Sackers

Quarterly briefing

June 2024

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

Q2

June 2024

On the front cover this quarter: Andrew Worthington (associate director) and Sophia Russell (associate)

Abbreviations

AVCs: Additional voluntary contributions
COBS: Conduct of Business Sourcebook
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
EP: Enhanced protection
ESG: Environmental, social and corporate governance
F&I: Funding and investment
FCA: Financial Conduct Authority
HMRC: HM Revenue & Customs
ICO: Information Commissioner's Office
LSA: Lump sum allowance
LSDBA: Lump sum and death benefit allowance
LTA: Lifetime allowance
LTA-Day: 6 April 2024
ORA: Own risk assessment
PASA: Pensions Administration Standards Association
PCELS: Pension commencement excess lump sum
PCLS: Pension commencement lump sum
PDP: Pensions Dashboards Programme
PLSA: Pensions and Lifetime Savings Association
PP: Primary protection
PPF: Pension Protection Fund
PSA21: Pension Schemes Act 2021
TCFD: Taskforce for climate-related financial disclosures
TPO: The Pensions Ombudsman
TPR: The Pensions Regulator
TTFAC: Transitional tax-free amount certificate
UFPLS: Uncrystallised funds pension lump sum
VFM: Value for money
WPC: Work and Pensions Committee

In this issue

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Current legal agenda

Topic	Summary	Timing
General code[1]	Updated code published 10 January 2024	Came into force on 28 March 2024
Pensions Dashboards[2]	DWP connection guidance published 25 March 2024 Statutory connection deadline is 31 October 2026	First connection date in guidance is 30 April 2025 (see pages 4 and 5)
Removing the LTA[3]	HMRC guidance and further updates to the legislation continue	LTA removed from 6 April 2024 (see pages 6 and 7)
DB scheme funding[4]	Revised regulations on the new funding and investment strategy came into force 6 April 2024 TPR's consultation on statement of strategy closed 16 April 2024	Applies to valuations with effective dates on or after 22 September 2024 (see page 8)
VFM[5]	Joint response to consultation on VFM was published in July 2023	FCA consultation on rules for VFM framework for contract-based schemes expected
Pensions transfers	Possible changes to the incentives and overseas investment flags following the DWP's review of the transfer conditions	Amending regulations expected
Notifiable events[6]	Consultation on changes to the regime back in 2021. Response to consultation and final regulations are outstanding	Unknown

1 See our Alert: The General Code (11 January 2024)
2 See our Alert: Pensions dashboards – DWP publishes connection guidance (26 March 2024)
3 See our Alert: LTA-Day – it's the final countdown (23 March 2024) and our Alert: Pensions tax changes – the revised allowances and removing the LTA (20 July 2023)
4 See our Alert: DWP publishes revised DB funding regulations (30 January 2024) and our Alert: TPR consults on its new DB funding code (19 December 2022)
5 See our Alert: Mansion House Reforms – the pensions avalanche (11 July 2023)
6 See our Hot Topic: New reporting requirements (January 2022)

Pensions dashboards

The DWP published its Pensions dashboards: guidance on connection in March 2024 (the "Guidance"). The Guidance sets out a staged timetable for occupational pension schemes, and personal and stakeholder pension providers, to be connected to the pensions dashboards ecosystem and be ready to respond to "find" and "view" requests.

What are the key trustee dashboard duties?

- **Connecting to the dashboard ecosystem** – Trustees will need to decide how to connect. They should talk to their administrators and software providers to assess whether they can meet the scheme's needs, or whether the trustees should consider engaging a separate integrated service provider.
- **Processing find requests** – Trustees will need to decide the data items that they are going to use for matching purposes. As a starting point, trustees should audit their scheme data and put in place a plan to improve and/or digitise data, if needed.
- **Responding to view requests** – Trustees will need to provide the relevant information on receipt of a view request, including value data, ie a member's pension values. The value data that needs to be provided will depend on the member's status and the benefit type.

Connection timetable

Trustees must "have regard to" the Guidance

Trustees will need to connect by the statutory deadline of **31 October 2026**. However, trustees must "have regard to" the connection timetable set out in the Guidance. The timetable is designed to provide the PDP with adequate time to assist and co-ordinate activities to support schemes' and providers' dashboards connections.

The connection timetable retains the broad framework of a phased approach to connection, starting with the schemes and providers with the greatest number of members.

