Sackers

# Quarterly briefing

## September 2022

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

# Q3
## September 2022

On the front cover this quarter: Ferdy Lovett (partner) and Paige Willis (senior associate)

## Abbreviations

**CDC:** Collective DC

**CETV:** Cash equivalent transfer value

**CMA:** Competition and Markets Authority

**DB:** Defined benefit

**DC:** Defined contribution

**DWP:** Department for Work and Pensions

**ESG:** Environmental, social and corporate governance

**ET:** Employment Tribunal

**EU:** European Union

**FCA:** Financial Conduct Authority

**GMP:** Guaranteed minimum pension

**ICO:** Information Commissioner's Office

**MaPS:** Money and Pensions Service

**PASA:** Pensions Administration Standards Association

**PDP:** Pensions Dashboards Programme

**PSA21:** Pension Schemes Act 2021

**SIP:** Statement of investment principles

**TCFD:** Taskforce on Climate-related Financial Disclosures

**TPR:** The Pensions Regulator

**VfM:** Value for members

## In this issue



## 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** | Response to DWP consultation[1] and PDP consultation on the draft set of "standards"[2] both issued in July 2022 | Final regulations to be laid before Parliament in 2022, with schemes starting to connect from April 2023 (see pages 5 and 6) |
| **Notifiable events** | Response to consultation and final regulations | Originally expected into force spring 2022 but response still awaited |
| **DB scheme funding** | The new funding and investment strategy | Consultation on draft regulations published 26 July 2022 (see page 10)<br>Consultation on draft code expected later this year |
| **Single code** | Revised code to be published | Expected autumn 2022 (see page 4) |
| **Simpler annual benefit statements**[3] | Response, regulations and guidance published 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 (see page 9) |
| **CDC** | Legislation for single or connected employer schemes came into force 1 August 2022. Expansion to multi-employer schemes to follow | End of 2022 / early 2023 |

1 See our Alert: Pensions Dashboards – DWP consultation response (18 July 2022)
2 See our Alert: Pensions Dashboards - PDP publishes consultation on standards (20 July 2022)
3 See our Alert: Simpler annual statement – response to consultation and final regulations (20 October 2021)
4 See Hot Topic: £1bn plus schemes – are you ready? (June 2022)

# Spotlight: single code of practice

TPR's new single code of practice (the "Code") is expected to be published in autumn 2022. 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.

TPR had a great deal of feedback on the draft Code, which was published back in 2021.[5] We are not expecting significant changes to the key requirements, but there will be differences in the final Code.

## Effective system of governance ("ESOG")

Trustees already have a statutory requirement to establish and operate an ESOG. However, the Code will set out how trustees can discharge this duty.

**Trustees should have an effective system of governance in place**

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 start, or continue, work now so they are in a good position to deal with any outstanding requirements when the Code comes into force. Actions include:

- ✓ For those yet to get started, having a training session on the new Code
- ✓ Preparing a project plan, thinking about whether a sub-committee is needed and getting meetings in the diary
- ✓ Working with your advisers to understand what actions are appropriate for your scheme
- ✓ Carrying out a gap analysis, in which you assess your existing policies and procedures and compare them against those listed in the Code.

5 See our Alert: TPR issues consultation on draft single code of practice (18 March 2021)

# Pensions dashboards

**Several key dashboard documents published recently**

The PSA21 sets out a framework for the introduction of a pensions dashboard service, a digital interface designed to enable individuals to see all their pensions information in one place.

Developments in the dashboard space have been coming thick and fast recently, helping to flesh out the detail of the new requirements. Draft dashboard regulations were consulted on earlier this year, with the DWP's response published in July. TPR's initial guidance has also been issued, together with a useful checklist, as well as the PDP's consultation on the draft set of standards and accompanying guidance.

We're not done yet though. Final regulations are set to be published later this year, with TPR's consultation on its draft compliance and enforcement policy due afterwards, setting out how TPR intends to police dashboards. This will be followed by final versions of the PDP's standards and guidance.

