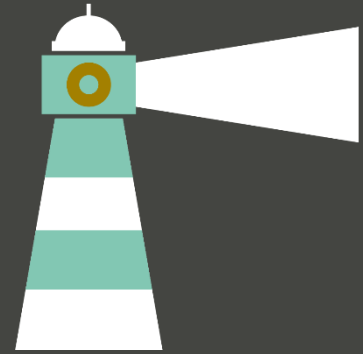


What's Happening in Pensions

Issue 103 – July 2023



[Travers Smith Pensions Sector Group](#)



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Pensions dashboards: New draft regulations provide for a single statutory deadline of 31 October 2026 for schemes to connect to the pensions dashboards ecosystem. But forthcoming guidance, to which trustees must have regard, will specify earlier expected connection dates. PASA has published new value data guidance. A new statute prohibits trustees from being reimbursed from scheme assets for dashboards compliance fines.

Contracted-out scheme amendments: The High Court has ruled on consequences of amendments having been made after April 1997 to benefit terms in a DB contracted-out scheme without obtaining the actuary's written confirmation that was required by section 37 of the Pension Schemes Act 1993. The potential consequences of the judgment are severe but further developments might help the scheme and other schemes that have similar issues.

LDI – Parliamentary committee report: Parliament's Work and Pensions Committee has published its report on DB pension schemes with liability driven investments. Among other things, it calls for work on the new DB scheme funding regime to be halted until the impact, especially as regards economic stability, has been fully assessed.

TPR guidance on employer distress: The Pensions Regulator has refreshed its guidance from November 2020 on protecting schemes from sponsoring employer distress.

Capita data breach: The Pensions Regulator issued a short statement to trustees on 12 May 2023 regarding the cyber-attack on Capita.

TPR blog posts: Louise Davey of the Pensions Regulator has written blog posts on: investment volatility, especially in the gilts market, and the impact on DC savers; and the Regulator's plans for checking compliance with TCFD disclosure requirements.

Transfer conditions regulations: The Government has published its 18-month review of the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021. There will be further discussions about concerns regarding issues with particular red and amber flag triggers.

Corporate Governance Code: The FRC has published for consultation proposed revisions to the UK Corporate Governance Code.

Retained EU Law (Revocation and Reform) Act 2023: The main sunset clause in the Retained EU Law (Revocation and Reform) Bill has been removed but the bill, now an Act, will still give ministers wide powers with regard to retained EU law.

PENSIONS RADAR: 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. A new issue is due later this month.

SUSTAINABILITY MATERIALS: Our [Sustainable Business Hub](#) includes a section on [ESG and sustainable finance issues for pension schemes and their sponsors](#). See also our latest [ESG Newsletter](#).

COVENANT: We have recently published a website article '[Ten covenant questions for DB scheme trustees](#)'. This discusses questions that trustees should always be asking themselves when considering their employer covenant and any proposed corporate activity within the employer's group.

Pensions dashboards

Connection timetable

The pensions minister has made a [written statement](#) to Parliament about the delayed requirement for schemes and personal pension providers to connect to the pensions dashboard ecosystem. Subject to approval of amending regulations by Parliament (see below), there will now be a single statutory connection deadline of 31 October 2026 for all schemes that have 100 or more non-pensioner members (now to be measured as at the end of the scheme year falling between 1 April 2023 and 31 March 2024). But guidance, to which trustees must have regard under the legislation, will include earlier expected staged connection dates.

Draft [amending regulations](#) to achieve the change have been published. These require the approval of both Houses of Parliament.

The Pensions Regulator has updated its [initial guidance](#) to reflect the announcement. We await its guidance on staging dates. An FCA announcement for personal pension providers is also expected: in the meantime, it has added a short [update](#) to its web page.

We are updating our '[10 actions for getting to grips with pensions dashboards](#)' website article to reflect the latest announcement. We also have a series of [video recordings](#) on this topic, featuring guest industry experts.

