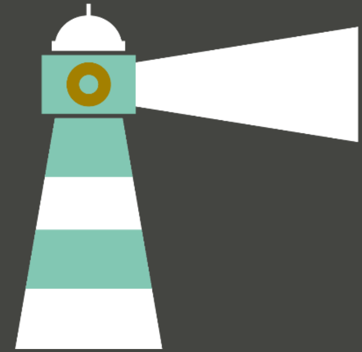
BRIEFING



What's Happening in Pensions

Issue 90 – August 2021

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PPF compensation: The Court of Appeal has given its ruling in appeals brought by the PPF and the Government in the *Hughes* case, concerning the calculation of PPF compensation and the application of the compensation cap. It found in favour of the PPF's proposed way of ensuring that compensation is at least as much as required following European Court judgments. But it found against the Government, upholding the High Court's decision that the PPF compensation cap is unlawful and must be disapplied.

Equality, diversity and inclusion: The Pensions Regulator has published its Equality, Diversity and Inclusion Strategy, setting out how it intends to embed an inclusive culture within its workplace and work with governing bodies of workplace pension schemes to help them become more diverse and inclusive in their decision-making. Separately, the main financial services regulators have published a discussion paper about proposed rules and guidance for firms on diversity and inclusion.

Climate change governance and disclosure regulations: Two sets of regulations have been finalised, together confirming the detail of the forthcoming climate-related governance, disclosure and reporting requirements for pension schemes.

Climate change – TPR consultation: The Pensions Regulator has launched a consultation on guidance in relation to compliance with the forthcoming climate-related requirements and on an associated new appendix to its monetary penalties policy.

Sustainability disclosures: In addition to the above, new sustainability disclosure requirements may be on the way for pension schemes and others. Further announcements in the run-up to the COP26 climate change conference should make matters clearer.

FCA - TCFD disclosures: The FCA is consulting on enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers. It is intended that the requirements for asset managers will meet the needs of pension schemes.

Long-term investment: The Prime Minister and Chancellor have written an open letter to institutional investors including pension scheme encouraging investment in long-term UK assets.

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DC regulations, guidance and call for evidence: The Government has published the response to its consultation on 'Incorporating performance fees within the charge cap' and parts of its consultation on 'Improving outcomes for members of DC pension schemes'. This confirms new governance and disclosure requirements for trustees relating to charges and the consolidation of smaller schemes. There is also a new call for evidence on consolidation nudges for larger schemes.

'Stronger nudge' to Pension Wise: The Government has published a consultation, 'Stronger Nudge to Pensions Guidance'. It proposes draft regulations that would require trustees to ensure that individuals who are seeking to access flexible benefits (broadly DC benefits), or seeking a transfer for the purpose of accessing them, receive Pension Wise guidance, unless they opt out.

Normal minimum pension age: The Government has published its response to the consultation on raising normal minimum pension age under the Finance Act 2004 from 55 to 57 on 6 April 2028, with some protections.

Pension Schemes Act 2021 – TPR powers: The Government has responded to its consultation on draft regulations under the Pension Schemes Act 2021 relating to the new contribution notice grounds and the Pensions Regulator's information gathering and fining powers.

GDPR – UK adequacy decision: The European Commission has formally approved a GDPR adequacy decision for the UK, meaning that that the UK's data protection regime is considered sufficient for the protection of personal data transferred from the EU.

Collective DC schemes: The Government is consulting on draft regulations under the Pension Schemes Act 2021 to allow collective defined contribution schemes to be operated, with specific new disclosure requirements also proposed.

'Scheme pays' extension: In order to facilitate the Government's *McCloud* remedies, concerning age discrimination issues in the public service pension scheme reforms, there are to be changes to mandatory 'scheme pays' deadline rules where pension input amounts are retrospectively increased.

Reporting to HMRC: HMRC Pension Schemes Newsletter 130 includes an update on suspended reporting requirements.

You may also be interested in the latest edition of Pensions Radar, our quarterly listing of expected future changes in the UK law affecting work-based pension schemes.

GMP equalisation/conversion

Working group guidance

The industry working group on GMP equalisation, chaired by PASA, has published a guidance note on GMP conversion. The guidance provides examples of how GMP conversion is being used for GMP equalisation by early adopters, explaining the issues they faced and how they addressed them.

The guidance, to which Travers Smith lawyers have contributed, is intended to help show how schemes might use GMP conversion to implement GMP equalisation in a proportionate and pragmatic way in the absence of further guidance or legislation from the DWP and HMRC. It outlines approaches to GMP conversion which the authors are aware either have been adopted or are actively being considered by early adopters, together with associated considerations.

