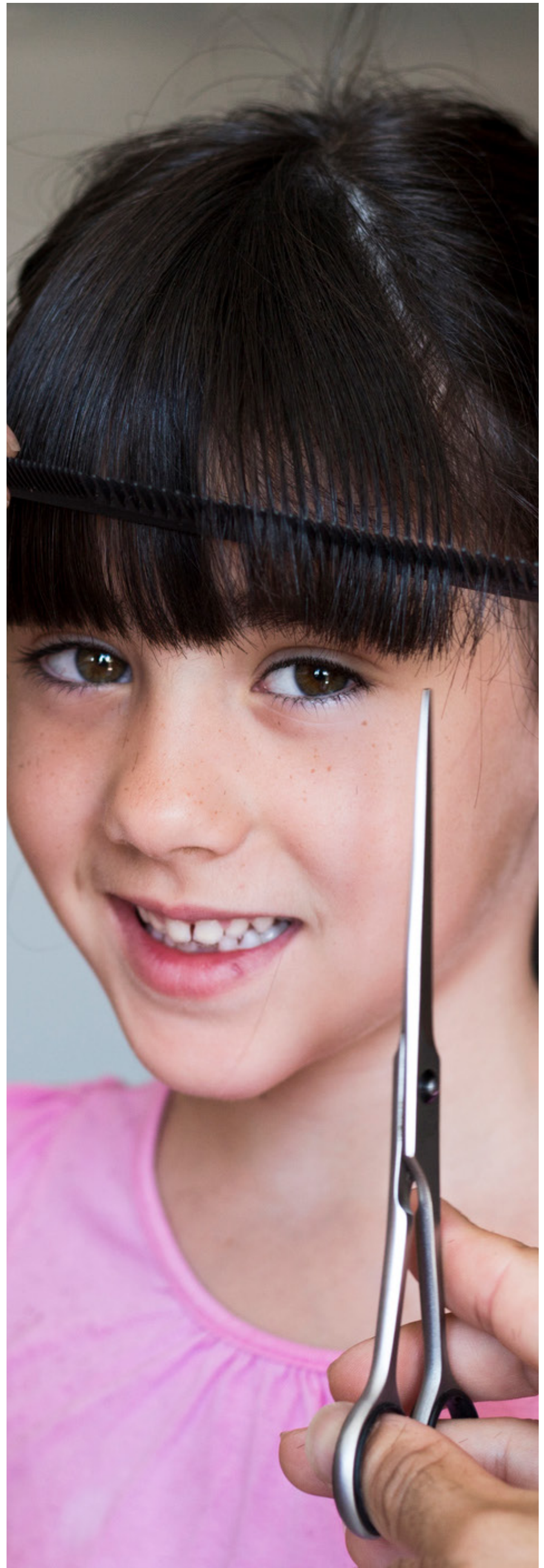
From 6 April 2020, the tapered annual allowance thresholds changed retrospectively. The adjusted income (broadly speaking, net income plus pension contributions) threshold increased from £150,000 to £240,000. Where an individual continues to be affected by the tapered annual allowance, the minimum allowance (previously £10,000) has reduced to £4,000.

The Finance Act also implements an easement granted by HMRC in relation to pension scheme members who return to work before age 55 and who had retired with a protected pension age. Provided the return to work occurred/occurs between 1 March 2020 and 31 October 2020 (this period may be extended) and is to assist with the response to COVID-19, an individual will not incur an unauthorised payment charge.

Finally, the Finance Act restores HMRC's secondary preferential creditor status in respect of certain taxes relating to insolvencies that commence on or after 1 December 2020. This means that HMRC will rank ahead of unsecured creditors, including pension schemes, if an employer becomes insolvent.

Transfers – A Few Blunt Cuts

Professional haircuts are more of a luxury than a necessity for children returning to school this year. The usual smartness is replaced by home haircuts, including wonky fringes (mum was taking multitasking a step too far), bald patches (dad forgot to put the attachment on the hair clippers) or even pudding basin cuts (grandma didn't realise that the 1970s had ended).



There is also a lot of trimming round the edges in terms of pensions transfers with the overall intention of improving standards and curbing pension scams.

Scams – Combing out the Nits

TPR and the Financial Conduct Authority (FCA) re-launched their joint "ScamSmart" campaign on 1 July 2020. A publicity campaign is planned and an industry-focused campaign will follow from October, with new tools and guidance available. The message to the pensions industry is: "You are the professional. Scammers are not."

