Sackers

Quarterly briefing

March 2023

Highlighting significant developments in pensions law, covering key areas such as pensions reform, regulatory developments, new legislation and cases

Q1
March 2023

On the front cover this quarter: Michaela Berry (partner) and Liam Goulding (senior associate)

In this issue

Abbreviations

AE: Automatic enrolment

AVCs: Additional voluntary contributions

CDC: Collective DC

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

FCA: Financial Conduct Authority

HMT: HM Treasury

IGC: Independent Governance Committee

IRM: Integrated risk management

LDI: Liability-driven investment

PPF: Pension Protection Fund

PSA21: Pension Schemes Act 2021

SIP: Statement of investment principles

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

VFM: Value for Money

Electronic format

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Current legal agenda

Topic	Summary	Timing
Single code[1]	Draft code consulted on in 2021	Revised code expected imminently (see page 4)
DB scheme funding[2]	TPR's consultation on draft code published December 2022 DWP consultation on draft regulations on new funding and investment strategy closed in October 2022	New regime expected to come into force in October 2023 at the earliest (see pages 6 and 7)
CDC[3]	DWP consulting on unconnected multi-employer schemes and decumulation-only schemes Legislation for single or connected employer schemes came into force August 2022	Consultation ends 27 March 2023 (see page 11)
VFM[4]	DWP, FCA and TPR are consulting on a proposed common framework for assessing VFM in DC schemes	Consultation ends 27 March 2023 (see page 8)
Pensions dashboards	Regulations came into force 12 December 2022	Schemes starting to connect from April 2023 (see page 5)
Notifiable events[5]	Consultation on changes to the regime back in 2021. Response to consultation and final regulations are outstanding	Timings still unknown

1 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021)
2 See our Alert: DWP consults on DB funding and investment strategy (27 July 2022), our Consultation Response and our Alert: TPR consults on its new funding code (19 December 2022)
3 See our Alert: The DC deluge (31 January 2023)
4 See our Alert: The DC deluge (31 January 2023)
5 See our Hot Topic: New reporting requirements (January 2022)

TPR's Single Code

New code expected shortly

At the time of writing, the industry is eagerly anticipating the arrival of TPR's new single code of practice (the "Code"), which is expected any day now. The Code will combine 10 of TPR's existing 15 codes of practice into an updated and online format, with additional content to reflect the statutory governance requirements.

Although TPR had a great deal of feedback to its 2021 consultation on the draft Code, we are not expecting significant changes to the key requirements. However, there are likely to be some differences in the final Code.

Effective system of governance ("ESOG")

Code will set out how to meet ESOG duties

Trustees already have a statutory requirement to establish and operate an ESOG. However, the Code will set out how trustees can discharge this duty. The ESOG must be proportionate to the complexity, scale and organisational structure of the scheme, and to the nature of the risks that the scheme is exposed to. In practice, the ESOG will be formed of the trustee's governance policies and procedures, so trustees need to ensure that these meet statutory requirements as well as those in the Code.

Own risk assessment ("ORA")

Under the Code, schemes with 100 or more members will have to prepare an ORA within 12 months of the Code coming into force. An ORA:

is a written statement prepared on an annual basis	is a way for trustees to assess the effectiveness of policies and procedures	sets out whether and why trustees consider their policies and procedures to be effective	is signed by the Chair and available on request

What can trustees be doing now?

Trustees should have preparations well underway, so they are in a good position to deal with any outstanding requirements when the Code comes into force.

Actions include:

- making sure you have a project plan and meetings in the diary
- carrying out a gap analysis, in which you assess your existing policies and procedures against those listed in the Code
- use your advisers to help with your gap analysis and to fill in any gaps
- keep the initial ORA in mind when reviewing current policies, thinking about how the effectiveness of those policies can be assessed in due course.

Pensions dashboards

Largest schemes will start connecting from April 2023

It's been a long time coming, but 2023 is the year in which pension schemes will start to connect to the dashboards "ecosystem", with the largest schemes connecting from April 2023 and others following suit at different "staging deadlines" over the next couple of years.