Three common GMP conversion situations are considered, as follows, with worked examples looking at six example members in three different schemes:

- A bulk one-off exercise for existing pensioners and dependants
- An at-retirement process (normally alongside a bulk exercise as above) – this may be before or after GMP 'pensionable age'
- A bulk one-off exercise for members with a deferred pension

Section 2 includes useful summaries of the potential ancillary benefits of GMP conversion and of which schemes are more and less likely to use GMP conversion. It also notes that schemes that have used GMP conversion have so far tended to go forward with a "pseudo GMP", though of course without the inequalities, rather than taking the opportunity to reshape pension increase terms significantly (which could be similar to a pension increase exchange exercise but an involuntary one).

Other sections mention some disadvantages of GMP conversion, including potential implications in some cases of the requirement, post-conversion, for a 50% (in "value") spouse's pension.

As to tax, the guidance considers issues with the annual allowance and the potential loss of fixed protections and enhanced protection against the lifetime allowance charge. In the absence of HMRC guidance, it is suggested that schemes may wish to seek non-statutory clearance from HMRC. The examples illustrate how these issues are influencing and constraining the way in which GMP conversion is being applied and also include details of the responses schemes have received from HMRC in relation to certain aspects in their particular circumstances.

The guidance notes that in practice a relatively small number of cases of annual allowance issues have so far arisen. But it also notes that the impact of GMP conversion on members with fixed protection and enhanced protection (mainly non-pensioners in the latter case) can be very material. It reminds readers that there may be members eligible for fixed protection 2016 who have yet to apply for it.

Other PASA industry group guidance

In the launch webinar, Geraldine Brassett of PASA gave the following update on other forthcoming guidance from the GMP equalisation working group:

- Historic transfers guidance – in the next one to two months
- Anti-franking guidance – currently in final draft
- Further communications guidance – early autumn
- Administration Q&As – in the next four to eight weeks

All of the group's existing guidance can be found here.

Private member's bill

Separately, a private member's bill is seeking to make the GMP conversion legislation easier to use. The bill is scheduled to have its second reading on 26 November 2021 but has not yet been published. Non-Government bills do not often make it into law but this one might be uncontroversial and, if so, may not be opposed. We will monitor developments.

Axminster case – limitation, forfeiture and amendment

The High Court has considered issues around forfeiture of benefits and limitation periods for claiming benefits, in a case concerning the Axminster Carpets Group Retirement Benefits Plan: *Punter Southall Governance Services Limited v Jonathan Hazlett*. The judge, Morgan J, confirmed some of his decisions in the *Lloyds Banking Group* case (see our briefing note GMP equalisation: court ruling) and also considered new questions, including as to an amendment power restriction and the exercise of a trustee discretion after automatic forfeiture.

Whilst this case was not about guaranteed minimum pensions, it is of interest regarding issues that arise in the context of GMP equalisation.

The scheme is in a PPF assessment period. The Court was asked to approve a compromise of benefit arrears claims, which it did, and to answer key questions about issues that had arisen. The potential arrears and interest claims arose mainly due to questions about the validity of deeds amending pension increase provisions.

Key provisions

The scheme's rules originally said:

> *"Any monies payable out of the Plan and not claimed within six years from the date on which they were due to be paid may (at the Trustees' discretion) be applied:*

(i) in augmenting the benefits of those Members still in Service;

(ii) in reducing the Employer's contributions to the Plan, or

(iii) in payment of the expenses of the management and administration of the Plan."

A 2001 amendment replaced that rule with the following:

"If a Beneficiary fails to claim a benefit within six years of its becoming due, it shall be forfeited but the Trustees may at their discretion subsequently apply all or any part of such benefit:

(a) to the Beneficiary notwithstanding the forfeiture;

(b) in augmenting the benefits of Members still in Service;

(c) in reducing the Employer's contributions to the Scheme under Rule 10; or

(d) in payment of the expenses of the management and administration of the Scheme under Rule 41."

Limitation periods

Morgan J considered his *Lloyds* decision on limitation with the benefit of more extensive argument this time. He confirmed his decision that no limitation period again here applied under the Limitation Act 1980 because the beneficiaries' claims were for recovery of trust property. He held that "trust property" means property held on trust and there was no requirement for a claimant beneficiary to have any proprietary interest (i.e. a claim on particular assets). The word "recover" also did not necessitate any such requirement.