The pension schemes bill allows regulations to be made to limit a member's statutory transfer right. The government intends that the right to transfer will be limited in some circumstances to a scheme to which a member can evidence an employment link. We await further details, but this should be a helpful development in preventing scams, as it closes some of the options that have been used as pension liberation vehicles. Although the new legislation should provide a layer of comfort, trustees should be mindful that scammers are adept at finding ways to circumvent legislation.

Action

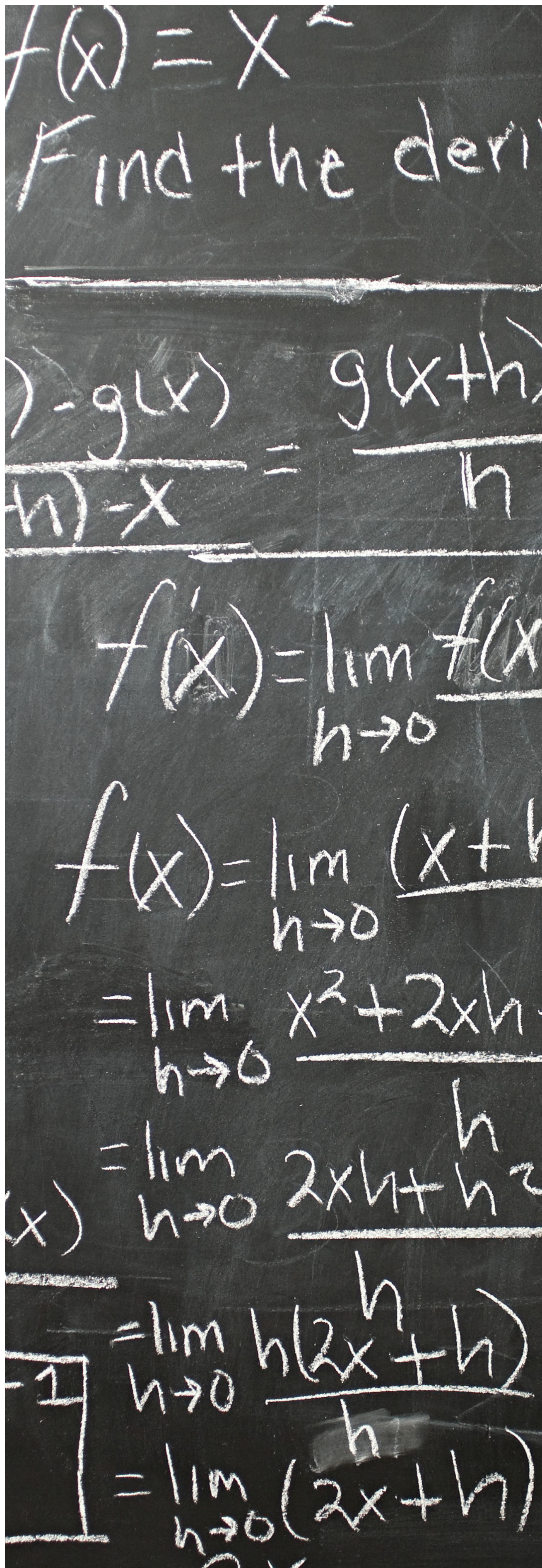
Trustees should monitor the progress of the new transfer legislation and the regulatory materials issued through the ScamSmart campaign. Trustees should check that the practices adopted by pensions administrators align with legislation, regulatory expectations and industry best practice.

French Pleats and Chignons – Claims Handlers Dress up Their Tactics

Trustees should be mindful of tactics employed by claims handlers who encourage former scheme members to make claims against trustees for an alleged failure in relation to their transfer from the scheme. Former members may be encouraged to ask questions or submit data subject access requests in order for the claims handler to gain insight that can be used for wider purposes.

Action

Trustees should always seek legal advice if they have concerns about information that should be disclosed to members.



Chopping off Contingent Charging

The FCA will ban contingent charging on pensions transfers from 1 October 2020 with exemptions where individuals are suffering from "serious ill-health" or experiencing "serious financial hardship" (as defined by the FCA). This is part of a package of measures introduced by the FCA in its drive to improve the quality of pensions transfer advice and address the conflicts of interest that arise when an adviser only receives a fee if a transfer goes ahead. The contingent charging ban includes advice paid for by the scheme or employer as part of a scheme-wide exercise.