Trustees of schemes in scope will need to:

- connect to the dashboard "ecosystem" by their staging deadline
- ensure their scheme can receive and service both "find" requests (a request sent as the result of an individual searching for information about their pensions) and "view" requests (a request by an individual to see detailed information about any pension which the dashboard shows they have).

With potential heavy fines for non-compliance, preparations for dashboard connection should be well underway, whether your scheme has an early staging deadline or if it's still a while off.

Preparation is key!

Speak to your administrators as soon as possible

In practice, we expect administrators will come to trustees with an initial proposal on how they are preparing for dashboards. However, trustees should contact their administrator if they haven't heard from them.

Initial points to consider include:

- ✓ who is going to oversee the project (eg full board or a sub-committee) and do any formal delegations need to be put in place?
- ✓ what is the timeline? Have you checked your staging deadline and whether there are any other big projects that could impact resourcing?
- ✓ do you need anyone else's input eg actuaries, AVC providers, tracing companies, IT/cyber security specialists?

Connecting to the dashboard ecosystem

Trustees should liaise with their administrator to understand how it is planning to connect and then decide whether this is appropriate for their scheme.

Schemes with more than one administrator (including any external AVC providers) will need to decide how the administrators will interact with each other and how to share that data with the dashboard ecosystem. For example, will the AVC provider connect directly to the dashboard or will it share data back to the main administrator for it to share the AVC data with the dashboard?

Dealing with find and view requests – it's all about the data

Trustees will only be able to comply with their dashboards duties if they have good data. To this end, trustees should:

Check your data!

- speak to their administrator and ask it to assess both the quality and accuracy of data held, and
- put a plan in place to improve the data and to digitise data if the scheme still has some paper records, as the data will need to be in electronic form.

What's next?

Trustees are responsible for meeting dashboard duties

Once preparations are underway, we expect that administrators will be carrying out much of the work in practice. However, trustees are ultimately responsible for the scheme meeting its dashboard duties so will need to make the key decisions throughout the project, including:

- choosing which data items will be used in "find requests", and
- the value data that needs to be provided in response to a "view request".

DB scheme funding

TPR consulting on new DB funding code

As an early Christmas present to the pensions industry, TPR delivered its long anticipated second consultation on a new draft DB funding code in December 2022. The draft code is designed to accompany the draft DB funding and investment strategy regulations, consulted on by the DWP last year. The consultation on the draft code closes on 24 March 2023.

Unusually, the draft code is based on the DWP's draft regulations as originally consulted on, which received a lot of industry interest. As the regulations are not yet final, further changes to the draft code in light of industry feedback to the regulations are a possibility.

What are the key requirements?

DB schemes will need to have a long-term funding strategy in place

DB schemes will be required to:

- have a funding and investment strategy ("F&I Strategy") in place and
- submit a written statement of that strategy to TPR ("Statement").

Trustees will need to obtain the employer's agreement to the F&I Strategy. Sponsoring employers must also be consulted on certain issues, including the main risks faced by the scheme in implementing the F&I Strategy, and how the trustees intend to mitigate or manage them.

F&I Strategy

The F&I Strategy is essentially a journey plan for how a scheme is going to achieve a state of "low dependency" on their sponsoring employer by the time the scheme is "significantly mature".

Draft regulations set out principles for trustees to follow

In determining the F&I Strategy, trustees must follow the principles set out in the draft regulations, including in respect of the funding level and investment risk (which in turn depend on the strength of the employer covenant), as well as the liquidity of scheme assets.

Key terms explained

Significant maturity

Maturity is a measure of how far a scheme is through its lifetime. The draft regulations provide for maturity to be measured in years using a "duration of liabilities" measure. This measure is the "weighted mean time until the payment of pensions and other benefits under the scheme, weighted by the discounted payments". This is, very broadly speaking, the average number of years it will take to pay out the benefits in the scheme, weighted by the value of the payments that are being made.

In line with the draft regulations, significant maturity is defined in the draft code as the point at which a DB scheme reaches a duration of liabilities of 12 years. However, recognising recent market volatility, other options are explored in the consultation.