## What are trustees' dashboard duties?

By way of recap, under the draft regulations, trustees of schemes in scope, all registrable UK-based occupational pension schemes with 100 or more members excluding pensioners, will need to:

- register their scheme with MaPS and connect to the "digital architecture" by their staging date
- ensure their scheme can receive both "find" requests (a request sent by the pension finder service to all schemes searching for a pension match) and "view" requests (a request to see the relevant pensions information)
- co-operate with MaPS when preparing to connect, maintain appropriate records, and report certain information to both TPR and MaPS.

## When does my scheme need to comply?

**Staging deadline for first two cohorts deferred**

There were some limited concessions to the proposed staging timetable in the DWP's July consultation response. Staging deadlines for the first two dashboard cohorts (large master trusts and large DC schemes used for automatic enrolment) have been deferred by two months to 31 August and 30 September 2023 respectively. The connection window for the first cohort has also been extended by two months, so those schemes can still start connecting from April 2023.

The method for determining the staging date for hybrid schemes will also be simplified. Total relevant members across both DC and non-DC sections should be calculated and then the entirety treated as non-DC. The upshot is that hybrid schemes will have a staging deadline no earlier than 30 November 2023.

### High-level summary of staging deadlines

| Type | Staging deadline |
|---|---|
| Master Trusts (20,000 or more members) | 31 August 2023 |
| DC schemes used for automatic enrolment (20,000 or more members) | 30 September 2023 |
| Remaining large schemes (1,000 or more members) | Between 30 September 2023 and 30 September 2024 depending on size |
| Public service pension schemes | 30 September 2024 |
| Medium schemes (100 to 999 members) | Between 31 October 2024 to 31 October 2025 depending on size |

# Pensions dashboards cont.

## What's next?

The final regulations are expected at the end of this year, with compliance being rolled out from spring 2023. However, the date that dashboards go "live" to the public, known as the "dashboard available point" (or "DAP") has not been set yet, although the current expectation is that it will not be until at least 2024.

### Key actions for trustees

TPR, the DWP and the PDP all make it clear that trustees should be starting preparations for dashboards now, regardless of when their staging date falls.

- ✓ **Pinpoint your staging date**
  Ensure all relevant advisers are aware of and agree with this timing.

- ✓ **Resourcing**
  Decide how to manage the project at trustee board level. Liaise with administrators and other advisers as soon as possible to help identify any potential capacity constraints and to check what support is on offer. New service providers may need to be engaged, such as a third-party integrated service provider ("ISP").

- ✓ **Bring employers into the loop**
  They may be able to help improve the availability and quality of data.

- ✓ **Decide how to connect to the dashboards ecosystem**
  Possibilities here include using an interface built by the scheme's third-party administrators or using an ISP. TPR cautions trustees that building their own interface, eg where the scheme is administered in-house, would be a "significant undertaking".

- ✓ **Get dashboard data ready**
  The DWP and the ICO expect schemes to be "doing what they can" to improve data accuracy and that steps should be taken to rectify any problems "without delay". Work with your administrators to make improvements and to help fill any gaps.

- ✓ **Decide "matching" criteria for find requests**
  Set your criteria for matching members with their pensions via the dashboards ecosystem. Discuss suitable options with your administrators and other advisers.

- ✓ **Data protection**
  Seek legal advice on the lawful basis for processing personal data for dashboards purposes as extra steps may be needed.

  Data protection legislation requires a data protection impact assessment ("DPIA") when "combining, comparing or matching" personal data obtained from multiple sources. The DWP expects trustees to "actively consider" the benefits of producing or reviewing their DPIAs to demonstrate compliance with their dashboard duties.

- ✓ **Contractual changes**
  Contracts with existing providers are likely to need to be updated to reflect any work relating to dashboards. Trustees will also need to consider contractual arrangements with any new providers, eg ISPs.

# Pension transfers and scams

## TPR / DWP joint statement and TPR guidance updated

TPR and the DWP issued a joint statement on the transfer regulations back in July.

By way of recap, changes to the transfer regime came into force from 30 November 2021, restricting the statutory right to transfer unless certain conditions are met. Depending on the circumstances, this includes assessing whether any red flags (indicating a heightened risk of a scam) or amber flags (indicating a potential scam) are present. A red flag stops the statutory transfer in its tracks, whilst an amber flag pauses it pending the member taking guidance from MaPS.[6]

**Overseas investments and transfer incentives proving challenging in practice**

The statement acknowledges that concerns have been expressed about applying the regulations where overseas investments (an amber flag) or small-scale incentives (technically a red flag) feature in the transfer.