Value data guidance

The Pensions Administration Standards Association (PASA) has published [Dashboards Values Guidance](#), following an [update on co-ordinating AVC information](#).

This Guidance is designed to provide trustees, managers, sponsors, administrators and providers with 'good practice' approaches to providing value data to pensions dashboards. The Guidance is designed for use by both DB and DC schemes and covers 20 topics including possible approaches for dealing with issues such as late retirements, underpins, partial retirements and split normal retirement ages.

Indemnification of fines prohibited

[The Pensions Dashboards \(Prohibition of Indemnification\) Act 2023](#) has received Royal Assent. It makes it a criminal offence for trustees to reimburse themselves out of scheme assets for pensions dashboards penalties (as it was already for penalties imposed by the Pensions Regulator for other pensions law civil offences).

This is achieved by an amendment to section 256 of the Pensions Act 2004 to include reference to the dashboards legislation. The amendment was accidentally left out of the Pension Schemes Act 2021, under which the pensions dashboards legislation was introduced.

Contracted-out scheme amendments

In [Virgin Media Limited v NTL Pension Trustees II Limited and others](#), the High Court ruled on consequences of amendments having been made to benefit terms in a DB contracted-out scheme after 5 April 1997 without obtaining the actuary's written confirmation that was required by section 37 of the Pension Schemes Act 1993 (until contracting-out was abolished in April 2016). The potential consequences of the judgment are severe but further developments might help the scheme and other schemes that have similar issues.

In this case, a 1999 deed purported to make adverse amendments to the scheme's deferred pension revaluation provisions regarding future accruals. Under section 37 of the Pension Schemes Act 1993 and underlying regulations, the rules of a salary-related contracted-out scheme could not be altered in relation to any 'section 9(2B) rights' (broadly, all benefit rights in a salary-related contracted-out scheme other than from member voluntary contributions) unless the actuary had confirmed to the trustees in writing that they were satisfied that the scheme would continue to satisfy the contracting-out 'reference scheme test' applicable at that time. These provisions were a feature of the legislation between 6 April 1997, when the reference scheme test was introduced, and 5 April 2016, when contracting-out was abolished. From 6 April 2013, however, the text clearly only referred to amendments to future service benefits.

The parties had not found such a confirmation at the time the case was heard but were still looking for evidence that it had been given. The Court was asked to proceed on the basis that none would be found and to determine the consequences of that being the case. In particular, Virgin Media asked the Court to determine whether this meant that

the 1999 revaluation amendment was void. And if so, did this apply only in respect of benefits accrued before the amendment or also to benefits accrued thereafter (i.e. was the confirmation only backward-looking or also forward-looking)? It also asked if amendments beneficial to members would also be void or whether this would only be the case for adverse amendments.

Mrs Justice Bacon held that:

- The amendment is invalid and void if there was no written actuarial confirmation.
- Section 37, and so the above finding, applies to both accrued rights and future service benefits (before the 2013 change to the legislation noted above).
- Section 37, and so the above findings, does not only apply to amendments that are or might be adverse to beneficiaries.

This meant that the revaluation changes would, if there were no confirmation, be ineffective and that benefit improvement amendments can also be void.

The judgment indicates that this outcome will cost the scheme around £10 million, in the absence of evidence of a written confirmation having been given. It is therefore very likely that an appeal is being considered. The Court could also be asked to consider further questions, such as whether a confirmation given after the event – perhaps now - could suffice.

Clearly, this judgment has a potentially very significant impact on other schemes too. The contracting-out legislation expressly allows the Government to make retrospective regulations to validate amendments that are void due to the absence of such written confirmation. Depending upon the outcome of any further decision and appeal, therefore, the Government is likely to be asked by industry bodies to take action - for example to avoid the granting of windfall benefits in cases where actuarial confirmation could have been obtained but appears not to have been. It may or may not wish to do so.

