TRUSTEE KNOWLEDGE UPDATE

Legal Update: August – October 2021

LEGISLATION **3**
New TPR powers from 1 October 2021 3
Amendments to scheme administration and charges and governance regulations 3
Simpler Annual Benefit Statements 4
CONSULTATIONS AND DRAFT LEGISLATION **4**
Strengthening TPR's Powers: consultation on amendments to notifiable events regime 4
Guaranteed Minimum Pension Fixed Rate Revaluation 5
Climate and investment reporting: setting expectations and empowering savers 5
Autumn Budget and Spending Review 5
HMRC **6**
Trust registration guidance 6
THE PENSIONS REGULATOR **6**
Consultation on single code of practice 6
Driving Value for Money in defined contribution pensions 6
Criminal Offences Policy 7
Draft Code of Practice 12 (Contribution Notices) 7
Revised Clearance Guidance 8
New enforcement policies consultation 8
DC investment governance guidance - temporary gating of funds 9
MISCELLANEOUS **9**
GMPe supplemental Guidance on Transfer Payments 9
GMPe Communications Guidance – Implementation Stage 9
GMPe Anti-Franking Guidance 9
Other organisations 9
TCFD: Implementing the Recommendations of the TCFD – Update 9

LEGISLATION

New TPR powers from 1 October 2021

(24 August 2021)

Regulations have been made which bring into force various provisions of the Pension Schemes Act from 1 October 2021 including:

- new contribution notice grounds;
- revised TPR powers in relation to contribution notices;
- new sanctions for the avoidance of an employer debt, including criminal offences and £1m fines;
- new sanctions for failure to notify notifiable events;
- new TPR inspection, interview and penalty powers;
- new sanctions for the provision of false or misleading information.

Please see the **CMS Guide to the Pension Schemes Act 2021** and the TPR section (below) for more detail on these new provisions.

Amendments to scheme administration and charges and governance regulations

(20 September 2021)

Regulations which came into force on 1 October 2021 make various changes to the requirements for the content of Chair's statements in DC schemes, introduce new value for member (VFM) assessments for schemes with less than £100m in assets and make some changes to the calculation of the charge cap.

For any scheme year ending after 1 October 2021, the Chair's statement for a relevant scheme must include information on the net return on investments in each default arrangement and in any fund which members are now or were able to select in which assets are invested in the relevant scheme year. It must also include charges and transaction costs for all self-select funds (previously this information was only required in relation to default arrangements).

Trustees of DC or hybrid schemes with assets of less than £100m must, in relation to any scheme year ending after 31 December 2021, undertake a VFM assessment in accordance with the regulations and statutory guidance. This will not apply to schemes which have notified TPR that they are winding up. An explanation of this assessment must be included in the Chair's statement. Information on asset valuation and on completion of the VFM assessment will become part of the scheme return. Where the trustees do not consider that the scheme provides good VFM then they will be expected to transfer the benefits to another scheme and wind-up (or explain why they have not done so).

TPR has updated its value for members guide, communicating and reporting guidance and quick guide to the Chair's statement to reflect the new requirements.

Changes to the calculation of the charges cap will, from the first charges year starting on or after 1 October 2021, expressly exempt the physical costs of holding an asset from the charge cap. The regulations also allow trustees to pro-rate performance fees across a number of years.

Comment:

These regulations impose new requirements on all relevant schemes (any scheme providing DC benefits other than purely through AVCs) to report in the Chair's statement on the net return on investments. It also widens out the requirements to report on investment matters from just the default fund to all funds in which member's contributions are invested. Smaller schemes will also have to undertake detailed assessments on VFM. This is all part of the Government's push to improve the retirement outcomes for pension savers and remove small under-performing schemes from the market.

Simpler Annual Benefit Statements

(19 October 2021)

These regulations introduce a requirement, from 1 October 2022, for trustees of automatic enrolment schemes which provide only DC benefits to issue active and deferred members with annual benefit statements which are no more than 2 sides of A4 paper when printed. The statement must include prescribed information including the value of contributions credited during the year, the value of accrued rights and the value of accrued rights the member would be likely to accrue by retirement age. The Government has also published guidance (which includes a template statement).

CONSULTATIONS AND DRAFT LEGISLATION

Strengthening TPR's Powers: consultation on amendments to notifiable events regime

(8 September 2021)

The Government is consulting on draft regulations which amend the current notifiable events regime and introduce new requirements in relation to duties to provide notices and statements to TPR about certain events. The consultation closes on **27 October 2021** and the draft regulations are slated to come into force on 6 April 2022.