This analysis, he added, would not be relevant to any potential claim against the trustee which was in place before the current trustee because it was no longer in possession of trust property.

The 'forfeiture' clauses

The judge ruled:

- The original clause (quoted first above) did not operate to forfeit any benefit entitlement because it did not purport to do so. It appeared that the clause was intended to deal with surplus monies in the fund as a result of there being an untraced beneficiary. Ultimately there was no extinguishing of the benefit entitlement.
- The replacement clause (quoted second above) did, subject to the Pensions Act 1995 provisions on permitted forfeiture, operate to forfeit benefits unpaid (including benefits partially unpaid) and not claimed within six years. He added:
  - The forfeiture applies in respect of each instalment of benefit, if not claimed within six years of being payable, rather than just a failure to claim benefits at all.
  - A 'claim' in the context of the clause can generally only be made after the entitlement to a particular payment has fallen due, though there could be a continuing claim in respect of payments falling due after the original claim.
  - The word 'failure' does not mean that there has to be any fault on the part of the beneficiary or that the trustees have to be free from blame: it just means that there has been no claim for the benefit (or unpaid part of the benefit) within the six year period.

Amendment power restriction

The judge held that the amendment of the clause, which introduced the possibility of forfeiture, was not prohibited by a restriction to the scheme's amendment power, which prohibited amendments that *"would diminish the benefits … already accrued"*.

He decided that the amendment did not diminish the amount of benefits to which any beneficiary was entitled. It could not be said that it "would" be the case that a beneficiary would not claim benefits to which they are entitled. The forfeiture power was therefore validly introduced.

(Note, therefore, that the words "would or might" in an otherwise similar amendment power are likely to result in a different outcome. Note too that there is an exception to the section 67 Pensions Act 1995 restrictions on amending subsisting rights which allows the introduction of a forfeiture clause that complies with the forfeiture legislation.)

Contracted-out benefits confirmation

It had originally been expected that this case would consider the effect of there having been no section 37 Pension Schemes Act 1993 certificate when contracted-out benefits were amended, specifically whether or not this invalidated the amendments, but Morgan J decided that his approval of the compromise made this unnecessary.

Ultimately, the judgment only says that amendments concerning certain death benefits, non-spouse survivors' pensions and Inland Revenue limits rules did not need such certification because they were not included in the rights protected by the contracting-out legislation, so the key question remains unanswered.

Exercise of the post-forfeiture discretion

The judge considered what factors are relevant factors when the trustee considers how to exercise its post-forfeiture discretion. He said that it will be relevant how the situation arose, possibly including who was 'at fault' for the benefit not being paid or claimed, and the consequences of the discretion being exercised or not exercised. He commented:

> *"the first reaction of the Trustee should be to make good the earlier underpayments without further delay. However, rule 36 does not impose an obligation on the Trustee to act in that way and the Trustee retains a power to act, or not to act, in that way. As before, the Trustee could choose not to act that way if the other uses of the money permitted by rule 36 were considered to be more compelling or there were administrative difficulties to such an extent as to justify not exercising the power*.
>
> …
>
> *As to the position of the beneficiaries, subject to possible qualifications, the general position is that the beneficiaries were not in a position to know that they were being underpaid over the years. Therefore, they were not in a position to make a claim to prevent time running under rule 36. It can therefore be said that the forfeiture of their benefits under rule 36 is wholly undeserved. It can then be said that the Trustee ought to exercise its discretion to restore those benefits under rule 36.1(a) unless there are other considerations which override that approach."*

Other relevant factors include whether the beneficiary could reasonably have been expected to make a claim sooner, that the scheme is expected to transfer to the PPF and (perhaps) administrative difficulties in respect of particular beneficiaries.

When asked if it would be perverse for the trustee not to exercise its discretion in favour of beneficiaries, Morgan J accepted that there was a "powerful reason" for the trustee to do so but that administrative difficulties, and the cost of resolving them, needed to be considered.

Interest

Morgan J confirmed that it is open to a beneficiary who is owed arrears of pension to bring a claim for equitable compensation for breach of trust and the Court has its usual jurisdiction in equity to award interest on the compensation ordered to be paid. He reiterated that, as in *Lloyds*, the appropriate interest rate here is 1% above base rate.

There may be further argument on whether interest can be claimed by beneficiaries for instalments unpaid for more than six years: the judge was not sure that it could be but this was not decided.