TPR's updated guidance makes clear that it expects trustees to assess whether a particular incentive indicates a heightened scams risk. It also notes that certain incentives could be considered normal industry practice. If this is the case, after appropriate due diligence, TPR suggests trustees might deem the transfer to be low risk and, where scheme rules allow, consider granting a discretionary transfer. The section on overseas investments has been similarly amended.

But the regulations remain unchanged and the DWP only plans to revisit them as part of a scheduled review, which is due by the end of May 2023, 18 months after the regulations came into force. Trustees contemplating the discretionary transfer route should therefore seek legal advice beforehand.

## TPR publications on pension scams

Combatting pension scams remains a key priority for TPR, with it publishing the following over recent months:

**Trustees should report potential scams**

- **a guide to reporting pension scams**
  This guide sets out why, when and how trustees should report actual or suspected scams. Trustees should report if they believe a scam has already happened, if a red flag is raised when making a transfer, or if they suspect a pension scam could be taking place (for example, because an amber flag applies to a transfer). A report can be made to Action Fraud, the FCA or TPR depending on the specific concern.
- **an updated scams letter for transfer packs**
  TPR expects trustees to include this updated letter, signed by TPR, the FCA and MaPS, in their response to any member request for a CETV of their DB benefits. Schemes should ensure they use this updated letter in their transfer documentation.
- **a new scams strategy**
  TPR's new scams strategy is aimed at educating the industry and savers on the threat of scams and preventing practices which can harm retirement outcomes. The strategy sets out various actions for the next three years, including setting expectations that schemes include a pension scam warning in every annual benefit statement.

6 See Hot Topic: Are you ready? The new statutory transfer regime (November 2021)

# DC update

## Call for evidence on “Helping savers understand their pension choices”

Back in 2018, the FCA introduced various measures to help consumers make informed choices at retirement and to reduce the risk of poor outcomes. These measures included earlier “wake up” packs and various limitations around drawdown where an individual had not taken advice. These changes created a disparity between what was being offered in respect of contract-based schemes regulated by the FCA and trust-based schemes regulated by TPR.

Against this background, the DWP published a call for evidence, which closed in July 2022, to explore the support members of trust-based pension schemes might need to make informed decisions about how to use their savings.[7] However, the DWP believes that the fundamental differences between trust-based and contract-based schemes should be reflected in any future policy changes.

## Driving value for money in DC pensions

**TPR and the FCA to consult on value for money proposals late 2022**

TPR and the FCA have published a feedback statement summarising responses received to their joint discussion paper on DC value for money (as distinct from VfM, which looks at much broader issues than the financial implications, such as good governance and record keeping). There were a number of areas where the responses did not show a clear consensus.

TPR and the FCA will consider which metrics schemes should be disclosing to facilitate more effective value for money assessments and aim to consult on policy proposals “towards the end of 2022”.

## Updated guidance for DC scheme returns

**New questions in DC scheme return**

TPR has updated its guidance on completing DC scheme returns, including an example DC scheme return. A scheme return notice will be sent between July and December 2022 to schemes which need to complete a return this year.

Where applicable, schemes will need to answer new questions for 2022, including providing information about the more detailed VfM assessment[8] and providing the website address where the scheme’s chair’s statement extracts, SIP, implementation statement and climate change report (as relevant) have been published.

7 See our Alert: Call for evidence – Helping savers understand their pension choices (16 June 2022)

8 See our Alert: Key changes in force from 1 October (29 September 2021)

# ESG and climate change update

## Schemes to measure and report on "Paris alignment"

**New requirement to measure and report on Paris alignment**

The DWP has published its long-awaited response to its October 2021 consultation[9] on proposals to require trustees of schemes in scope of the climate-related governance and reporting regulations to measure and report on the "Paris alignment" of their investment portfolios.[10] The Paris Agreement involves limiting global warming to well below 2°C and pursuing efforts to limit it to 1.5°C above pre-industrial levels.

The requirement to measure and report on the "Paris alignment" will come into force on 1 October 2022, and will apply to occupational pension schemes with £1bn or more in relevant assets, as well as authorised master trusts and authorised CDC schemes.