Notifiable events

The two proposed new notifiable events, which must be reported to TPR by the employer, are:

- a decision in principle by the employer to sell a material proportion of its business or assets; and
- a decision in principle by the employer to grant or extend a relevant security over its assets, where the grant or extension would result in the secured creditor being ranked above the scheme.

Notice and Statements

It is proposed that the requirement for an employer or person connected or associated with an employer, to give notices and statements to TPR will apply on:

- the intended sale by the employer of a material proportion of its business or assets, in respect of which the main terms have been proposed;
- the intended granting or extending of a relevant security by the employer over its assets, where the grant or extension would result in the secured creditor being ranked above the scheme in the order of priority for debt recovery, in respect of which the main terms have been proposed;
- the intended relinquishing of control by a controlling company of the employer company, in respect of which the main terms have been proposed, or where the controlling company relinquishes such control without a decision to do so having been taken, the relinquishment of control.

The statement (which must be provided to TPR and the trustees) must describe:

- the event, including, where relevant, the main terms proposed;
- any adverse effects of the event on the scheme;
- any adverse effects of the event on the employer's ability to meet its legal obligations to support the scheme;
- any steps taken to mitigate those adverse effects; and
- any communication with the trustees or managers of the eligible scheme about the event.

Comment:

The new requirements for notices and statements (previously referred to by the Government as "declarations of intent") are some of the key measures in the Pension Schemes Act 2021 intended to strengthen TPR's powers and protect DB pension schemes. Once in force they should give TPR and trustees early warning of corporate transactions which might harm schemes. TPR will be able to impose fines of up to £1m for failure, without reasonable excuse, to comply with the new requirements.

Guaranteed Minimum Pension Fixed Rate Revaluation

(23 September 2021)

The Government is seeking views on a proposed move from 3.5% pa to 3.25% pa for fixed rate revaluation of GMPs. This new rate would apply to formerly contracted-out members who leave pensionable service in the period 6 April 2022 to 5 April 2027. The consultation closes on **18 November 2021**.

Climate and investment reporting: setting expectations and empowering savers

(21 October 2021)

This Government consultation proposes adding new Paris alignment reporting to the existing climate reporting requirements. Trustees will have to, as far as they are able, calculate and disclose a portfolio alignment metric, setting out the extent to which investments align with the goal of limiting the increase in global average temperature to 1.5 degrees Celsius above pre-industrial levels. The consultation closes on **6 January 2022**.

It is proposed that this new requirement will apply from 1 October 2022 to schemes within scope of the Climate Change Governance and Reporting Regulations. This would include trustees of schemes with relevant assets of at least £5 billion on the first scheme year end date which falls on or after 1st March 2020, trustees of schemes with relevant assets of at least £1 billion on the first scheme year end date which falls on or after 1st March 2021 plus trustees of all authorised master trusts and authorised CDC schemes. Trustees of schemes in scope will have to report against the new metric within 7 months of end of the scheme year which is underway on 1 October 2022.

The Government is also consulting on new statutory and non-statutory guidance on stewardship and on expectations in relation to implementation statements (IS) and SIPs. The proposed guidance aims to meet four objectives:

- Improve the quality of SIP policies. The guidance aims to clarify DWP's intention that boilerplate statements in the SIP (for example, "we delegate ESG/voting/engagement to our asset managers") are insufficient.
- Develop best practice for IS reporting in relation to reporting engagement activities, voting behaviour and most significant votes.
- Clarify how schemes may use disclosures from other frameworks including UK Stewardship Code reporting.
- Improve consistency across schemes' reporting and practice.

Autumn Budget and Spending Review

(27 October 2021)

As expected, the Budget contained very little on pensions. The relevant announcements are:

- Suspension of the triple lock on state pensions: The earnings link for State Pension uprating will be suspended next year.
- Further changes to the DC charge cap to support investment in long-term assets: There will be consultation "before the end of the year" on further changes to the charge cap to better accommodate

performance fees and enable investments into long-term, productive assets.

- Top-up for low earners using Net Pay: In 2025-26 the government will introduce a system to make top-up payments in respect of contributions made in 2024-25 onwards directly to low-earning individuals saving in a pension scheme using a Net Pay Arrangement. A response to the Call for Evidence on pensions tax relief administration providing further details has been published.