High-level summary of connection dates

Type	Connect by
DC master trusts (20,000 or more members)	30 April 2025
FCA-regulated pension providers (5,000 or more members)	30 April 2025
Hybrid schemes and DB schemes (20,000 or more members)	31 May 2025
DC schemes used for automatic enrolment (5,000 or more members)	31 May 2025
Remaining large schemes (1000 or more members)	Between 30 June 2025 and 30 November 2025
Public service pension schemes	31 October 2025
FCA-regulated pension providers (under 5,000 members)	31 January 2026
Medium schemes (100 to 999 members)	Between 31 January 2026 and 30 September 2026

Pensions dashboards cont.

Calculating the connection date
When working out the scheme connection date, occupational pension scheme trustees must look at the number of relevant members (all non-pensioner members) at the "reference date", which is the scheme year end date falling between 1 April 2023 and 31 March 2024.

Deferring connection when changing administrator
Where certain stringent conditions are met, there is a statutory process for deferring the connection deadline of 31 October 2026 when changing administrator. The Guidance acknowledges that changing administrator can be a significant process and that it may be "excessively burdensome" to connect by the date in the Guidance. If trustees do not believe it is possible to connect by that date, they do not have to make a formal application to defer, but should:

- review the deferred connection guidance, which sets out information that they may wish to consider, and
- communicate their plans with the PDP and TPR "at the earliest opportunity".

FCA-regulated pension providers

FCA-regulated pension providers must also connect to the dashboard ecosystem by 31 October 2026. The FCA Handbook requires firms to "have regard to" the Guidance with "due skill, care and diligence". When calculating their connection date, FCA-regulated pension providers should calculate the number of pots in accumulation across all the relevant pension schemes the provider operates at the "reference date" (see above).

The FCA has provided an easement enabling firms to connect in line with the Guidance, even if they are unable to comply with the relevant COBS rules in respect of all of their member data at the point of connection. The FCA acknowledged that the unmodified rules may have deterred firms from connecting by the dates in the Guidance.

Demonstrating compliance with the Guidance

Trustees and pension providers must consider the Guidance when making decisions or taking actions in relation to preparing to connect to dashboards, and be able to demonstrate, upon request, how they have had regard to the Guidance. This includes:

- not making final decisions about connecting before engaging with the Guidance
- being able to demonstrate that adequate governance and processes for making such decisions are in place. The reasoning for decisions should be clearly considered and documented, as well as how relevant risks are identified, evaluated, and managed
- making sure that access is available to all relevant information before making decisions and acting upon them. Trustees and providers should keep clear and accurate audit trails to demonstrate the decisions made, the reasons for them and the actions taken.

Trustees should record how they have taken the Guidance into account

If trustees or pension providers are unable to demonstrate how they have had regard to the Guidance, this may result in enforcement action by the relevant regulator.

Trustee action

With under a year until the first connection date, all schemes should be preparing to connect to the dashboard ecosystem. Trustees can use TPR's guidance and checklist, along with PASA's connection readiness guidance, to help with this.

Life after LTA-Day

LTA was removed on 6 April 2024

6 April 2024, also referred to as "LTA-Day", marked the end of the LTA, leaving in its wake a number of complications, including where to draw the dividing line between tax-free lump sums and taxed lump sums. As a result, there are some key issues for trustees to address.

The new regime

In place of the LTA, there are now two new tax-free lump sum allowances: the LSA (£268,275) and the LSDBA (£1,073,100). The new allowances apply per person across all registered pension schemes, with lump sums exceeding either allowance taxed at an individual's marginal rate.

An individual's maximum tax-free PCLS will be limited by their available LSA, as will tax-free elements of an UFPLS and standalone lump sums. In addition to the lump sums caught by the LSA, certain death benefits and other lump sums which are payable tax-free (eg a serious ill-health lump sum) will count towards the LSDBA.

Individuals holding a valid LTA protection will retain their rights to a higher level of tax-free lump sum, as well as to higher tax-free parts of lump sums and lump sum death benefits.

PCELS – the new authorised payment in town

- A PCELS will be payable where a member has exhausted their LSA, or has exhausted their LSDBA (because they have become entitled to a serious ill-health lump sum), provided certain other conditions are met and scheme rules permit the payment.
- The aim is to ensure that individuals who have crystallised benefits above £1,073,100 can continue to take benefits as a lump sum, as the LTA excess lump sum is no longer available.
- The same timing will apply as for a PCLS, ie a PCELS must be paid up to six months before but no later than one year after the day on which an individual becomes entitled to a relevant pension.
- For some schemes, introducing a PCELS option could alter benefit design. Trustees will therefore need to consider whether to pay a PCELS, taking account of the views of sponsoring employers, the potential impact on DB funding, and the administrative implications.

