Sackers

Quarterly briefing

March 2022

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

Q1

March 2022

On the front cover this quarter: Stuart O'Brien (partner) and Lucy Swart-Mallett (senior associate)

In this issue

Current legal agenda 3

Spotlight: Stronger Nudge 4

Pension Schemes Act 2021

- Climate Change: TPR guidance on climate-related risks and opportunities 5
- Pensions Dashboards: consultation and draft regulations published 5
- Notifiable events: final regulations expected 6
- CDC: final regulations and TPR draft code published 6
- TPR's powers: TPR code comes into force 6
- DB funding: further delays to TPR's code 6

TPR update 7

DC update

- Ban on flat fees for small pots 8
- Consultation on enabling investment in productive finance (charge cap and performance fees) 8

In other news

- GMP Conversion Bill has Government support 9
- Auto-enrolment: Private Member's Bill introduced to Parliament 9
- State pension: DWP launches second SPA review 9

PPF update 10

Cases

- Court of Appeal 11
- TPO 11

Abbreviations

AVCs: Additional Voluntary Contributions

CDC: Collective Defined Contribution

CETV: Cash equivalent transfer value

CJEU: Court of Justice of the European Union

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

ESG: Environmental, social and corporate governance

FAS: Financial Assistance Scheme

FCA: Financial Conduct Authority

GMP: Guaranteed Minimum Pension

MaPS: Money and Pension Service

MoD: Ministry of Defence

PA04: Pensions Act 2004

PASA: Pensions Administration Standards Association

PDP: Pensions Dashboards Programme

PLSA: Pensions and Lifetime Savings Association

PPF: Pension Protection Fund

PSA21: Pension Schemes Act 2021

SIP: Statement of Investment Principles

SPA: State Pension Age

TCFD: Taskforce on Climate-related Financial Disclosures

TPR: The Pensions Regulator

TPO: The Pensions Ombudsman

Electronic format

You can access electronic copies of all our publications at:

www.sackers.com/knowledge/publications

Environment

In line with our approach to corporate social responsibility (CSR), we monitor closely the number of copies printed of this publication. The paper and print manufacturing has been done in compliance with ISO14001 environmental management standards. Our paper, Revive 100% silk is derived from 100% pre and post-consumer waste, which is certified for FSC® chain of custody.

For more information on our CSR policy, please visit our website at www.sackers.com/about/csr

Current legal agenda

Topic	Summary	Timing
Pensions dashboards	Consultation and draft regulations published 31 January 2022	To be laid before Parliament in 2022, with delivery set for 2023 (see page 5)
Notifiable events	Response to consultation on draft regulations awaited	Expected into force 6 April 2022 (see page 6)
Ban on flat fees on small pots	Final regulations published in January	In force 6 April 2022 (see page 8)
Stronger Nudge	Response to consultation and final regulations published in January	In force 1 June 2022 (see page 4)
CDC[1]	Response to consultation and final regulations published in December	In force 1 August 2022 (see page 6)
Single code[2]	Revised code to be published	Summer 2022
DB scheme funding	Consultations on draft regulations introducing the new funding and investment strategy and TPR's revised funding code to be published	Consultation on draft regulations due spring 2022 Consultation on draft code late summer 2022 (see page 6)
Simpler annual benefit statements[3]	Response, regulations and guidance published 19 October 2021	1 October 2022
Climate change governance and reporting requirements[4]	Schemes with £1bn or more in relevant assets in scope	1 October 2022

1 See 7 Days (20 December 2021)
2 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021)
3 See our Alert: Simpler annual statement – response to consultation and final regulations (20 October 2021)
4 See our Alert: Key changes in force from 1 October (29 September 2021)

Spotlight: Stronger Nudge

Stronger Nudge applies to all DC benefits, including DC AVCs

From 1 June 2022, except in certain circumstances, trustees and managers of occupational pension schemes will be required to deliver a "Stronger Nudge" to guidance in relation to applications (or communications in relation to applications) to transfer or start receiving "flexible benefits" (broadly DC) on or after that date.[5]

The aim of the Stronger Nudge is to make taking pensions guidance a normal part of the process for applying to draw or transfer DC benefits, and to require members and other beneficiaries to make an active choice not to do so.

These changes build on existing obligations on trustees and managers to inform members who are considering accessing flexible benefits that Pension Wise is available, that members should access this and consider taking independent advice, and to provide details on how they may access pensions guidance.