Low dependency

Broadly, a scheme has low dependency on its employer under the draft regulations when:

- it has sufficient assets invested in a low dependency investment strategy to provide for accrued pension rights, and
- it is not expected, under reasonably foreseeable circumstances, to need further employer contributions.

This definition intentionally steers clear of "self-sufficiency", given that "unexpected circumstances, which are materially different from those assumed" may prompt the need for additional employer funds.

DB scheme funding cont.

Employer covenant

Covenant assessment to be set out in legislation for the first time

Aligning employer covenant strength with the risks a scheme is taking is a key element of TPR's current IRM approach. However, the draft regulations will represent the first time that the need to carry out such an assessment has been set out in legislation.

Assessing covenant under the draft code

Under the draft code, an assessment of employer support (including contingent asset support) will need to consider the following:

Visibility over employer's forecasts
This typically covers a period of between one to three years.

Reliability over available cash
This represents the period where trustees have reasonable certainty over the employer's available cash to fund the scheme.

Longevity of the covenant
This represents the maximum period trustees can reasonably assume that the employer will remain in existence to support the scheme.

There is more detail on employer covenant in the draft code, including the factors likely to affect the performance and development of an employer's business. TPR is also updating its covenant guidance in 2023.

Written statement of the F&I Strategy

Trustees to prepare a written statement and submit it to TPR

As soon as reasonably practicable after determining or revising the scheme's F&I Strategy, the trustees will have to prepare a Statement, capturing the detail in writing. The Statement must cover various points set out in the PSA21 and the draft regulations, including:

- providing an assessment of whether the F&I Strategy is being successfully implemented, and any intended remedial action to get things back on track
- setting out the key risks and mitigations for implementation, and
- an assessment of the strength of the employer covenant.

The Statement must be submitted to TPR along with the scheme's actuarial valuation.

When does this all come into force?

Due to come into force from 1 October 2023?

The new regime is expected to come into force for actuarial valuations with effective dates on or after 1 October 2023 at the earliest. To meet this timescale, the final code is expected to be laid before Parliament in June 2023, alongside the DWP's final regulations. As this is a fairly ambitious timetable, TPR acknowledges that this may yet change.

Trustee action

With much detail to digest, DB scheme trustees and employers should begin discussing the impact of the new requirements on their schemes with relevant advisers as soon as possible.

DC update

Broadening DC investment opportunities

Following a consultation in October 2022, the DWP has decided to make changes to DC investment disclosure requirements and the charge cap.

Disclose and explain policies on illiquid investments

Most occupational schemes providing DC benefits (exceptions include schemes whose only DC benefits are AVCs) will have to:

- disclose and explain their policies on illiquid investments in the default SIP (or the main SIP for CDC schemes) the first time that it is revised after 1 October 2023 (or by 1 October 2024 at the latest)
- publicly disclose and explain the percentage of assets in the default fund(s) (or scheme as a whole for CDC schemes) that are allocated to certain asset classes in their annual chair's statement, starting with the chair's statement for the first scheme year which ends after 1 October 2023.

Exclusion from the charge cap

Certain performance-based fees to be excluded from the charge cap

Certain performance-based fees will be excluded from the charge cap from 6 April 2023. The charge cap applies to default funds in DC schemes used for AE and CDC schemes used for AE. The driver here is that the charge cap is seen as a barrier to trustees considering certain illiquid assets.

Statutory guidance

Trustees must have regard to the statutory guidance when complying with their obligations. It is intended to help them with the calculation and format of asset allocation disclosures, and to provide support on the broad range of performance-based fee structures that exist, together with an understanding of the merits of these structures.

New VFM framework

A joint consultation on a new VFM framework was published in January 2023. It seeks views on proposals requiring trustees and managers of DC occupational pension schemes and providers and IGCs of workplace personal pension schemes to disclose, assess and compare the value for money of their schemes. The new framework, which will look across the key elements of investment performance, costs and charges, and quality of services, is intended to:

- encourage greater transparency and standardisation of reporting across the DC pensions market, allowing trustees to make more informed investment and governance decisions and employers to better compare the value and performance between DC schemes when deciding where to automatically enrol their employees
- drive and support the further consolidation of schemes, where this is in savers' best interests.