PPF compensation

The Court of Appeal has given its ruling in appeals brought by the Pension Protection Fund and the Government in the *Hughes* case, concerning the calculation of PPF compensation and the application of the compensation cap. It found in favour of the PPF's proposed way of ensuring that compensation for members is at least as much as required following European Court judgments and also in favour of its proposals for spouses' and civil partners' pensions. But it found against the Government, upholding the High Court's decision that the PPF compensation cap is unlawful and must be disapplied.

PPF compensation: The European Court ruled in the *Hampshire* case that the insolvency protection required under European law is an individual minimum guarantee that the affected employee or former employee will receive at least 50% of the value of their accrued pension entitlement (see WHiP Issue 72).

The PPF had proposed to ensure that this was achieved by applying a one-off actuarial value test, rather than considering total lifetime payments, and by granting spouses and civil partners compensation of 50% of the member's compensation, even if this is less than 50% of what they would otherwise have received under the scheme rules. The Court of Appeal has upheld the PPF's appeal against the High Court's decision on these points (see WHiP Issue 83) though it noted that the actuarial assumptions used in the value assessment are not immune from challenge.

Compensation cap: The PPF compensation cap restricts compensation to (currently) 90% of £41,461.07 pa at age 65 and applies to individuals who were below normal pension age when their scheme entered PPF assessment. The High Court had ruled that the cap amounted to unlawful age discrimination (see WHiP Issue 83). The Court of Appeal dismissed the Government's appeal on that decision, meaning that the Government is required to disapply the cap. On the face of it, therefore, individuals should no longer have the cap applied. There could, however, be limitation period defences to claims for arrears of compensation.

The judge left open the option for further argument by the Secretary of State in relation to the effect of the end of the Brexit transition period but we understand that this is not being pursued.

There is also now a period in which applications to appeal to the Supreme Court can be made by the Secretary of State and/or the members, though we understand that the Secretary of State will not be appealing.

Equality, diversity and inclusion

The Pensions Regulator has published its Equality, Diversity and Inclusion Strategy, setting out how it intends to embed an inclusive culture within its workplace and work with governing bodies of workplace pension schemes to help them become more diverse and inclusive in their decision-making.

In particular, the strategy says that the Regulator will work with governing bodies of workplace pension schemes to encourage them to be more diverse and inclusive in their decision-making.

The Regulator has also published a blog post on this topic.

The Regulator was also instrumental in facilitating the creation of the new Board Diversity Industry Working Group and is partnering with it. As part of this work, the Regulator intends to set targets for the development of more diverse and inclusive trustee boards, building on its Future of Trusteeship work (see WHiP Issue 80).

The Working Group has four sub-committees. Travers Smith is represented on a number of them, including as co-chair of the Standards/Best Practice/Board Composition sub-group. You can read more about our approach to diversity and inclusion in the pensions industry here.

Separately, the three main UK financial services regulators, the Financial Conduct Authority, Prudential Regulation Authority and the Bank of England have issued a joint Discussion Paper which is intended to form the basis of proposed rules and guidance on diversity and inclusion in the financial sector. See our Financial Services and Markets team's briefing for more detail.

Climate change governance and disclosure regulations

Two sets of regulations have been issued, together confirming the detail of the forthcoming Pension Schemes Act 2021 climate-related governance, disclosure and reporting requirements:

- The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021
- The Occupational Pension Schemes (Climate Change Governance and Reporting) (Miscellaneous Provisions and Amendments) Regulations 2021

Both sets are in their previously published form. As previously announced, they will start taking effect on 1 October 2021, with the largest schemes and authorised master trusts being subject to the requirements first.

Please see our briefing note on the Act and WHiP Issues 87 and 89 for details of the requirements.

Climate change – TPR consultation

The Pensions Regulator has launched a consultation on guidance in relation to compliance with the forthcoming climate-related requirements noted above and on an associated new appendix to its monetary penalties policy.

The draft guidance says that the Regulator will be looking for clear evidence that trustees are taking proper account of climate change when taking decisions, with help from advisers, in a way that is consistent with the Task Force on Climate-Related Financial Disclosures (TCFD) recommendations. It also expects trustees to consider climate change risks and opportunities seriously and to have set a target to help them achieve their decided goals.

It sets out example steps to take and matters that must be reported regarding:

- Governance
- Strategy and scenario analysis
- Risk management
- Metrics
- Targets

plus a section on publishing the scheme's TCFD report and notifying members.