Similar requirements will apply to personal pension providers

The 1 June 2022 date aligns with the timing of similar FCA rules coming into effect for providers of personal and stakeholder schemes.[6]

Delivering the Stronger Nudge

Several steps are involved in providing the Stronger Nudge, with trustees and managers having to:

Trustees and managers must refer beneficiary to Pension Wise

- refer the beneficiary to appropriate pensions guidance ("Guidance"), ie Pension Wise, and explain its nature and purpose
- facilitate a Guidance appointment for the beneficiary, including offering to book the appointment and, where that offer is accepted, taking reasonable steps to do so
- explain to the beneficiary that their application cannot proceed unless they have received the Guidance and notified the trustees or managers of its receipt, or opted out of doing so
- explain to the beneficiary that they can only opt out of receiving the Guidance by giving the trustees or managers an opt-out notification.

Opting out of the Guidance

An opt-out notification must be given "in a communication made solely for the purpose of opting-out" of the Guidance (eg requiring a member to complete a standalone opt-out form), unless the trustees / managers receive confirmation that one of the exemptions applies (eg the beneficiary's application is solely to transfer any of their rights to flexible benefits).

Exemptions

There are various exemptions to the Stronger Nudge requirement, including in relation to a transfer if the beneficiary is under 50 or receiving flexible benefits is not the purpose, or one of the purposes, of the beneficiary's application (eg it is a transfer for the purpose of consolidating benefits).

Speak to your administrators as soon as possible

Key action

With timing for making the necessary changes to benefit application processes quite tight, trustees and managers should liaise with their administrators as soon as possible to understand how they will accommodate the Stronger Nudge. Your legal advisers can then advise you on whether those proposals will be compliant with the regulations.

5 See our Alert: Stronger Nudge to pensions guidance (17 January 2022)

6 See 7 Days (6 December 2021)

Pension Schemes Act 2021

Climate Change: TPR guidance on climate-related risks and opportunities

The new climate risk governance and reporting requirements are being phased in, with master trusts and schemes with relevant assets of £5 billion or more having had to comply since 1 October 2021[7]. Schemes with £1 billion or more of assets will follow suit from 1 October 2022. 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.

TPR climate change guidance published[8]

TPR has now published guidance to help trustees meet these climate-related governance and reporting requirements, following consultation on the draft guidance last summer. TPR's guidance is intended to describe what trustees need to do and report on in their annual climate change (or TCFD) report to comply with the new legislation. Whilst no additional requirements are imposed on trustees, the guidance provides examples of how to apply the regulations and the DWP statutory guidance.

Pensions Dashboards: consultation and draft regulations published

DWP is keen to hear industry views

The DWP has published a consultation on pensions dashboards, including draft regulations.[9] The purpose of the consultation is to seek views on a range of policy areas relating to the creation of pensions dashboards. Key points from the consultation are as follows:

- the draft regulations set out the requirements to be met for a dashboard to be a "qualifying pensions dashboard service" and the requirements to be met by the trustees or managers of relevant occupational pension schemes, along with provisions to ensure compliance
- certain elements of the data that pension schemes will need to provide exceed current disclosure requirements
- the DWP is keen to hear from interested parties to understand what is workable
- the requirements will be phased in from April 2023, starting with the largest pension schemes first. Trustees will need to be ready to comply with the regulations by their "staging date".

In addition to the consultation:

- the PDP has announced the potential commercial providers taking part in the initial development of the pensions dashboards eco-system, in addition to the MaPS non-commercial dashboard[10]
- the PLSA has published an industry guide, "the Pensions Dashboards A-Z", which identifies key issues relating to the different layers of the dashboard ecosystem[11]
- PASA has published its Data Matching Convention ("DMC") Guidance. This initial guidance is intended to help schemes in choosing how they wish to compare "find requests" from individuals using the dashboard service against their member records. PASA explains that trustees' choice of matching will depend on the accuracy of the personal data they hold on their scheme, across all of their deferred and active member records.

Trustees should continue working on their data

7 See our Alert: Key changes coming into force from 1 October (29 September 2021)
8 See 7 Days (20 December 2021)
9 See our Alert: Pensions Dashboards – your DWP needs you! (1 February 2022)
10 See 7 Days (20 December 2021)
11 See 7 Days (20 December 2021)

Notifiable events: final regulations expected

See our publications on the proposed changes[12]

A response to the consultation on changes to the notifiable events regime is expected any day now. As the new regime is scheduled to come into force on 6 April 2022, DB employers should be ready to act swiftly when the final regulations are published.