LDI – Parliamentary committee report

Parliament's Work and Pensions Committee has published its [report](#) on DB pension schemes with liability driven investments (LDI).

It recommends that, in light of the Bank of England Financial Policy Committee's (FPC) recommendation for the Pensions Regulator to take account of financial stability, the Government and Pensions Regulator should halt their existing plans for a new DB funding regime. They should do this, it says, at least until they have produced a full impact assessment for the proposals including the impact on financial stability and on open DB schemes. On financial stability, the Work and Pensions Committee's principal concern is the risk, under the proposed new regime, of schemes' increased "herding" towards the same investments.

Other recommendations include:

- The Government should work with the Pensions Regulator and the PPF to produce, by the end of 2023, a detailed account of the impact on pension schemes of the autumn 2022 LDI episode.
- The Pensions Regulator should require trustees to report certain data on their use of LDI and should develop a strategy for engaging with schemes based on the results more closely.
- The Regulator should work with the FCA to review whether the guidance the FCA issued to LDI funds in April 2023 has been implemented effectively and is providing trustees with the simple mechanism for monitoring LDI that the FPC said was needed.
- The Government and the Pensions Regulator should report back to the Committee by the end of October 2023 on how they plan to monitor whether LDI resilience is being maintained.
- In addition to putting in place mechanisms to provide real-time warning of reductions in LDI resilience, the Government and the Pensions Regulator should consult on whether introducing disclosure requirements on pension schemes relating the use of LDI, through the annual report or investment statement, would help improve standards of governance.

The Government has two months in which to respond.

For more on this topic, see our recent website briefing '[Lessons from the LDI crisis: new TPR and FCA guidance on enhancing the resilience of LDI](#)'.

TPR guidance on employer distress

The Pensions Regulator has refreshed its [guidance](#) from November 2020 on protecting schemes from sponsoring employer distress. The update was announced in a [blog post](#) by Nicola Parish, which puts the guidance in context vis-à-vis the current economic environment and stresses the importance of covenant monitoring.

The changes are not substantial. The Regulator lists the key points as follows:

- *"All trustees should adopt a fully documented **integrated risk management** (IRM) approach to their scheme, with workable contingency plans and suitable triggers in place.*
- *Practising IRM will highlight problems early on, and the sooner trustees act, the greater the prospects of protecting the scheme's position. Trustees should regularly review these risk management and governance procedures to make sure they're fit for purpose.*
- *Engaging regularly with the employer and with other creditors (where applicable) will help trustees to identify and manage key risks early on.*
- *If trustees delay putting robust scheme protections in place, other stakeholders, such as lenders, will be in a better position to exert control over and extract value from a distressed employer, potentially to the detriment of the scheme.*
- *Trustees should remain alert to pensions scams or unusual transfer activity and prepare a communications strategy to support savers when they are facing uncertainty.*
- *If an employer is facing the prospect of insolvency, trustees should refer to the Pension Protection Fund (PPF)'s **contingency planning guidance for employer insolvency**.*"

On **Integrated risk management**, the guidance includes sections on: understanding the legal obligations to the scheme and the possible outcomes of employer insolvency; ensuring effective risk management processes are in place; reviewing scheme governance (including skills and experience, conflict management, record-keeping and information sharing); monitoring covenant; and seeking advice.

Where an employer is **showing signs of distress**, the guidance includes content on: identifying warning signs (with an Annex listing examples); increasing the frequency of covenant monitoring; performing a detailed review of the scheme's position; reviewing investment strategy; understanding the position of other creditors and what they might do; considering employer requests to defer contributions or release security; information sharing; possible corporate activity in a distressed situation; communications with scheme members; and being alert to scams and unusual transfer activity. Another Annex contains examples to illustrate how a scheme's position can be worsened by corporate activity and what trustees can do to protect the scheme's position.