New VFM framework would be introduced in stages

The changes would be implemented in phases, applying initially to default arrangements used for AE and legacy DC schemes.

The consultation closes on 27 March 2023. The FCA expects to carry out a further consultation with proposed changes to FCA rules, taking account of responses to this consultation. The DWP also expects to conduct a further consultation with proposed changes to regulations.

DC update cont.

Deferred small pots

The DWP has issued a call for evidence relating to deferred small pots, building on work by the Small Pots Cross-Industry Co-Ordination Group.[6] The call for evidence focuses on two large-scale automated consolidation solutions:

- a default consolidator model, where eligible pots would transfer automatically to a consolidator, with members being given an opportunity to opt out, and
- a "pot follows member" model where, if a member changes jobs, their deferred pot would automatically move with them to their new employer's scheme.

The call for evidence closes on 27 March 2023, and the responses will inform the DWP's development of an approach which will be consulted on "in due course".

Supporting DC savers in the current economic climate

TPR has published guidance for DC scheme trustees outlining its expectations of trustees in light of current market conditions when:

- communicating with and supporting members, and
- reviewing governance and investment arrangements.

DC trustees should be supporting members close to retirement

In particular, TPR expects trustees to target efforts towards members most "in need of help". It also highlights the importance of supporting members close to retirement to help them understand the implications of current market conditions, encouraging members to seek advice from MoneyHelper before making any major decisions, and cautioning them against making hasty decisions which could increase the risk of scams.

The statement contains a checklist to help trustees develop an action plan to review their scheme's governance and investment arrangements, as well as to support their members.

Trustee action

Trustees should consider working through the checklist at their earliest opportunity, and follow up with their investment advisers and administrators on the various action points.

Member outcomes in DC schemes

TPR has published a blog focusing on member outcomes in DC schemes. It discusses recent regulatory changes, such as the introduction of detailed value for member requirements for small DC schemes, which "should drive significant change". Given these changes, TPR emphasises that all trustees "need to consider whether their governance structures are fit for the future investment environment" or whether it would be appropriate to consolidate to achieve better member outcomes.

Key considerations for DC investment in illiquid assets

The Productive Finance Working Group, a pensions industry working group convened by the Bank of England, the FCA and HMT, has published guides which are intended to give DC scheme trustees, sponsoring employers and investment consultants "the tools to consider investing in [less liquid assets] such as venture capital, private equity, private credit, real estate, and infrastructure, where appropriate and in scheme members' best interests".

Key issues discussed by the guides include VFM, performance fees, and liquidity management.

6 See our Alert: The DC deluge (31 January 2023)

TPR update

All change at the top!

TPR has appointed Nausicaa Delfas as its new Chief Executive from the end of March 2023, taking over from Charles Counsell. Nausicaa will join TPR from her current role as Executive Director, Governance, at the FCA.

David Fairs, the Executive Director of Regulatory Policy, Analysis and Advice, will be leaving his role in mid-March 2023 to pursue new challenges, having joined TPR in July 2018. An interim Director of Regulatory Policy, Analysis and Advice will be appointed.

Scheme return updates

New asset questions for DB and hybrid schemes

The scheme return for DB and hybrid schemes has been updated to include new asset breakdown questions, with information requirements based on the scheme's size:

- schemes with less than £30m in total liabilities will need to provide "simplified" information
- schemes with over £30m in total liabilities will need to provide more detailed information about their bond and equities holdings, and
- schemes with over £1.5bn in total liabilities will also need to provide information on risk factor stresses.

Trustee action

Trustees must submit their 2023 scheme returns to TPR by 31 March 2023.