CDC: final regulations and TPR draft code published

Final CDC[13] regulations published[14]

The PSA21 introduces the authorisation and supervision regime for collective money purchase (or "CDC") pension schemes. In December 2021, the DWP published the final regulations relating to CDC schemes, as well as a draft set of further regulations making consequential changes to other pieces of legislation. Subject to Parliamentary approval, both sets of regulations will come into force on 1 August 2022.

The regulations aim to help ensure that CDC schemes are set up and well governed by providing clear criteria for TPR to authorise and supervise them. They also "pave the way for the launch of the CDC scheme that Royal Mail and the Communication Workers Union aim to introduce".

Existing DWP guidance will be updated to include publication requirements for CDC schemes. This updated guidance is due to be published in February 2022 and will come into effect at the same time as the regulations.

TPR is consulting on a new CDC code of practice[15]

TPR has published a consultation on a new code of practice for the authorisation and supervision of CDC schemes and it expects that schemes will be able to apply for authorisation from 1 August 2022. The consultation closes on 22 March 2022.

TPR's powers: code comes into force

Updated code of practice on contribution notices in force[16]

TPR's updated code of practice 12 on contribution notices came into force on 25 November 2021. The code sets out the circumstances in which TPR may use its expanded contribution notice powers, and is unchanged from the finalised version published in September 2021.

DB funding: further delays to TPR's code

DB funding code not expected until late summer 2022[18]

TPR has confirmed that the second stage of its consultation on the revised DB scheme funding code[17], originally due before the end of 2021, will now be launched in "the late summer of 2022". TPR wants to take the opportunity to learn from the DWP's consultation on the draft funding and investment regulations, which it expects to be published in spring 2022.

The existing code and funding regime remain in place until such time as the new legislative requirements and code come into effect. When introduced, the changes will be forward-looking, meaning that only those schemes with valuation effective dates on or after the code's commencement date will be affected.

12 See our Alert: New notifiable events and the declaration of intent (9 September 2021) and Hot topic: new reporting requirements (January 2022)
13 See our Alert: DWP Collective Money Purchase Schemes consultation (20 July 2021)
14 See 7 Days (20 December 2021)
15 See 7 Days (31 January 2022)
16 See 7 Days (29 November 2021)
17 See our Alert: Pension Schemes Act 2021 – the dawn of a new regulatory era? (11 February 2021) and our Consultation Response
18 See 7 Days (20 December 2021)

TPR update

Trustees encouraged to report potential scams

TPR's plans for 2022

TPR has published a blog setting out its aims for 2022.[19] Its areas of focus include:

- **Defending savers from scams** – TPR is encouraging trustees to take a "decisive and common-sense approach" to the new transfer regulations[20]. TPR also urges trustees to report suspected scams to the authorities, as well as joining TPR's pledge[21] to combat pension scams
- **Value for money** – TPR is working with its regulatory partners to establish common standards on value for money
- **Climate-related risk** – TPR wants to see schemes integrating climate change into their decision making and generally improving their capability around climate and ESG
- **Criminal powers** – TPR confirms it will take an "appropriate and proportionate approach" to the use of its new criminal powers
- **Diversity** – TPR wants to continue to improve diversity across the pensions industry.

Trustees should be prepared to answer more extensive questions in the scheme return[22]

TPR updates scheme return for DB and hybrid schemes

TPR has changed the DB and hybrid scheme return for 2022. The return will be issued in two parts and contains some new questions for this year. For example, if DB trustees have assessed the employer covenant, they will be asked for the assessment date and to select a grade between 1 and 4. DB and hybrid schemes will also be asked to provide the website addresses where the following have been published:

- the scheme's SIP and implementation statement (for schemes with more than 100 members)
- the scheme's climate change report for schemes that already need to comply with the new climate change governance and reporting requirements, ie those caught from 1 October 2021
- extracts from the chair's statement for hybrid schemes that need to produce one.

The scheme return must be completed and submitted by 31 March 2022.

First DB superfund added to TPR's list[23]

TPR adds first DB superfund to list

The first DB consolidation vehicle (or "superfund") has met TPR's requirements and been added to a new online list. The list will include those superfunds which have been assessed by TPR and have demonstrated that they meet several criteria, including good governance, being run by fit and proper people, and being backed by adequate capital.

