Sackers

Key changes in force from 1 October

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Introduction

Several key changes are coming into effect from 1 October 2021 under the Pension Schemes Act 2021 ("PSA21") and beyond. Where necessary, trustees and employers should seek advice on what those changes mean for their schemes and on the preparatory steps they should be taking now.

Key changes from 1 October

- The first wave of new climate risk governance and reporting requirements for occupational pension schemes take effect.
- TPR's powers are extended, including new criminal and civil sanctions, enhanced information-gathering powers and new contribution notice ("CN") tests.
- Regulations introducing an array of changes for DC schemes in relation to charges and value come into force.
- With so many developments on the horizon, a busy period lies ahead. See "What's still to come" below for more detail, including as to expected timing.

Climate change

Climate change has been a hot topic for some time now but, from 1 October, the latest round of changes start being phased in. Back in the summer, the DWP published draft regulations and statutory guidance on improving climate change risk governance and reporting, in line with TCFD recommendations (see also our ESG guide).

Among other things, schemes will have to produce and publish (on a publicly available website, accessible free of charge) a report on how they have met the relevant climate change governance requirements and inform members of its publication. To ensure that they are able to understand the outputs of activities such as scenario analysis and calculating emissions-based metrics, and to incorporate them into their new climate change risk management processes, trustees of schemes which are in scope must also have the appropriate degree of knowledge and understanding.

The new requirements are being phased in. Master trusts and schemes whose net assets (excluding bulk

and individual annuity contracts) are £5 billion or more must comply from 1 October 2021, and produce their report within seven months of their scheme year end date. Schemes with £1 billion or more of assets will follow suit from 1 October 2022, and so should start taking preparatory action as soon as possible.

Bearing in mind trustees have a fiduciary duty to actively consider climate change as a likely financially material risk, schemes currently out of scope should nonetheless consider whether to voluntarily adopt some or all of the requirements as a matter of good governance.

TPR's powers

Changes being brought in under the PSA21 will boost TPR's ability to impose criminal and civil sanctions, with the following coming into force from 1 October:

- the new criminal offences of "conduct risking accrued scheme benefits" and "avoidance of employer debt", and of failure to comply with a CN. All three are potentially punishable by an unlimited fine and/or (in the case of the first two) up to seven years in prison
- as an alternative to each of the above, TPR will be able to impose a civil penalty of up to £1 million. Such a penalty could also apply where a person provides false or misleading information to DB trustees or TPR (the latter already being a criminal offence). By avoiding Court costs and the higher burden of proof inherent in criminal proceedings, the civil penalty route looks likely to be the more well-trodden path
- two new snapshot tests for imposing a CN, under which TPR can require payment to be made into a scheme with DB benefits, focusing on "employer insolvency" and "employer resources". These are designed as alternatives to existing CN powers, the drafting of which can make it difficult to assess whether an "act" or "failure to act" has affected a sponsoring employer's financial strength
- increased information-gathering powers, giving TPR greater ability to require people to attend and respond to interviews, and to inspect premises, with a penalty of up to £1 million for non-compliance.

Helpfully, none of the new powers will apply to acts taking place before 1 October 2021. However, TPR may still look back at facts prior to 1 October as part of its investigations, eg when looking at someone's intention, and it acknowledges that those being prosecuted may also rely on such facts in their defence.

TPR has today (29 September) published its finalised code of practice and accompanying code-related guidance addressing the two new CN tests, following consultation, together with the finalised policy on its approach to investigation and prosecution of the new criminal offences. A further consultation (running until 21 December) was issued at the same time, covering policies on how and when TPR will use its information-gathering powers, its approach to the new monetary penalty, and how its powers will be operated where they overlap (ie where TPR has the option to use either criminal or regulatory powers for the same offence). See next week's 7 Days for further detail.

- For detail on the remaining changes to TPR's powers, see "What's still to come" below.

DC changes

In June, the DWP published "a series of measures to prepare the DC occupational pensions market for the challenges and opportunities ahead", including its response to consultation on improving outcomes for members of DC schemes and new call for evidence. Regulations and guidance on delivering better value for members ("VfM") for DC members, and on changes to reporting costs and charges, both take effect on 1 October 2021. Key takeaways include:

- subject to certain exceptions, trustees of DC or hybrid schemes with less than £100 million in total assets

will be required to undertake a "more holistic" annual VfM assessment, and to report on it in their chair's statement and scheme return. To give schemes time to access the necessary data, the new style VfM assessment will apply from the first scheme year ending after 31 December 2021

- from the first scheme year ending after 1 October 2021, trustees of most DC schemes, regardless of size, will be required to state in their chair's statement the net investment returns for their default and self-selected funds
- the DC default fund charge cap is amended to allow schemes to smooth performance fees over five years
- schemes with a third party "promise" as to the level of benefits are currently carved out from the definition of a default arrangement and therefore exempt from the default fund charge cap and the production of a default SIP. Such schemes will now have to produce a default SIP within three months of the end of the first scheme year ending after 1 October 2021, or by 1 April 2022, whichever is later
- it is now clear that the cost and charges disclosures in the chair's statement must include funds that members were able to select in the past, as well as those they can currently select.

What's still to come

Plenty of pensions developments under the PSA21 are still on the horizon, including:

- final regulations which will impose new conditions on a member's right to a take statutory transfer, with the aim of protecting members from transfers to scam vehicles. It is likely that these regulations will be brought into force promptly once released (potentially by the end of October). In the absence of transitional provisions (which are not on the cards), trustees and their administrators will need to act swiftly to ensure their procedures align with the new requirements. A recent TPO decision held that "a period of approximately one month" was generally sufficient for new processes to be put in place by schemes following the publication of significant transfer guidance
- changes to the notifiable events regime. A consultation seeking views on changes and additions to the notifiable events regime was issued recently and will capture certain corporate activity whenever a DB scheme is in play. With commencement expected in 2022, all DB employers should ensure this is on their radar and should seek specialist legal advice at the earliest possible stage
- regulations outlining the detail of the new requirement for DB trustees to determine, with the agreement of sponsoring employers, a strategy for ensuring that scheme benefits can be provided over the long term. Known as the "funding and investment strategy", its introduction is set to dovetail with TPR's new DB funding code of practice which is not expected to come into force until late 2022 "at the earliest"
- draft regulations relating to the introduction of pensions dashboards are expected around the end of the year, with delivery still on track for 2023.

If you have any questions on any of the above, **please speak to your usual Sackers contact**

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