New or revised documents were also been published relating to previously announced matters:

- Amendments to Scheme Pays legislation in relation to retrospective reporting.
- Expansion of the dormant assets scheme.
- Taxation of the public service pension reform remedy.

HMRC

Trust registration guidance

(updated 1 September 2021)

HMRC has substantially updated its guidance to reflect new requirements for the registration of express trusts with the Trust Registration Service (TRS). This will include EFRBS and some trusts established for children or other vulnerable beneficiaries. Registered pension schemes and trusts holding life or retirement policies are exempt from the requirements. (unless they are required to pay certain taxes). The deadline for registrations of non-taxable trusts which are not exempt and were in existence on or after 6 October 2020 is the 1 September 2022.

Trusts liable to the payment of tax should already be registering with TRS within 6 months of the end of the tax year in which the liability arises.

THE PENSIONS REGULATOR

Consultation on single code of practice

(updated 24 August 2021)

In March 2021, TPR published a consultation on the first stage of its work in consolidating its codes of practice. In October 2021, TPR issued an interim response which confirmed that it does not now expect to lay the new code in Parliament before spring 2022, and so it is unlikely to become effective before summer 2022.

Driving Value for Money in defined contribution pensions

(16 September 2021)

TPR and the FCA have published a joint discussion paper inviting views on developing a holistic framework to assess Value for Money (VFM) in all FCA and TPR regulated DC pension schemes. The aim is to promote consistent assessments on VFM to enable meaningful comparisons between schemes. Any comments should be provided by **10 December 2021**.

TPR and the FCA are proposing that schemes should provide further transparency on:

- investment performance;
- scheme oversight provided (including customer service levels such as data quality and communications); and
- costs and charges.

It is proposed that there should be a common framework for disclosures to allow for effective comparison by members and IGCs. The responses to the paper will also help inform the DWP's work on VFM in large schemes and on incentivising consolidation.

Criminal Offences Policy

(29 September 2021)

TPR has published its Criminal Offences Policy (COP) which provides guidance on its approach to the investigation and prosecution of the new criminal offences of 'avoidance of employer debt' and 'conduct risking accrued scheme benefits' in sections 58A and 58B of the Pensions Act 2004. The COP should be read in conjunction with TPR's Prosecution Policy, which covers its general approach to criminal investigations and prosecutions for all offences.

The COP confirms TPR's understanding that the new criminal offences do not have retrospective effect. TPR can only prosecute for acts that took place on or after 1 October 2021. However, it may take into account facts from before that date as part of its investigations, and targets may wish to rely on those facts in their defence.

A person will only commit an offence if they didn't have a reasonable excuse. The legal burden is on the prosecution (TPR) to prove the absence of a reasonable excuse. What amounts to a reasonable excuse in any particular case will be fact and circumstance specific.

There are three factors that will generally be significant in TPR's assessment of whether a person has a reasonable excuse:

- The extent to which the detriment to the scheme was an incidental consequence.
- The adequacy and timeliness of any mitigation provided to offset the detrimental impact.
- Where no, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact.

TPR's decision to investigate will be risk-based and will take into account a number of factors, such as the impact on the funding level of the scheme, whether there are any particular concerning features or behaviour and TPR's available resources. The COP includes a case study considering a transaction from the point of view of the employer, parent, bank, lender and customer.

For more detail on TPR's new criminal powers please see the **CMS Guide to the Pension Schemes Act 2021**.

Comment:

There has been great concern within the pensions industry, and the wider corporate world, that the new criminal offences are so broadly drawn that the threat of them could stall normal corporate activity. The general tone of this policy and the detailed examples and case study may allay some of those fears but corporates should still be cautious when engaged on anything other than "business as usual" activities which might bring them into the scope of these new powers.

Draft Code of Practice 12 (Contribution Notices)

(29 September 2021)

TPR has published a final draft of its revised Code of Practice on Contribution Notices (CN) together with code-related guidance. The draft Code covers the material detriment, employer insolvency and employer resources tests and sets out the circumstances in which TPR expects to issue a CN if it is of the opinion that one of the tests could be met. The circumstances are:

- Employer covenant is removed, substantially reduced or becomes nominal (any of the tests).
- Significant weakening of the scheme's creditor position (material detriment and/or employer insolvency tests).
- Some instances of paying a cash dividend or a return of capital by the sponsoring employer (material detriment and/or employer insolvency tests).