Regarding the requirements that are to be met "as far as you are able", the draft guidance says that the primary purpose of this provision *"is to recognise that all the information you need to carry out these activities may not be available immediately. As the investment industry adapts to the new data capture and reporting requirements, more information should become available."*. On this subject, the draft monetary penalties policy appendix says, in addition to the above and in the context of scenario analysis, *"This means that to meet this requirement, trustees must take reasonable and proportionate steps, taking into account costs and time commitments."*.

The draft appendix (and the guidance itself) proposes that failures to carry out underlying governance activities will be treated more seriously than a failure to make a disclosure. With regard to the minimum £2,500 mandatory penalty for failure to report, it also discusses penalties for repeated breaches, higher penalties for professional trustees, and the other circumstances in which higher penalties are likely to be levied. It adds that discretionary penalties for underlying governance failures may be levied in addition to a mandatory penalty. Regarding discretionary penalties, it outlines factors that will affect the amount, including a table giving some examples. These generally take account of the nature and impact of the breach.

This guidance sits alongside other existing guidance on these obligations. There is more detailed Government statutory guidance (currently awaiting Parliament's approval), to which the Regulator's draft guidance includes several links, and TCFD non-statutory guidance. Trustees are required to have regard to the former and will certainly find the latter useful.

The Regulator says that it will publish further guidance on how to consider climate-related risks and opportunities as part of the covenant assessment.

The consultation closes on 31 August 2021.

Sustainability disclosures

In addition to the above, new sustainability disclosure requirements may be on the way but there is currently a lack of clarity here. Further announcements in the run-up to the COP26 climate change conference to be hosted by the UK in November 2021 should make matters clearer.

An HM Treasury press release to accompany a Mansion House speech by the Chancellor of the Exchequer said:

> *"In his speech, the Chancellor announced plans to require companies, pension schemes, financial services firms and their investment products to report on the impact they are having on the climate and environment - as well as the risks and opportunities facing their business."*.

The published speech does not include that announcement but the press release itself refers to:

"new integrated Sustainability Disclosure Requirements [that] will bring together and streamline existing climate reporting requirements and go further to ensure consumers and investors have the information they need to make informed investment decisions and drive positive environmental impact. The Government intends to legislate to deliver this and will set out its approach to green finance regulation ahead of COP26.".

An HM Treasury policy paper published at the same time, "A new chapter for financial services" says that the Government will:

"Require businesses to disclose their risks and opportunities from, and impact on, the climate and the environment through implementing integrated Sustainability Disclosures Requirements (SDR). This economy-wide regime will cover real-economy corporates, financial services firms, and pension schemes. The government will work closely with the regulators to ensure strong coordination and a coherent approach across the economy, and will publish a roadmap setting out its approach to sustainability disclosures ahead of COP26."

This would appear, from the limited information currently available, to be the UK's version of the EU's Sustainable Finance Disclosure Regulation but details are currently sparse.

We discuss this topic in a blog post in our Sustainable Business hub.

FCA - TCFD disclosures

The FCA is consulting on enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers. As for the rules for occupational pension schemes, the new rules are consistent with TCFD recommendations. It is intended that the requirements for asset managers will meet the needs of pension schemes, including to allow them to comply with their duties, noted above.

The proposed 30 June 2023 disclosure deadline (for the largest firms) means that information will not always be provided in time for pension schemes' first disclosure obligations. Trustees may therefore need to rely on the "so far as you are able" qualification (see above).

The consultation closes on 10 September 2021 and the FCA aims to publish a policy statement later in 2021. For more detail on the requirements as they will affect asset managers, see our Financial Services and Markets department's briefing.

Separately, the FCA is also proposing to extend the application of its climate-related disclosure requirements for commercial companies with a UK premium listing to issuers of standard listed equity shares (excluding standard listed investment entities and shell companies).

Long-term investment

The Prime Minister and Chancellor of the Exchequer have written an open letter to institutional investors, including pension schemes, calling for an "Investment Big Bang" to drive recovery and boost Britain's long-term growth. It encourages more investment in long-term UK assets.

Separately, the Pensions Regulator will reportedly now not include in its forthcoming single code of practice an expectation that *"Unless there are exceptional circumstances, governing bodies should ensure no more than a fifth of scheme investments are held in assets not traded on regulated markets"*. This was proposed in the Regulator's consultation earlier this year (see WHiP Issue 88). Pension schemes will nevertheless have to comply with the requirement in the 2005 investment regulations that scheme assets *"must consist predominantly of investments admitted to trading on regulated markets"*.