Statutory override

New statutory override introduced

Depending on their rules, the tax changes may inadvertently cut across some schemes' benefit design, eg because benefits are limited by reference to the LTA (or related concepts). A new statutory override aims to ensure that such limits remain in place post LTA-Day. This should provide comfort to those schemes whose benefit design is tied to the current tax regime, although trustees may still wish to check how the new override and their particular scheme rules work together.

The override will expire on **5 April 2029**, giving schemes some much needed breathing space, especially with the legislation still in a state of flux. However, we are still hoping that the Government will also look at providing an exemption from the requirements of section 67 of the Pensions Act 1995 (which protects members' subsisting rights), as well as a power to make changes to rules by resolution (under section 68 of the same Act), to help facilitate scheme amendments to take account of the LTA's removal.

Life after LTA-Day cont.

Transitional provisions

Transitional provisions for those who have taken benefits before LTA-Day

Where individuals took benefits before the new regime came into force, generally the two lump sum allowances will be reduced by 25% of any LTA used up before 6 April 2024. However, where a member didn't take their maximum 25% tax-free cash when accessing benefits before LTA-Day, they will be able to request an alternative calculation by applying to their scheme for a transitional tax-free amount certificate ("TTFAC"). The TTFAC must set out the amount of LTA previously used up and the amount of the individual's available LSA and LSDBA. Where a TTFAC is in force, the member's available LSA and LSDBA must be calculated in accordance with it.

Transitional tax-free amount certificates

An application for a TTFAC:

- can be made to any scheme of which the individual is a member, or was a member immediately before their death
- must be made before the member first crystallises benefits on or after LTA-Day
- must be accompanied by "complete evidence" of, broadly, any tax-free lump sums taken or lump sum death benefits paid before LTA-Day. HMRC expects members to provide documents such as financial records, bank statements or benefit crystallisation event statements as part of this evidence
- needs to be granted and a certificate issued, or alternatively the applicant notified it has been refused (due to insufficient evidence), within three months of receipt.

Trustees should discuss with their scheme administrators putting in place a suitable TTFAC process, including having an appropriate form available.

LTA protections – further regulations expected

A second set of regulations is expected to address "technical" errors and other remaining issues with the legislation.[7] Several of the issues relate to members holding various LTA protections, including:

- **transferring to a new provider with EP** – individuals with EP could lose their "permitted maximum" tax-free entitlement to certain benefits if they transfer their benefits, since the permitted maximum is calculated on a "per arrangement" basis. The Government is intending to change the legislation to enable members with EP to retain their tax protection on a transfer. Until the amending legislation is effective, HMRC has said that members with EP "may wish to delay transferring to a new provider"
- **EP or PP with protected lump sum rights** – HMRC has also acknowledged an issue with the legislation that will prevent members with EP or PP who have protected lump sum rights taking a PCLS in excess of their usual protected LSA of £375,000. Until the new legislation comes into force and, in order to benefit from their full entitlement, HMRC suggests that affected members delay the payment of their PCLS. The timeframe for paying a PCLS is up to six months before and up to 12 months after the member becomes entitled to it, which offers some flexibility here.

However, where a member requires "a payment which is affected by the further regulations and cannot wait until these are introduced due to financial hardship", HMRC expects administrators to contact HMRC directly.

7 See our Alert: LTA-Day – certain members may wish to consider delaying transfers or taking benefits (5 April 2024)

DB update

New DB funding regime

The PSA21 sets out the framework for a new requirement for DB schemes to have an F&I Strategy, in which trustees will set out how they plan to reach low dependency funding by the time the scheme is significantly mature.

Regulations setting out the matters the trustees must take into account, and the principles they must follow, in determining or revising their scheme's F&I Strategy came into force on 6 April 2024. However, trustees won't be required to produce their first F&I Strategy until 15 months after the effective date of the scheme's first actuarial valuation **on or after 22 September 2024**.

TPR has consulted on the statement of strategy

TPR has recently consulted on the **statement of strategy**, which will set out the F&I Strategy and certain "supplementary matters", including the trustees' assessment of the F&I Strategy, key implementation risks and mitigations, and information relating to investment, funding and covenant.[8]

What is still to come?

- The **revised DB funding code** was consulted on in December 2022 and is expected to be laid in the summer, to be in force in September 2024. The code is designed to partner with the regulations, providing practical guidance on how trustees can comply with the requirements.
- TPR's consultation on revised **covenant guidance** is also expected in the summer.
- TPR's **Bespoke and Fast Track** regulatory approach was consulted on in December 2022 and we are awaiting TPR's response.