Transfer activity is likely to be impacted, as some members will not want to pay upfront fees for advice. Some financial advisers may cease to offer pensions transfer advice.

Action

Trustees to note the possible effect on scheme transfer activity.

Brushing up on Automatic Transfers

Many readers will remember discussions and consultations in the middle of the last decade about the merits and mechanics of automatic transfers. The government announced in 2018 that it was "not the right time" to progress automatic transfer legislation. The Pensions Policy Institute (PPI) has now reignited the debate, setting out policy options for government intervention to prevent the growing number of small deferred pension pots in defined contribution (DC) master trusts. The PPI estimates that there could be up to 27 million deferred pots by 2035 – these can be costly to administer and difficult for members to locate and manage. The government may have hit the snooze button on automatic transfers, but we do not expect this issue to remain dormant for long.

Highlighting Consolidator Schemes

In June 2020, TPR issued interim guidance to clarify regulatory thinking on how DB commercial consolidator vehicles are expected to operate. This should pave the way for new models to emerge. Generally, superfunds are established to accept bulk transfers from DB schemes as a more affordable alternative to buying out benefits with an insurance company.

Superfunds must demonstrate that they meet TPR's standards before they can transact – the standards include capital adequacy requirements to protect scheme members and to protect against claims on the PPF.

TPR's experience in dealing with superfunds, using its existing powers, will inform future legislation but there is no timetable for putting this legislation in place.

Action

Trustees should seek legal advice at an early stage if a transfer to a superfund is under consideration.

Governance – Be Fighting Fit Post Lockdown

There were tears in many households when the devastating news broke that daily PE sessions with Joe Wicks were ending in July. Dogs howled in corners at the prospect of a further increase to their daily exercise programme and parents went online to sign up to fitness challenges that did not involve a trot to the local take away. At the same time, pension trustees faced a barrage of information, while trying to ensure that all of the key scheme functions (such as paying pensions) continued to run smoothly. Stress levels have been high. To reduce stress, we recommend (a) yoga and (b) undertaking governance reviews to provide assurance that high standards continue to be met.

Stepping-up the Standards on Policies and Protocols

Trustees should keep policies and protocols under review at all times and also schedule periodic reviews as part of their business planning. We anticipate that trustees will have an established process for reviewing longstanding policies, such as reporting to TPR (whistleblowing) and notifiable events. Other policies, such as those stemming from GDPR and cybersecurity, will have evolved more recently. Do these policies operate effectively given the altered working conditions that many pension schemes and workforces are adapting to: remote working, virtual meetings, furlough, self-isolating or shielding? Do they reflect the changing nature of risks faced by the scheme, given the inevitable change to the economic outlook, volatility in investments, and potential financial pressures on sponsoring employers?

For example:

- Does the **data privacy policy** reflect COVID-19 changes, including individuals working from home or accessing scheme data on personal devices? Have recent postal delays prompted greater reliance on the sharing of information electronically or via a scheme website or online portals? If so, then does the data privacy policy adequately address this and ensure that the information can be shared and updated securely? Does the data privacy policy identify how data subject access requests (of which we are witnessing an increasing number) should be handled and responded to within the timeframes prescribed by the GDPR?
- High-profile cybersecurity attacks have emphasised the importance of having up-to-date and operational **data breach response plans.** It is important to test these plans and to ensure the availability of key individuals who are responsible for setting the wheels in motion and ensuring that tight deadlines for reporting a breach are met. We also recommend discussions with service providers who process scheme personal data to ensure that measures are up to date for identifying, reporting, investigating and responding to a suspected data breach event quickly.

Action

- Trustees should check whether policies are up to date.
- Trustees should periodically test response plans.

Last year, the PPF advocated that trustees adopt **contingency plans** in the event of sponsoring employer insolvency. This includes ensuring that trustees can access payroll and banking facilities, as well as member records and a complete set of scheme documentation (without requiring access to employer systems and premises). Economic uncertainly and questions around employer strength are likely to remain for the foreseeable future.

Action

Trustees should consider the benefits of following the PPF's plan, to protect the scheme and the members if insolvency were to occur.