Where the employer is **facing the prospect of insolvency**, the guidance refers trustees to the PPF's contingency planning guidance (last updated in January 2023). The Regulator's guidance has a section on restructuring plans and moratoriums under the Corporate Insolvency and Governance Act 2020 and reminds trustees of the notifiable events reporting requirements. (We still await the outcome of the Government's September 2021 consultation on expanding the notifiable events regime, from a date to be confirmed.)

A third Annex offers a summary checklist for trustees covering all of the above.

Throughout, there are references to the desirability in many situations of taking advice.

Capita data breach

The Pensions Regulator issued a short [statement](#) to trustees on 12 May 2023 regarding the recent cyber-attack on Capita and the possible impact on pension schemes and their members.

The statement says:

"Capita has recently experienced a cyber security incident and it is now known that some data has been exfiltrated from their servers.

As trustees, you are responsible for the security of your members' data. If you use Capita's services, you should check whether your pension scheme's data could be affected. Make sure you keep communicating with Capita as the situation evolves.

This situation is likely to cause concern to members and you should be prepared to answer their queries. You should contact your members proactively to warn them about pension scams and keep them updated while you confirm whether a data breach has taken place. You should also monitor increased or unusual transfer requests.

If there has been a data breach in your scheme, you may need to notify affected individuals and should direct them to data breaches guidance for individuals from the National Cyber Security Centre. You may also need to notify us and the Information Commissioner's Office.

This incident shows the importance of having a robust cyber security and business continuity plan in place. Make sure you have read our cyber security guidance and check that your own plans are up to date.

We may engage with you further to understand the steps you have taken and what progress you have made."

(The statement include links to various pieces of guidance – please use the link above to access it.)

TPR blog posts

DC volatility

Louise Davey of the Pensions Regulator has written a [blog post](#) calling on DC trustees to use Pensions Regulator guidance to protect savers who are close to retirement and could be impacted by economic volatility depending on their applicable investment strategy. She also wants trustees to be prepared for member concerns about falls in investment performance.

The piece focuses on investments in bonds, especially gilts, and their reductions in value following the September 2022 'Mini-Budget' and currently high interest rates and price inflation. Trustees are told to ensure that bond investments align with member choices at retirement and that their default pre-retirement strategy is targeting the right outcome and is fit for purpose in the current market environment.

Ms Davey notes that many, especially older, members receiving annual benefit statements in the coming months can be expected to be concerned about investment performance. Trustees should therefore, she says, provide more up-to-date context in annual statements and supporting materials and try to deter members from making "knee-jerk decisions".

She concludes by saying:

"The annual benefit statement cycle is an important opportunity to explain the implications and while trustees cannot give savers financial advice, they should signpost them towards sources of appropriate advice and guidance, notably Pension Wise and MaPS, to improve the chances of savers making good decisions and realising their retirement goals."

TCFD disclosures

Ms Davey has also written a [blog post](#) to explain why ignoring environmental, social and governance (ESG) factors is no longer an option for trustees. In autumn 2023, the Regulator will begin a two-stage regulatory initiative to check compliance with the statutory requirements.

This will be in two phases:

- Checking that all trustees subject to the 'TCFD' requirements have published their statements of investment principles and implementation statements and included the required information.
- Reviewing a cross-section of these disclosures. "This will be a qualitative review and only in relation to the climate, ESG and wider sustainability related provisions included in these documents."

Ms Davey notes that some schemes' disclosures are "vague and generic" and wants to see that change. The Regulator will also look to publish examples of good practice to help other schemes to improve their future disclosures.

Transfer conditions regulations

The Government has published its 18-month review of the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021. These are the regulations that added new conditions to the statutory transfer right, including the red and amber flag regime, with a view to protecting against pension transfer scams. (See our briefing ['Pension scams: new statutory transfer right restrictions'](#) for more detail.)