TPR's annual funding statement

TPR's latest annual funding statement was published in April 2024.[9] The statement is primarily aimed at schemes with valuation dates between 22 September 2023 and 21 September 2024, but is also relevant to schemes which are reviewing their funding and investment strategies. The majority of schemes are estimated to have improved funding positions and TPR encourages DB trustees and employers to use this "step change in position" as an opportunity "to reassess their long-term targets and consider run-on, consolidator or insurance options".

TPR suggests it would be "good practice" for trustees to consider the steps they can take now to align (even if broadly) with the DB funding code when it is published, so as to avoid having to make significant changes at the next valuation.

Options for DB schemes

The DWP's recent consultation on options for DB schemes built on the "package of pension reform" set out in the Autumn Statement 2023.[10] The DWP:

- is considering introducing a statutory override to enable all DB schemes to share surplus, subject to appropriate funding levels

Proposals to make surplus extraction easier

- plans to establish a public sector DB consolidator by 2026, which will be run by the PPF and aimed at schemes unattractive to commercial endgame providers. The consolidator would offer standardised benefit structures and be legally separate from the existing PPF compensation fund.

The DWP also intends to "press ahead" with creating a permanent legislative regime for superfund consolidators, although no timeframe has been given.

8 See our Alert: DB funding – TPR consults on statement of strategy (5 March 2024)
9 See our Alert: TPR publishes annual funding statement 2024 (25 April 2024)
10 See our Alert: Consultation on options for DB schemes (27 February 2024)

ESG update

ESG risks and opportunities

Trustees should manage wider ESG risks

TPR has published a blog on how trustees can manage wider ESG risks and opportunities, now that climate reporting has become part of "business as usual" for those in scope. TPR acknowledges that ESG and related reporting is a "significant challenge" for trustees, but failure to account for climate-related risks and opportunities and, where material, nature and social factors, puts "savers at risk".

The blog outlines some actions trustees may wish to consider, including becoming early adopters of reporting in line with the Taskforce on Nature-Related Financial Disclosures recommendations.

Climate reporting

Provide context and use plain English in climate reports

TPR has set out its findings from analysing a representative sample of climate reports (often referred to as TCFD reports), providing observations on good practice and suggested improvements. When preparing reports, trustees should consider:

- giving information such as scheme size, structure of DB sections and popular DC default funds early in the report to provide context for readers
- where reports reference specific investment mandates, explaining their size in relation to total scheme assets to help readers understand an issue's materiality
- providing plain English summaries for members.

Recommendations to improve scenario analysis include:

- providing commentary on the challenges and limitations of the scenario analysis undertaken
- taking these challenges and limitations into account when drawing conclusions about the scheme's exposure to risks.

Incorporating social factors into investment

Quick start guide on social factors in investment

The Taskforce on Social Factors has published its guide on incorporating social factors into trustee investment and stewardship decision-making. Accompanying publications are intended to provide frameworks of good practice and allow for the assessment of materiality. These include a "quick start" guide to help trustees begin to identify and monitor the social risks and opportunities of their scheme's investments.

In addition, the PLSA has published best practice case studies on how trustees can incorporate social factors into investment strategies. They are intended to support trustees by offering tangible examples of investment approaches that seek to maximise returns, as well as making a positive impact on social factors.

Fiduciary duties, sustainability and climate change

The Financial Markets Law Committee has published a report on trustees' fiduciary duties and decision-making in the context of sustainability and climate change. Intended to help trustees in their conversations with advisers, it sets out a general explanation of the legal position, including fiduciary duty and decision-making responsibility, and discusses how trustees can take decisions in keeping with their fiduciary duties.

TPR update

TPR's organisational restructure

TPR has restructured to "reinforce its strategic shift in overseeing the workplace pensions market". It now has three new regulatory functions:

Shake up in TPR's structure

- **regulatory compliance** – protecting pension savers' interests through the effective and efficient delivery of regulatory compliance services, targeting schemes and employers
- **market oversight** – enhancing the market through strategic engagement with schemes and others who influence pension savers' outcomes, with a strong focus on delivering VFM and trusteeship
- **strategy, policy and analysis** – using insights from its regulatory approach and elsewhere to evolve the regulatory framework and support market innovation in savers' interests.

The shakeup is intended to help TPR adapt to the changing pensions environment and enable it to be "swifter to address compliance failures and market-wide risks".