Some pension trustees have **privilege protocols** in place. Recent court cases have examined the extent to which legal privilege can be claimed in respect of documentation or communications relating to the provision of legal advice, so that it does not have to be disclosed to another party in the event of a dispute or regulatory investigation (such as TPR or the Information Commissioner's Office). The cases have highlighted that the ability to claim privilege can all too easily be lost, for example, where the documentation has previously been shared or discussed with others or referred to (even indirectly) in correspondence or other documents. This is a particular risk for pension schemes, given the number of parties and service providers typically involved in the running of a scheme and the flow of information between them.

Action

Trustees should consider having a training session on the importance of legal privilege. Building on that, they may wish to adopt a protocol governing how privileged material should be shared, referred to, recorded, stored and created. Where legal advice is sought (or litigation or regulatory intervention could be on the horizon) then the ability of the trustees to claim privilege can often be enhanced, and not inadvertently lost, by taking simple precautionary steps.

Limbering up for GMP Equalisation

The guaranteed minimum pension (GMP) equalisation picture is slowly coming into focus. The GMP Equalisation Working Group, led by the Pensions Administration Standards Association, continues to issue helpful guidance, most recently on communications with members (August 2020), the data aspects of GMP equalisation (July 2020) and the timing of the decision of when to carry out GMP rectification exercises when GMP equalisation is on the cards (March 2020). Guidance documents recently published by HMRC answered some (but not all) questions about the tax treatment of benefits that need to be adjusted as a result of GMP equalisation.

HMRC's February newsletter provided guidance on how the payment of GMP equalisation adjustments would be recognised in annual allowance and lifetime allowance calculations. The more recent July newsletter concentrated on the treatment of past and future lump sums where a GMP equalisation adjustment is payable. It contained some reassurance, for example, by addressing concerns that an unforeseen GMP equalisation adjustment could result in previous payments becoming unauthorised due to HMRC requirements that the lump sum must extinguish benefits or stay within monetary limits. The treatment of trivial commutation lump sums paid in the past, however, remains a concern. HMRC has taken the view that the extra benefits resulting from GMP equalisation should have been included in the original assessment of whether the member's benefits exceeded the trivial commutation limit at the time the lump sum was paid. The discovery of a GMP equalisation uplift may now mean that the lump sum is an unauthorised payment.

Some big unanswered questions centre on GMP conversion. Many pension scheme trustees are keen to proceed with GMP conversion but are holding back due to questions around the interpretation of legislation and the tax treatment of benefit changes resulting from the conversion process. HMRC has expressly stated that previous guidance given on GMP equalisation does not extend to benefit adjustments, if any, which occur at the same time or as a result of GMP conversion. The July newsletter confirmed that due to the complexities surrounding GMP conversion, more detailed work needs to be done on the wider issues associated with that methodology.

The pensions industry is also awaiting a ruling from the courts in connection with the latest instalment in the *Lloyds* litigation. The court hearing has now concluded and it is hoped that the resulting judgment will provide some much needed clarity about where the responsibility to equalise for the effect of GMPs falls where members have previously transferred their benefits out of the pension scheme.

Action

- Trustees should consider whether to review the past payment of trivial commutation lump sum payments as part of their GMP equalisation exercise.
- Trustees considering GMP conversion exercises should continue to seek legal advice regarding the right time to proceed.

Fund Closures – Beware of Substitutions

Trustees of defined contribution funds should be mindful that the temporary closure of a fund (e.g. a property fund) could result in the creation of a default fund where member contributions are re-directed to an alternative fund. A default fund is subject to specific legal requirements, such as a cap on charges (where the scheme is used for automatic enrolment) and a requirement to have a separate statement of investment principles. The assessment of whether a fund is a default fund will depend on how members made their investment choice.

Action

Trustees should consider TPR's defined contribution COVID-19 guidance and take legal advice if they are affected by a temporary fund closure.

Funding and the PPF – Interpreting the Language of Business and Finance

School children will have absorbed a lot about pensions and the world of business from parents working from home. They will understand that terms used on conference calls require a degree of interpretation. "Sorry, I was on mute" translates as "I thought I had time to make a cup of coffee", "I can't get my video camera to connect today" means "I am in my dressing gown", and "excuse me for a moment, someone is knocking on the door" means "the children are fighting again, I need to intervene." The linguistic skills of future generations will no doubt be enhanced by these experiences.

Turbulent Times – We Would Prefer to Press the Mute Button on This Issue

COVID-19 has resulted in turbulent times for scheme funding and many uncertainties remain. Trustees and sponsoring employers will be assessing the impact on their own schemes and workforce – there may be an unsettled picture for some time.