DC regulations, guidance and call for evidence

The Government has published the response to its consultation on 'Incorporating performance fees within the charge cap' (see WHiP Issue 88) and parts of its consultation on 'Improving outcomes for members of DC pension schemes' (see WHiP Issue 84). This confirms new governance and disclosure requirements for trustees, to apply from 1 October 2021

except as noted below.

- **Consolidation and value for members:** In order to encourage the consolidation, where appropriate, of smaller DC schemes, trustees of schemes with less than £100 million in assets that have been operating for at least three years will be required to undertake an annual detailed "value for members" assessment of costs and charges. They will have to report on the assessment in the chair's governance statement in their annual report and also in the annual scheme return to the Pensions Regulator. If the trustees conclude that the scheme does not offer good value, they must outline what they intend to do about that – for example, make improvements or take steps to consolidate.

  Following consultation feedback, the first of these assessments will now not have to be undertaken until the first scheme year that ends after 31 December 2021.

  Hybrid schemes with DB as well as DC benefits are in scope if their total assets are valued at less than £100 million - but in that case the assessment will only be required in relation to the DC element of those benefits. Schemes in winding-up are exempt but only if they have notified the Pensions Regulator of the winding-up before the chair's statement is due.

  Alongside the consultation response, the Government has issued a further call for evidence on barriers to greater scheme consolidation in the DC pension market. This is aimed at schemes with assets between £100 million and £5 billion. The Pensions Minister says that he does not intend to stop at £5 billion.

- **Net investment returns:** The Government will amend legislation to require trustees of 'relevant schemes' (i.e. schemes providing money purchase benefits other than just from AVCs) to state in the chair's statement the investment returns net of costs and charges for the default arrangement and also self-selected funds.

- **Illiquid assets - performance fees and look-through:** Amendments to the charge cap regulations will allow DC schemes to smooth any performance fees over a five year period when assessing their default arrangement charges against the charge cap. There are some drafting changes to the original proposals here. The Government accepts that this is only part of what is required in order for pension schemes to invest more in illiquid assets.

  On the question of look-through for closed-ended funds and pooled investment vehicles, there will be an announcement to Parliament on next steps. The Government accepts that *"the current requirement needs to be clarified and may need to change to remove the requirement to look-through"*.

- **Costs and charges disclosure guidance:** Some further changes are made to the statutory guidance, 'Reporting of costs, charges and other information: guidance for trustees and managers of relevant occupational schemes'. These include the removal of the need for trustees to publish signed versions of relevant documents.

These measures will be implemented by The Occupational Pension Schemes (Administration, Investment, Charges and Governance) (Amendment) Regulations 2021, which have been laid before Parliament. Subject to parliamentary approval, they will come into force on 1 October 2021.

Confirmed new statutory guidance on completing the 'value for members' assessment and the reporting of net investment returns, and the above-mentioned revised statutory guidance on reporting of costs and charges will come into effect on the same date.

'Stronger nudge' to Pension Wise

The Government has published a consultation, 'Stronger Nudge to Pensions Guidance'. It proposes draft regulations that would require trustees to ensure that individuals who are seeking to access flexible benefits (broadly DC benefits), or seeking a transfer for the purpose of accessing them, receive Pension Wise guidance, unless they opt out.

The draft regulations seek to amend the transfer legislation in the Pension Schemes Act 1993 and the disclosure requirements in the 2013 Disclosure Regulations.

The requirement will apply in respect of members aged 50 or over and also survivors. It will not apply where the purpose of the transfer is consolidation (though we note that under the draft regulations that is only the case if the consolidation transfer is to an occupational pension scheme) or where the individual has received Pension Wise guidance or regulated financial advice on the proposed transaction within the previous 12 months. There is no exemption for small pots.

Where the requirement applies, the existing Pension Wise signposting requirements will not apply but trustees will have to give information about the available Pension Wise guidance and offer to book an appointment. The Government acknowledges that these requirements may apply alongside the forthcoming requirement, in some cases, to refer individuals requesting a transfer to scams guidance (see WHiP Issue 89).

Trustees may not act on the individual's instructions unless they have received the guidance or expressly opted out of doing so. This generally needs to be done in a free-standing communication (except where the application is for a serious ill-health lump sum).

Trustees will be required to keep records about these matters.

Responses must be received by 3 September 2021. The draft Regulations are expressed to come into force on 6 April 2022.

The FCA recently consulted on similar rules for contract-based pension providers (see WHiP Issue 89).

Normal minimum pension age

The Government has published its response to the consultation on raising normal minimum pension age under the Finance Act 2004 from 55 to 57 on 6 April 2028, with some protections.