Lack of diversity in trustee boards

Trustees should look at improving board diversity and inclusion

Based on the results of TPR's 2023 diversity and inclusion trustee survey, there was broad consensus that diverse and inclusive pension boards are important for good decision-making (84%), good governance (83%) and good member outcomes (85%). The survey highlighted "the lack of trustee diversity in terms of protected or visible characteristics such as ethnicity", although most trustee boards were seen as diverse in other ways such as skills, life experience and professional background.

Trustees are encouraged to use TPR's recent guidance for practical ways to improve board diversity and inclusion.

Value for members

TPR has given an update on the pilot stage of its initiative to ensure compliance with the rules on value for members assessments for schemes with less than £100 million in assets. This stage involved a sample of hybrid schemes, with 16% of trustees of schemes involved reporting that, having concluded their schemes do not offer good value, they have opted to wind them up.

TPR will now be "scrutinising information" from DC scheme returns, with the potential for fines to be issued for non-compliance. A fine of £12,500 has already been issued against a corporate trustee, and further fines for non-compliance "will be issued shortly".

TPR flexes its muscles

Having issued a warning notice seeking financial support directions against six companies, TPR has published a regulatory intervention report setting out how a settlement was reached. The intervention was based on evidence that assets had been transferred out of a scheme employer to its wider corporate group, and resulted in £3.52 million being paid into the scheme.

Commenting on its actions, TPR says they send a "clear message" that it will investigate corporate transactions and restructurings which affect schemes of all sizes, and it may engage its anti-avoidance powers where "proper mitigations" have not been considered for pension schemes.

In other news

WPC report on DB schemes

The WPC has published its report on its inquiry into private sector DB schemes. The report calls for a "fresh approach" to funding regulation and the treatment of surpluses, with recommendations including that:

- the DWP and TPR work with open schemes to address remaining concerns that such schemes could be forced to de-risk unnecessarily, potentially leading to premature closure, before the revised DB funding code is laid before Parliament
- TPR's objective to protect the PPF should be replaced with a new duty to protect future service benefits, as well as accrued benefits
- TPR should consider requiring schemes to set out why they have pursued a particular endgame approach and why it is in the best interests of scheme members.

General levy

General levy has increased

Following a consultation in late 2023 on mitigating the ongoing deficit in General Levy funding, the DWP decided to retain the current levy structure, whilst increasing rates by 6.5% per year from 1 April 2024.

Data protection fining guidance

The ICO has published new data protection fining guidance. The guidance sets out the factors the ICO will take into account when deciding to issue a penalty notice, the methodology used to calculate any fine, and the legal framework that gives the ICO the power to impose fines.

Spotlight on TPO determinations – Dr Y

In February 2016, the administrator wrote to inform Dr Y that the LTA would be reduced, from £1.25 million to £1 million from April 2016, stating that "based on the information it held about Dr Y's benefit entitlement from the Scheme, it considered that he may be affected by this change to the LTA". In response to this letter, Dr Y decided to opt out of the scheme by ceasing his contributions. However, after subsequently learning that the value of his benefits was just over £600,000, he re-started his contributions.

Dr Y complained that his decision to opt out was based on information contained within the letter, which caused him to miss out on contributions.

TPO held that, although it suggested that Dr Y may have been close to the LTA, the letter did not provide any incorrect information (ie it did not say that Dr Y was close to, or in excess of, the LTA), nor did it recommend he take any specific action. It was Dr Y's responsibility to determine his LTA position, noting that this would have included consideration of any benefits he held outside of the scheme. Therefore, the administrator is not responsible for the financial consequences of Dr Y's decision to opt out.

Comment

Following the LTA's removal (see pages 6 and 7), this recent TPO determination is a timely reminder that it is the member's responsibility to establish their own tax position.[11]

This decision also highlights that, whilst it may be appropriate to provide information about changes in the law which might affect members, trustees or administrators must not give advice, so should avoid setting out exactly how the change might affect a specific individual case.

11 See our case summary: Dr Y (CAS-37814-G1K9) – administrator not responsible for member's decision to opt out following letter about lifetime allowance changes (4 March 2024)

Sackers

Upcoming webinars and seminars

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

Quarterly legal update	11/07/2024	Online webinar This session will provide an essential overview of significant developments affecting occupational pension provision in the UK for employers and trustees.

If you would like to attend any of our events, please contact our marketing team at marketing@sackers.com.

A selection of short videos, webinars and podcasts on topical pensions-related issues and aspects of our firm is available on our website: www.sackers.com/knowledge/multimedia

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Recent publications

The Pensions litigation briefing – May 2024 reviews recent case law and examines the practical lessons for trustees and employers.

The Finance & investment briefing – June 2024 takes a look at current issues of interest to pension scheme investors.

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