Blog on equality, diversity and inclusion

TPR has published a blog on equality, diversity and inclusion ("EDI"). This follows publication of TPR's EDI strategy, and recent action plan. It encourages schemes to "explore ways they can gather, interpret and use data to bring about change across their organisations", and is aware that "many trustees are showing increasing willingness to embrace diversity and inclusion".

TPR also confirms that it will be providing practical tools on recruiting diverse candidates, creating and maintaining an inclusive culture, engaging with employers on diversity, and ensuring communications to scheme savers are inclusive.

Guidance on LDI resilience

TPR has published a statement for DB schemes, which aims to achieve and maintain an "appropriate level of resilience" in leveraged LDI funds and to improve schemes' operational governance.

Trustees with LDIs should be testing their liquidity buffers

Trustees should test their liquidity buffer by following the steps outlined in TPR's statement. If trustees depart from the expected liquidity buffer, they should complete a risk assessment of how they will respond to stressed market events, and prepare a plan for bringing the scheme to higher levels of resilience in the event of market volatility.

TPR recommends trustees confirm authorised signatories are up to date, specify what assets would be sold on collateral/margin calls and check the process for doing this, document and regularly review arrangements, and continue to have detailed conversations with LDI managers on liquidity.

A further update is expected in TPR's Annual Funding Statement in April 2023.

In other news

2023/24 PPF levy determination

The PPF published its policy statement and formal levy rules for 2023/24 in December 2022.[7]

Levy estimate for 2023/24 is £200 million

The levy estimate for 2023/24 is £200 million, down from £390 million in 2022/23. This is generally expected to be positive news for levy paying schemes, as it should result in a reduction for most.

The PPF is implementing measures which are intended to significantly reduce volatility in levies. In addition, the new asset class information being collected by TPR in the 2023 scheme return (see page 10) will be integrated into the levy calculation for 2023/24.

Trustee and employer actions

Trustees and employers who intend to put in place or recertify contingent assets should start the process as soon as possible. The deadline for certification/recertification on Exchange is midnight on 31 March 2023. If any documents must be submitted, such as a guarantor strength report, these must be emailed to the PPF by 5pm on 3 April 2023.

Since the levy year 2014/15, a simplified recertification procedure may be used for contingent assets where certification/recertification occurred not more than five years previously and the trustees can confirm that the underlying agreement remains in place. If you have a contingent asset which you have not recertified in the last four levy years, consider whether it would be worth doing so this year. Once an asset has not been recertified for five levy years it must be submitted as new, which can carry additional costs.

Expansion of CDC regime

The DWP has published a consultation on policy proposals related to CDC schemes, following the introduction of single and connected employer CDC schemes in 2022.[8] The proposals include:

Consultation on multi-employer CDC schemes

- introducing unconnected multi-employer CDC schemes, and
- the possibility of enabling "decumulation-only" CDC schemes, and how these might work in practice with oversight by TPR.

The consultation closes on 27 March 2023.

Factsheet on TPO determinations

New useful TPO factsheets published

TPO has published a factsheet on "Determinations by the Ombudsman", which explains how to comply with any directions in a Determination, how to appeal a Determination, and where to go for further information and help. The factsheet is clearly written and will help anyone going through the Determinations process, particularly if TPO does not rule in their favour.

7 See our Alert: The 2023/24 PPF levy determination (10 January 2023)
8 See our Alert: The DC deluge (31 January 2023)

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Upcoming seminars and webinars

We offer an extensive programme of client workshops and seminars. In addition to the quarterly legal updates, our seminars and webinars, which are led by our experts, offer clients the opportunity to ask questions and to share experiences on topics.

Cracking the single code	Date TBC	Online webinar In this webinar, our governance experts will: • take you through the new code • explain how to address TPR's expectations for an effective system of governance and an own risk assessment • provide practical advice on meeting governance standards in newer areas, such as cybersecurity, stewardship and climate change.
Quarterly legal update	04/05/2023	Online webinar This session will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.

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Recent publications

The Finance & investment briefing – March 2023 takes a look at current issues of interest to pension scheme investors.

The Pensions litigation briefing – December 2022 reviews recent case law and examines the practical lessons for trustees and employers.

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