Action

Trustees should keep up to date with TPR's helpful COVID-19 guidance while recognising that each pension scheme and each employer's business is unique. There is no "one size fits all", and no substitute for taking scheme-specific actuarial, covenant or legal advice before making decisions.

Zooming in on the Annual Funding Statement

TPR's annual funding statement is particularly relevant for schemes with valuation dates between 22 September 2019 and 21 September 2020. TPR sets out guidance on how trustees should approach the valuation in current conditions. If trustees plan to change their valuation date, they should first take legal and actuarial advice and should be prepared to explain their reasons to TPR.

TPR may issue further guidance in the autumn.

Action

Trustees should note that no general extension has been granted for the completion of actuarial valuations. For some schemes, the valuation process will be more protracted than in previous years and trustees should allow plenty of time for discussions and professional advice.

The DB Funding Code – Open for Questions

On 3 March 2020, TPR issued the first of its two planned consultations on a revised scheme funding code of practice. The draft code had been eagerly anticipated and received immediate comment from industry professionals who later that month were consumed by issues relating to the COVID-19 pandemic.

TPR extended the consultation deadline from 2 June 2020 to 2 September 2020 to allow the pensions industry to pay sufficient attention to this important issue. Despite industry calls for the draft code to be revised due to the impact of the pandemic, TPR remains of the opinion that its proposed principles for "a sound, resilient funding framework" do not need to be reworked.

The draft code includes

- Proposals for a twin-track compliance route for actuarial valuations – a "fast track" approach and a "bespoke" approach.
- TPR's views on how long-term objectives should be set.
- Questions around the employer covenant, including the extent to which trustees should rely on the covenant and for how long. (This debate will no doubt be heavily influenced by the impact of the pandemic.)

The scope of the consultation does not extend to schemes with "unusual" employer or benefit structures – including multi-employer schemes and those supported by not-for-profit organisations – these will form part of TPR's second consultation.

TPR expects the new code to come into force in late 2021.

Action

Trustees should keep up to date with developments and may wish to input into TPR's consultations on the funding code.

A Broadcast From the PPF

The PPF's insolvency risk-scoring methodology has had a home makeover, with Dun & Bradstreet (D&B) taking over from Experian. The new methodology providing the insolvency risk scores for employers went live from the end of April for use in 2021/22 levies. The PPF does not intend to publish its final levy rules until December; it will monitor developments in light of COVID-19 and assess any changes that might be required to the levy rules.

Levy payers who are struggling this autumn due to the economic impact of COVID-19 may extend their PPF levy payment period from 28 days to 90 days without incurring an interest charge. Levy payers who wish to apply for this extension must complete the COVID-19 extension form.

Action

Trustees should consider the potential extension and complete the application if appropriate.

Crossed Wires on Compensation

Hughes v Board of the Pension Protection Fund is the latest court ruling on the validity of the restrictions imposed by the PPF on the amount of compensation it will provide if a DB pension scheme falls into the PPF following employer insolvency. In the earlier case of *Hampshire v Board of the Pension Protection Fund,* the CJEU ruled that the compensation paid by the PPF had to equal at least 50% of the value of a member's accrued benefits in the pension scheme. The claimants in *Hughes* took this one step further. Their challenge centred on both how the PPF tests whether benefits meet the *Hampshire* threshold and also the imposition of the compensation cap.

In *Hughes*, the Administrative Court ruled that the compensation cap was incompatible with EU law and should be disapplied. The impact of the ruling on the PPF was tempered by the fact that, whilst arrears of pension will be payable as a result of the removal of the cap, the court also held that the Limitation Act 1980 applies to limit the look-back period for calculating those arrears to six years. The PPF has indicated in a recently updated FAQ that it is reviewing the ruling with the DWP to decide their next steps – the PPF "will not without further notice treat time as continuing to run from 22 June 2020 – being the date of the recent Administrative Court's judgment – so no PPF members will be prejudiced by not making a legal claim for arrears now".

As regards the challenge to how the PPF checks that PPF compensation meets the threshold set in *Hampshire*, the court ruled that it is for the PPF to decide how the overall compensation payable during retirement (or the lifetime of a survivor) will equal at least 50% of accrued scheme benefits. It is not necessary for the PPF to conduct an annual comparison. The court also held that members of pension schemes in a PPF assessment period should receive benefits that meet the minimum benefit threshold.