The Government notes industry concerns about the overseas investment amber flag and transfer incentive red flag but has not yet decided what, if anything, to do about them. It will conduct further work with the industry and the Pensions Regulator to consider if changes could be implemented to the regulations to improve the pension transfer process, without undermining the policy intent. No timescale is indicated.

Corporate Governance Code

The FRC [has published for consultation](#) proposed revisions to the UK Corporate Governance Code. These build on themes set out in its Position Paper, Restoring Trust in Audit and Corporate Governance, published on 12 July 2022. The Position Paper was published in response to the BEIS consultation paper, Restoring Trust in Audit and Corporate Governance, launched on 18 March 2021, and the government's response on 31 May 2022.

In summary, proposed amendments include, among others:

- That all significant director appointments should be listed in the annual report, describing how each director has sufficient time to undertake their role effectively in light of other commitments, with annual board performance reviews considering directors' other commitments and ability to discharge responsibilities.
- Proposals to strengthen the Code in relation to diversity and inclusion (for example, appointments and succession plans should promote equal opportunity, and diversity and inclusion of protected and non-protected characteristics).
- Adopting certain recommendations of the Chartered Governance Institute's 2021 review of the effectiveness of independent board evaluation in the UK listed sector.
- Giving the audit committee responsibilities for: developing, implementing and maintaining the audit assurance plan and engaging with shareholders, with the annual report describing the committee's approach; monitoring the integrity of narrative reporting, including sustainability matters, and describing its work in the annual report; and promoting effective competition during the tendering for external auditors.
- Removing duplication following publication of the Minimum Standard for Audit Committees in relation to External Audit.
- Making the board responsible for maintaining the effectiveness of the risk management and internal control framework.
- Retaining going concern and amended viability statement provisions for non-PIE companies.
- Introducing an annual report board declaration of whether the board can reasonably conclude that the company's risk management and internal control systems have been effective throughout the reporting period.
- Highlighting the importance of aligning remuneration outcomes to company performance, purpose and values, with a specific mention of ESG objectives.
- That director contracts and other documents covering director remuneration should include malus and clawback provisions, with the annual report on remuneration including a description of these.

- Revisions intended to improve reporting on executive remuneration policies.
- That the annual report should describe how environmental and social matters are taken into account in board strategy, including climate ambitions and transition planning.

The deadline for responses to the consultation is 13 September 2023.

Retained EU Law (Revocation and Reform) Act 2023

The [Retained EU Law \(Revocation and Reform\) Bill](#) has received Royal Assent and is now an Act.

As widely reported, the Government [formally announced](#) a reversal of policy on the sunset clause in the bill. It tabled an [amendment](#), which was agreed, to remove the bill's main 'sunset' provision. Under that provision, reams of retained EU law would have been revoked on 31 December 2023 unless expressly saved. Instead, the bill now includes a list of specific legislation that will be revoked on that date. There is no pensions content.

That is not the end of the story, however. Other important provisions remain in place, including wide powers for ministers to restate, revoke and replace secondary legislation by statutory instrument, removal of the supremacy of EU law, and the disapplication of EU law general principles. It is also notable that the amendments do not remove the separate sunset provision for directly effective EU law rights (which include those under Article 157 of the EC Treaty on equal pay, including pensions, though domestic legislation of course already includes measures reflecting these and will remain in force).

In an earlier House of Lords [debate](#) on the latest PPF levy ceiling order, Government minister Viscount Younger of Leckie responded to a question about the intention previously announced in Parliament to revoke the effects of the *Hampshire* case on 50% minimum pension protection compensation following employer insolvency (see [WHiP Issue 72](#)). In a reversal of policy, he said that "the Government intend to retain the *Hampshire* judgment beyond the sunset date". It is not yet clear what steps the Government will take to ensure that *Hampshire* continues to apply.

There are other key pensions cases on EU law that are affected by the Act. We await Department for Work and Pensions announcements as to its proposals for restatements and revocations.

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