Draft legislation for the next Finance Bill has also been published. Comments are requested by 14 September 2021.

Normal minimum pension age is the lowest age at which benefits can generally be taken without incurring an unauthorised payments tax charge.

As originally proposed (see WHiP Issue 87), the increase will be a step change: those born after 5 April 1973 are affected. Protections are proposed for members with unconditional rights under scheme rules as at 11 February 2021 (the publication date of the original consultation) to take benefits earlier than age 57. All of any such member's benefits in that scheme, including future accruals, will be protected. HMRC will analyse example scheme rules in a future update to the Pensions Tax Manual but some schemes will need specific advice.

These rights do not include rights subject to consent. It is relatively unusual for DB scheme members to have an absolute right to draw benefits in their fifties. DC scheme members are therefore more likely to benefit from the transitional provisions than members of DB schemes.

Further protection measures have been added in order to address concerns raised by respondents:

- Individual transfers of benefits will now retain any right to draw benefits from age 55, ("PPA") but on a ring-fenced basis. (Block transfers protections also apply, as they already do for protected pension ages below age 55.)
- In order to address questions raised by respondents (including (a) the date by when someone needs to have joined an age 55 right scheme in order to be protected and (b) members who are already transferring and unknowingly losing age 55 rights), the Government will *"introduce a window to give individuals an opportunity to join pension schemes which offer a PPA (i.e. the scheme rules on 11 February 2021 already confer an unqualified right to take pension benefits below age 57 and they join that scheme by 5 April 2023)"*.

  Schemes will be expected (though apparently not required by legislation) to tell members whether or not they have an unqualified right to draw benefits from age 55.

  There would appear to be a risk here of some members making poor decisions to opt out and transfer out of schemes whose rules did not in February 2021 include an explicit right to draw benefits from age 55.
- The Government is giving thought to what to do about unprotected individuals who in April 2028 will be over age 55 but not yet 57. Without transitional protection, they would become entitled to draw benefits under the tax legislation when they reach age 55 and then lose that right for a period of time, until they reach age 57.

Existing protected pension age rules, from when the normal minimum pension age of 50 was introduced in April 2006 and when it was raised from 50 to 55 in April 2010, will continue to apply in their current form. There are some differences from those earlier protected pension age regimes in the now proposed age 55 protected pension age: there will be flexibility as regards drawing benefits while still working and drawing benefits in tranches, i.e. whereby protection will not be lost, and the easement above regarding individual transfers will not apply.

The increase will not apply to members of the police, fire service and armed forces pension schemes.

Pension Schemes Act 2021 – TPR powers

The Government has responded to its consultation (see WHiP Issue 88) on draft regulations under the Pension Schemes Act 2021 to:

- outline the 'employer resources test' for one of the new contribution notice grounds; and
- set out information that interview notices issued by the Pensions Regulator must contain; modify how inspection powers may be used in multi-employer schemes; and set out penalty rates for non-compliance with information gathering requests.

Final regulations have been laid before Parliament for approval and are expected to take effect on 1 October 2021.

Please see our briefing note on the Act for more details.

CN employer resources test: This is a new ground under which the Pensions Regulator may be able to issue a contribution notice, requiring an employer or associated or connected party to make a payment to a defined benefit scheme. The test is whether an act or failure to act reduced the employer's resources by an amount that is material, relative to the estimated section 75 employer debt. As for the other contribution notice grounds, a reasonableness requirement applies.

Despite half of respondents calling for a more holistic approach to assessing employer resources for this purpose, the Government has confirmed the approach on which it consulted. This is based on normalised profits before tax. Requests for EBITDA to be used instead were rejected, with the Government noting that there is no EBITDA accounting disclosure requirement and any such figures are not required to be audited. The Government suggests that consideration of employer resources in the round will be a factor when the Regulator considers the reasonableness requirement for contribution notices.

The final regulations seek to address issues for employers that do not seek profits, namely charities and not-trading-for-profit organisations.

It is confirmed that the commencement order for the relevant provisions of the Act will ensure that there is no retrospective effect, which might otherwise have been an issue due to the six year look-back period for contribution notices.

There may be more and updated Pensions Regulator guidance in this area.

Information gathering powers: Here, the regulations add detail to the Pensions Regulator's powers under the Act, in particular:

- the information to be included in a notice requiring a person's attendance for an interview;
- the powers to inspect premises; and
- fixed penalties (£400) for non-compliance and escalating penalties for further non-compliance (£200 per day for individuals and up to £10,000 for others).