The PPF has, quite rightly, pointed out that it is not in its power to change the rules – the compensation levels and cap are set out in legislation. However, no legislative changes are proposed for the time being as it has recently been announced that the PPF and the DWP will be challenging elements of the *Hughes* ruling. The PPF has issued a statement confirming that it is seeking to appeal the court's decisions regarding the approach the PPF may adopt to ensure members receive 50% of the value of their entitlement and how survivors benefits should be dealt with. We also understand that the DWP has lodged an appeal against the ruling that the compensation cap is unlawful. These challenges could mean that the position regarding the payment of PPF compensation remains unclear for some time to come. In the meantime, the PPF will continue with its existing approach to the calculation of PPF compensation.

DB scheme trustees may take some comfort from the PPF's chief actuary comments in the case that the removal of the cap would have no "immediate and directly discernible impact" on the rate at which the PPF levy is set. However those schemes with a higher than typical proportion of deferred or active members with pension benefits in excess of the cap may find that their levy bill increases in future. See our blog for more information on the ruling and its implications.

ESG – Just the Latest Craze?

Do you remember Top Trumps (and we do not mean Donald), Pokémon cards and Rubik's cubes? Not all of these playtime crazes endured. Nor did Tamagotchis, the 1990s toys that would die if not fed. (And presumably they did die because where are they today?)

Environmental, Social and Governance (ESG), initially billed a "fad" by some, is now shaping the investment policies of pension trustees and coming under increased scrutiny from members and action groups. ESG is not a craze that will fade out and be replaced.

The State of Play

Before 1 October 2019, trustees merely had to have a policy stating the extent, if at all, they took account of social, environmental or ethical considerations in their investment policies. Since that date, trustees have been required to have a policy in place in relation to those ESG considerations (including, but not limited to, climate change) that trustees consider to be financially material. Additionally, there is a theme of greater transparency and disclosure on investment issues.

Trustees of occupational schemes providing defined contribution benefits (other than pure AVCs) have been required to publish their statement of investment principles (SIP) online since 1 October 2019 and trustees of DB schemes are required to do so from 1 October 2020. The first set of report and accounts to be produced after 1 October 2020 must include an implementation report. For DB schemes, this does not need to be published until 1 October 2021, but for schemes providing DC benefits, this must be done as soon as the report and accounts have been completed.

In July, consultation closed on non-statutory guidance for occupational pension schemes on assessing, managing and reporting climate-related risks in line with the recommendations of the TCFD. The draft guidance was produced by the Pensions Climate Risk Industry Group.

While TPR welcomed this development, the government went a step further, first, by amending the pension schemes bill to include a provision that, if passed, would allow government to require pension trustees to adopt and report against the recommendations of the TCFD and, second, by issuing a consultation document on policy proposals to require trustees of larger schemes to address climate change risks and opportunities through effective governance and risk management measures.

Joining the Dots – The Patterns of Change

The National Employment Savings Trust has taken this to the next level and publicly announced that it will take steps to combat climate change, including divesting from the most harmful fossil fuels, transitioning its portfolio to the 1.5C global warming limit and ceasing to work with companies and fund managers that are not aligned with the Paris Climate Agreement. This reflects the proposed amendments made to the pension schemes bill by the House of Lords. In addition to the government's amendment that would enable the introduction of regulations requiring trustees to report in line with the TCFD's recommendations, the Lords amended the bill so that it would require pension schemes to take into account the Paris Climate Agreement goals. If this amendment were to be approved in the House of Commons, it would be a controversial move away from trustees having the absolute discretion to determine how pension funds are invested.

Attitudes towards stewardship have also changed. It has become more widely recognised that stewardship (i.e. engaging with the companies in which pension schemes are invested) can bring about better outcomes for pension schemes, whether it is the trustees or investment managers who undertake that engagement. From 1 October 2020, the requirements relating to trustees' policies on stewardship are expanded and must be reflected in their SIP. TPR has encouraged trustees to sign up to the UK Stewardship Code in both its investment governance guide for DC trustees and investment guidance for DB trustees.

Skipping Into Action

Pension scheme members are taking a greater interest in the way in which their pension funds are being invested. Examples are considered in our blog.