- Early redemption or repayments of other significant creditor balances, before they are contractually due, that favour other creditors to the employer over the scheme (material detriment and/or employer insolvency tests).

The guidance gives examples of matters which are unlikely to meet the tests including poor trading, selling assets at fair value and employer covenant being reduced but still covering the section 75 debt. Examples of matters likely to be materially detrimental include:

- Substitution of sponsor where the employer covenant becomes nominal.
- Disposal of business or asset where the employer covenant is reduced.
- Manufactured insolvency where the employer covenant is removed.

For more detail on TPR's new regulatory powers please see the **CMS Guide to the Pension Schemes Act 2021**.

Revised Clearance Guidance

(29 September 2021)

TPR has issued revised clearance guidance, replacing the 2008 version. It provides guidance on the voluntary process of obtaining a clearance statement which gives assurance that, based on the information provided, TPR will not use its powers to issue a contribution notice or financial support direction to the applicant in relation to a particular event. The revised guidance takes into account the two new contribution notice grounds (the employer resources test and employer insolvency test). A key change from the 2008 guidance is that it is no longer a requirement for the scheme to have a "relevant deficit" in order for an event to be a "Type A event" and so open to clearance.

Comment:

This revised Code of Practice and clearance guidance are further pieces in the jigsaw of the new powers given to TPR by the Pension Schemes Act 2021. Any corporate considering a transaction where a DB pension scheme might be affected should carefully consider the Code and guidance.

New enforcement policies consultation

(29 September 2021)

TPR is consulting on three draft policies concerning their enforcement powers. The consultation closes on **21 December 2021**.

Draft overlapping powers policy

This policy will apply where TPR has the option to pursue both criminal and/or regulatory powers in respect of the same set of circumstances. When choosing between powers TPR will take into account the nature and effect of each of the powers available and the outcome the use of each might achieve.

Draft monetary penalty powers policy

This draft policy considers TPR's new powers to impose high fines (up to £1m) for avoidance and in relation to information gathering.

Draft information gathering powers policy

This considers TPR's use of section 72 notices, interviews and inspections. The draft policy considers both voluntary and statutory requests for information. When requiring information, TPR will allow a reasonable period for compliance, taking into account the amount and complexity of information requested, the accessibility of that information, as well as any statutory time limits for the use of potential powers. It will also set out the method by which the information should be provided. The draft policy also includes information about interviews, inspections and the execution of warrants.

DC investment governance guidance - temporary gating of funds

(4 October 2021)

TPR has updated the section in its DC investment guidance to include the wording which was previously in its COVID-19 guidance (now archived) on the temporary closure ("gating") of funds.

MISCELLANEOUS

PASA

GMPe supplemental Guidance on Transfer Payments

(11 August 2021)

PASA's GMP Equalisation Working Group has published its GMP equalisation transfer guidance. It provides an update to the Methodology Guidance issued in September 2019. Its aim is to assist schemes and advisers to find a pragmatic approach to equalising historical transfers. It includes a chart illustrating the key steps in the process and gives practical suggestions for tracing former members and verifying data. The guidance considers both transferring and receiving Schemes.

GMPe Communications Guidance – Implementation Stage

(27 September 2021)

PASA has issued its second tranche "Implementation stage" guidance on GMPe Communications. The guidance outlines broad principles for trustees and contains sections on the member perspective, timing, content, planning for the data to use in communications and dealing with "business as usual" communications.

GMPe Anti-Franking Guidance

(29 September 2021)

PASA has published its GMPe anti-franking guidance. The guidance notes the types of member for whom anti-franking is particularly likely to be an issue, outlines the key issues for GMP equalisation (giving examples of three different 'techniques' for applying the anti-franking 'whole of service' test to post-1990 benefits) and includes detailed example member calculations.

Other organisations

TCFD: Implementing the Recommendations of the TCFD – Update

(18 October 2021)

The Task-Force on Climate-related Financial Disclosures (TCFD) has published an update to its guide to "Implementing the Recommendations of the TCFD", superseding the 2017 version. It provides both general and sector-specific guidance on implementing the TCFDs disclosure recommendations and forms the basis of the reporting requirements for pension schemes under the Climate Change Governance and Reporting Regulations.

Dates for diaries: Trustee training remains one of the most important ways of ensuring that trustees have the knowledge and understanding required to perform their duties. CMS runs regular trustee training days. If you would like to be updated of upcoming dates or have any other enquiries about this course, please contact Megan Thorogood (megan.thorogood@cms-cmno.com).