The Regulator will be updating its monetary penalties policy and there will be guidance on its use of the information powers, including as regards criminal investigations.

GDPR – UK adequacy decision

The European Commission has formally approved a GDPR adequacy decision for the UK, meaning that that the UK's data protection regime is considered sufficient for the protection of personal data transferred from the EU.

EU-based data controllers and processors subject to GDPR will be able to continue to transfer personal data to the UK, without having to put in place additional safeguarding mechanisms. There are some caveats, however, not least (in the first of its kind for an adequacy decision) a sunset clause which limits the decision to four years, after which time the decision will expire unless renewed. This will require a fresh review of UK laws and practices at that time.

The UK's Information Commissioner had already given a similar (though open-ended) declaration in relation of transfers of data from the UK to the EU.

Collective DC schemes

The Government is consulting on draft regulations under the Pension Schemes Act 2021 to allow collective defined contribution (CDC) schemes to be operated, with specific new disclosure requirements also proposed.

Under a CDC scheme, target defined benefits are communicated but not promised. Investments are pooled (not selected by members) and pensions are paid from the scheme rather than by annuity purchase. Adjustments are made to pensions in payment and to benefit targets, based on the funding position from time to time.

The permitted model will be an occupational pension scheme for single or associated employers, which for the time being rules out commercial operators. The legislation is being introduced to allow Royal Mail to set up such an arrangement for its staff, by agreement with the Communication Workers Union. Other employers may use the same framework but will not have design flexibility.

Arrangements will need to be authorised, for a substantial fee, by the Pensions Regulator under requirements not yet published but expected to be similar to those that apply under the master trusts authorisation regime.

The draft regulations set out an authorisation and supervision regime and were developed in close consultation with the Pensions Regulator. They also include provisions on valuations and benefit adjustments, and on triggering events and continuity. The draft disclosure regulations amendments focus on ensuring that members understand that benefits are targeted, not guaranteed.

The consultation closes on 31 August 2021. No timescale for implementation has been announced.

'Scheme pays' extension

In order to facilitate the Government's *McCloud* remedies, concerning age discrimination issues in the public service pension scheme reforms, there are to be changes to mandatory 'scheme pays' deadline rules where pension input amounts are retrospectively increased.

Where an individual has an annual allowance charge of £2,000 or more in respect of pension input in a tax year of more than £40,000 (even if their annual allowance is lower, due to the taper for high earners), mandatory 'scheme pays' is available. Under this option, a scheme can be required by the member to pay their annual allowance charge and reduce their benefits by an equivalent amount. It generally has to be applied for by the 31 July in the year following the year in which the relevant tax year ended (e.g. for 2020/21 pension input, by 31 July 2022). The scheme then has to pay the charge as part of its next quarterly 'Accounting for Tax' process. (Voluntary 'scheme pays' is possible in other circumstances but these changes do not apply to that.)

The proposals envisage that some members of the public service schemes will become subject to a new or higher annual allowance charge in relation to a past tax year when their chosen *McCloud* remedy is applied. Where, therefore, a scheme revises an annual allowance pension input amount calculation and gives the member a new pension savings statement, the proposed changes will extend:

- the deadline for the member to apply to a scheme for mandatory 'scheme pays', where otherwise the deadline would in many cases already have passed; and
- similarly, the deadline for the scheme administrator to report and pay the annual allowance charge.

The changes are to be backdated to 6 April 2016. They are generally applicable: i.e. they do not only apply to the public sector schemes, so there may be some circumstances in which members of private sector schemes can make use of them.

Draft legislation for the Finance Bill 2022 has also been published. Comments are requested by 14 September 2021.

Reporting to HMRC

HMRC Pension Schemes Newsletter 130 includes the following update on suspended reporting requirements:

> *"In Pension schemes newsletter 128 HMRC told you that the temporary changes to some pension processes would be extended until 30 June 2021. These were to help scheme administrators during the coronavirus (COVID-19) pandemic.*
>
> *We've reviewed the temporary changes and are extending the following until 31 October 2021:*
>
> - *APSS105 relief at source repayment claims*
> - *APSS106 relief at source repayment claims*
> - *APSS590 relief at source declaration*
> - *submitting the APSS107 registered pension schemes annual statistical return without a signature*
>
> *All other temporary changes listed in pension schemes newsletters 118, 119, 120, 121 and 124 will end on 30 June 2021 as expected.*
>
> *We'll keep you updated on any further changes in future pension schemes newsletters."*

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