19 See 7 Days (31 January 2022)
20 See our Alert: Combatting pension scams – new conditions on transfers (9 November 2021)
21 See 7 Days (16 November 2020)
22 See 7 Days (24 January 2021)
23 See 7 Days (6 December 2021)

DC update

Ban on flat fees for small pots

No flat fees for pots under £100 in default arrangements[24]

From 6 April 2022:

- new regulations will prohibit an annual flat fee from being charged to members with rights in the default arrangement of a DC occupational pension scheme used for auto-enrolment where that fee would reduce the value of those rights to less than £100
- where more than one flat fee charge is imposed in respect of a member in a single charges year, scheme trustees or managers will need to restore the member's rights under the default arrangement to the position they would have been in if only one such charge had been imposed.

The Government has also published a revised version of its charge cap guidance to reflect these changes.[25]

Consultation on enabling investment in productive finance (charge cap and performance fees)

The DWP published a consultation on "Enabling investment in productive finance" at the end of November, which closed in January. Key points to note are as follows:

- the Government is proposing to include "well-designed performance fees that are paid when an asset manager exceeds pre-determined performance targets" on the list of charges excluded from the charge cap. It believes that this will address the problem that variable fees, such as performance fees, are not suitable for regulation through a flat cap
- should the above change go ahead, the smoothing mechanism introduced in October 2021, with the aim of enabling investments in assets attracting performance fees, will be removed[26]
- the consultation notes that the "Government will be introducing several initiatives to meet its commitment to shift the focus of DC schemes' investment strategies away from cost and move towards overall value, including opening up private markets to DC savers". No further detail is available at this stage.

A further consultation on draft regulations is expected early in 2022, with the aim of bringing the above changes into force in October 2022.

24 See 7 Days (10 January 2022)
25 See 7 Days (17 January 2022)
26 See our Alert: Key changes in force from 1 October (29 September 2021)

In other news

GMP Conversion Bill has Government support

The Bill aims to improve the statutory process[27]

This Private Member's Bill, which aims to clarify certain aspects of the statutory process for the conversion of GMPs, had its second reading in the House of Commons, with Guy Opperman, the Pensions Minister, recently stating that the Government supports the Bill. Unlike most Private Member's Bills, the GMP Conversion Bill now stands a good change of making it to an Act.

Key areas the Bill aims to address include:

- providing for regulations to set out the conditions that must be met in relation to survivors' benefits
- providing for a power to set out in regulations detail about who must consent to the conversion
- removing the requirement to notify HMRC.

Auto-enrolment: Private Member's Bill introduced to Parliament

A Private Member's Bill seeking to extend auto-enrolment to all jobholders aged at least 18, and to remove the lower qualifying earnings threshold, has been introduced to Parliament and is set to have its second reading in February.[28]

A report by thinktank "Onward" suggests that introducing these changes by 2026 could create additional pensions savings as high as £2.77 trillion across the working lifetime of the current workforce.

State pension: DWP launches second SPA review

On 14 December 2021, the DWP announced that it has launched its latest review of SPA. Legislation requires the Government to regularly review SPA, and this review must be published by 7 May 2023.[29]

The review will consider whether the rules around pensionable age are appropriate, and specifically whether the increase to age 68 should be brought forward to 2037-39, based on latest life expectancy data and other evidence.

27 See 7 Days (13 December 2021)
28 See 7 Days (10 January 2022)
29 See 7 Days (20 December 2021)

PPF update

Levy rules for 2022/23 published

The PPF has published its policy statement with final levy rules for 2022/23, and updated its levy estimate.[30] The policy statement confirms that:

- the majority of schemes paying a risk-based levy will see their levy fall
- the PPF will keep the measures in place that it introduced in 2021/22 to support schemes through the pandemic, ie the Small Scheme Adjustment, lower cap on the risk-based levy, and the COVID-19 easement option[31]
- for the minority of schemes that do see increases, for 2022/23 only, it will introduce a limit of 25% on increases to individual schemes' risk-based levy compared to 2021/22.

PPF levy estimate has fallen in recent years

The PPF has also updated its levy estimate for 2022/23 to £390 million. This is a reduction of £130 million from the previous levy year, and means the levy has reduced by over £200 million since 2020.

Hampshire update

The PPF has published its latest update in the wake of the Court of Appeal's judgments on the methodology for implementing the *Hampshire*[32] decision and the PPF compensation cap.[33] The DWP and PPF Board have confirmed:

- there will be no time limit on payments relating to *Hampshire* or on uncapping arrears. The PPF will pay arrears from the time that affected members started to receive compensation
- although the FAS cap wasn't affected by the Court of Appeal's ruling, some members are entitled to *Hampshire* arrears to make sure that they receive 50% of the value of their accrued old age benefits. The PPF acts as the scheme manager for FAS on behalf of the DWP. The DWP has now confirmed that it will not put a time limit on the payment of *Hampshire* arrears for members, and that interest won't be paid on the arrears because there is no legal basis to do so.