The outcome of a complaint brought before The Pensions Ombudsman (TPO) last year is worth noting. A member of the Shell Contributory Pension Fund requested information on how the fund was measuring and managing the potential risks of climate change, including actuarial valuations, extracts from minutes and documentation relating to investment strategy, covenant reviews and risk management. The Trustee refused to provide some of the documentation. TPO determined that the information requested went beyond what must be disclosed under legislation and there had been no maladministration on the part of the Trustee. Legally, there is no requirement for trustees to take account of members' views when making investment decisions, although they may take account of them if there would be no detriment to the fund in doing so. The difficulty, of course, is ascertaining members' views. Trustees do, however, seem to be coming under increasing pressure to take account of members' views in respect of climate change and newly formed action groups are recognising the enormous influence and buying power of pension schemes.

A number of action groups have come to the fore in recent months including Make My Money Matter, which campaigns for individuals, organisations, industry and the government to ensure that pension funds are used for the good of the environment. MPs, councillors and faith leaders recently signed an open letter to Guy Opperman, effectively accusing him of "yo-yoing" and urging him not to discourage pension trustees from divesting from fossil fuels. This was in response to a statement made by Guy Opperman that investors have "an influential position to nudge, cajole or vote firms towards lower-carbon business practices" rather than encouraging investors to disinvest in fossil fuels.

Action

- Trustees should regularly review their policies in relation to financially material considerations (including ESG) and stewardship. In particular, the stewardship requirements are expanded from 1 October 2020, and the updated requirements should be included in the SIP.
- Trustees should ensure that from 1 October 2020 their SIP is revised to include their policy in relation to arrangements with asset managers. It would be unusual for trustees to already have such a policy in place and so this should be considered in advance.
- Trustees should ensure that their next report and accounts completed after 1 October 2020 includes an implementation report and, where the scheme provides DC benefits, this should be published in a freely available format on a website as soon as the report and accounts have been signed off.
- Trustees of DB schemes should ensure that their SIP is published in a freely available format on a website by 1 October 2020.

For further information on the 1 October deadlines, see our publication on trustees' investment duties.

Round-up – All Good Things Come to an End

Children are unlikely to forget fraught attempts at homeschooling by parents who had to resort to internet searches for definitions of a "fronted adverbial". Loudly, they protested that English grammar has evolved since their own school days.

The pensions horizon also continues to evolve, with lots of developments on the way this year. In addition to the issues already covered in this publication, here are some of the things that we can expect.

- The DWP and TPR have repeatedly expressed concerns about the number of small DC schemes that may not be well governed, leading to sub-standard member outcomes. So far, they have struggled to address this issue, but we can expect to see more evidence of their work to remove barriers to DC consolidation.
- The Pensions Dashboards Programme hopes to issue a timetable for delivery of pensions dashboards by the end of this year.
- TPR anticipates progress on a number of workstreams, including the consolidation of the codes of practice into a single code and updating the trustee knowledge and understanding code of practice. We can also expect further announcements about TPR's work to improve diversity and inclusion on trustee boards.
- There will inevitably be more discussion around price inflation indices and their impact on pension schemes. We await the outcome of the recent consultation considering the technical statistical processes to be used to align the RPI to the CPIH and the timing of the proposed changes, which is likely to be between 2025 and 2030.
- TPO expects an increase in complaints due to transactions and services impacted by COVID-19. Trustees should continue to work closely with administrators and keep members fully informed where delays cannot be avoided.
- There will be more developments on international data transfers following the landmark decision (the *Schrems II* judgment) which affects the lawful transfer of data outside the EEA. (For information on how this could affect pension trustees and scheme administrators, see our blog.)
- The issue of pensions tax relief will almost certainly come under scrutiny as the Chancellor looks to make cost savings. We hope that any measures are fully considered and aligned with government aims to increase private pensions savings.
- We hope for clarity from the ICO on where member communications could be classed as "direct marketing activity". The draft direct marketing code of practice published by the ICO for consultation caused concern in the pensions industry.
- We also hope for clarity from the FCA amid concerns that proposed changes to its guidance could see trustees at risk of being deemed to be giving regulated financial advice when providing illustrative transfer values.
- Finally, let's not forget Brexit. Preparations have taken something of a back seat due to the more immediate concerns caused by COVID-19. However, concerns remain around disruption to both pension scheme and sponsoring employer business planning.

**Congratulations to readers who made it to the end of our publication.
You can award yourselves a gold star.**

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