The PPF expects that it will take until the end of 2022 to complete the majority of the payments.

PPF publishes updated valuation guidance documents

The PPF has published new versions of various valuation guidance documents, including guidance in respect of valuations under sections 143, 152, 156 and 179 of PA04.[34] These updates came into effect on 1 December 2021 and allow for the *Bauer*[35] and *Hampshire* court judgments, as well as making other general tidying changes.

30 See our Alert: the 2022 / 23 PPF Levy Determination (11 January 2022)
31 See our Alert: the 2021 / 22 PPF Levy Determination (2 February 2021)
32 See our case summary: Hampshire v PPF (Judgment of the CJEU) (10 September 2018
33 See 7 Days (20 December 2021)
34 See 7 Days (6 December 2021)
35 See our case summary: PSV v Bauer Judgment of the CJEU (20 December 2019)

Cases

Court of Appeal

Mitchells & Butlers Pensions Ltd v Mitchells & Butlers plc (High Court, Chancery Division)

On 12 November 2021, the High Court ordered the rectification of pension increase provisions contained in the rules of the Mitchells & Butlers Pension Plan ("the Plan").[36]

The sole corporate trustee of the Plan raised the claim on behalf of the members against the current principal employer. Rectification was sought for trust deeds and rules from 1996, when an unintended change first entered the Plan's documentation. Subsequent trust deeds and rules, from 2002 and 2006, perpetuated the change.

The judgment contains discussion of witness statements, and of what constitutes proper consultation of a scheme actuary, and so will be of interest to schemes, lawyers, and actuaries alike.

TPO

Mr S (PO-11134): scheme to reinstate member after transfer out

TPO has directed MoD to reinstate Mr S as a member of the Armed Forces Pension Scheme, as it did not carry out adequate pension scam checks in relation to the transfer.[37]

Mr S was transferring benefits from one occupational pension scheme to another and could therefore only take a CETV if he was an "earner" in relation to the new arrangement. Despite receiving evidence that Mr S was on Jobseekers Allowance (as part of the proof of identity checks), MoD failed to note that he was not in receipt of earnings. As he was not an "earner" for the purposes of the legislation, TPO concluded that Mr S did not have a statutory right to transfer his pension into the receiving scheme. In the absence of a facility under the scheme rules to make a discretionary transfer, the transfer was declared void.

Furthermore, TPR had issued new pension scams guidance in February 2013. TPO concluded that MoD did not take account of this guidance in relation to Mr S's transfer, even though his transfer was not completed until several months after the guidance was published.

Update transfer processes in a timely manner

With new statutory transfer requirements having come into force back in November 2021[38], this determination serves as a timely reminder that TPO expects administrators to update their processes promptly to reflect any change in industry guidance or legislation. This is generally within one month but "each case will be assessed on its own merits".

MoD was directed to pay £2,000 for the severe distress and inconvenience caused to Mr S.

36 See our case summary: Mitchells & Butlers Pensions Ltd v Mitchells & Butlers plc (High Court, Chancery Division) (22 November 2021)
37 See our case summary: Mr S (PO-11134) – scheme to reinstate member after incorrect transfer out (17 January 2022)
38 See our Alert: Combatting pensions scams – new conditions on transfers (9 November 2021)

Sackers

Upcoming 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 particular topics.

Our seminars are continuing as webinars for the time being and you are advised to check our website for all the latest information on www.sackers.com/events

PLSA Trustee Training Programme – Part 2: the practice	29/03/2022	Webinar (10:00am-4:00pm) With support and guidance from independent experts, trustees with some experience will take part in boardroom simulations to learn how to approach the issues you will face in your role.

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

Sign up

Stay up to date with all the latest legal and regulatory developments affecting pensions and retirement savings by signing up to our free publications on www.sackers.com/knowledge/publications.

These include our weekly round-up, 7 Days, Alerts where topical issues are covered in depth, and Briefings which give practical commentary and perspectives on essential issues.

Recent publications

Our Hot topic – new reporting requirements – a practical take on the proposed changes to the notifiable events regime.

Our Hot topic – Are you ready? The new statutory transfer regime – a practical guide on the changes to the statutory transfer regime.

The Pensions litigation briefing – December 2021 reviews recent case law and examines the practical lessons for trustees and employers.

Sacker & Partners LLP
20 Gresham Street
London EC2V 7JE
T +44 20 7329 6699
E enquiries@sackers.com
www.sackers.com