New statutory and non-statutory guidance on reporting on stewardship in SIPs and implementation statements has also been issued.

## Penalties for breach of climate-related reporting requirements

**TPR to issue penalties only where nothing is published or no genuine effort to comply**

Over the coming months, around 100 schemes are expected to publish their first climate-related reports, often referred to as TCFD reports. TPR has acknowledged the challenges faced by some schemes in relation to the availability, quality and consistency of data that schemes rely on when carrying out their climate-related reporting obligations.

Given the above, TPR does not anticipate issuing any penalty notices to trustees of schemes that publish their first reports over the coming months, except where:

- the report has not been published – this will result in a mandatory penalty of at least £2,500, or
- it is clear the trustees have not made a genuine effort to comply – this could result in a discretionary penalty of up to £50,000.

## Schemes can be doing more in respect of the "S" in ESG

**Trustees can do more in respect of the social aspects of ESG**

The DWP has published a response to its March 2021 call for evidence[11] seeking views on how schemes approach social risks and opportunities, commenting that trustees who do not factor in financially material social factors are "at risk of not fulfilling their fiduciary duty". Whilst there were "strong examples of stewardship on social factors" from "a minority of respondents", the social aspects of ESG are an area in which the risk management of pension schemes can be strengthened.

A new taskforce on social factors will be established to help support trustees and the wider pensions industry with some of the challenges around these risks. The taskforce will, among other things, take the lead on ascertaining reliable data sources and other resources which could be used by pension schemes to identify, assess and manage financially material social risks and opportunities.

9 See our Alert: Consultation on changes to climate and investment reporting (26 October 2021)
10 See our Alert: Response to consultation on changes to climate and investment reporting (20 June 2022)
11 See our Alert: Call for evidence on consideration of social risks and opportunities by occupational pension schemes (25 March 2021)

# In other news

## New DB funding and investment strategy

Designed to implement requirements set out in the PSA21 for all DB schemes to have a funding and investment strategy in place, and to submit a written statement of it to TPR, the DWP published its greatly anticipated consultation and draft regulations on 26 July 2022.[12]

The intention underpinning the new strategy is "to have better, and clearer, funding standards, but not to move away from the strengths of a flexible scheme specific approach". For open DB schemes, this means that the regulations will not prevent access to "riskier investments where there are potentially higher returns, as long as the risks being taken can be supported and members' benefits are effectively protected".

**Further detail to be included in the revised DB funding code**

Schemes will need to target "low dependency" on their sponsoring employer by the time they are "significantly mature". Broadly, a scheme will have low dependency on its employer 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.

The first strategy will need to be produced no later than 15 months after the effective date of the first actuarial valuation after the regulations come into force, which is expected to be in late 2023.

A further consultation on the revised DB funding code will be published once TPR has "taken the opportunity to learn" from this consultation.

## Overseeing investment consultants and fiduciary managers

The DWP finally published its response to the 2019 consultation on draft regulations intended to integrate the CMA Order 2019 into pensions law from 1 October 2022.[13] Subject to limited exceptions, the Order requires trustees to carry out a tender process for fiduciary management services and to set objectives for their investment consultants. The draft regulations, which largely replicate the Order, will bring the requirements under the pensions law umbrella, allowing TPR to oversee compliance rather than the CMA.

**Trustees to report to TPR via the annual scheme return**

Following consultation, the DWP has proposed some minor changes to the draft regulations. These include changes to the definitions of "investment consultancy services" and "fiduciary management services", as well as clarifying which assets should be excluded from scheme assets for the purposes of identifying when the requirements apply.

TPR has published updated guidance reflecting these changes. The update also includes new guidance on how trustees might assess the performance of potential and existing fiduciary managers.

## New PASA GMP equalisation guidance on past transfers

**Guidance contains a useful checklist to help trustees**

PASA has published guidance on the administration implications of past transfers out. The guidance takes the form of a checklist of the various issues which require trustee consideration and the potential impact any related decisions may have on administration. The intention is that trustees use the checklist to inform their discussions, capture any decisions made, and to provide an audit trail for the future.

12 See our Alert: DWP consults on DB funding and investment strategy (27 July 2022)

13 See our Alert: Trustee oversight of investment consultants and fiduciary management – DWP response to consultation (13 June 2022)

# Age discrimination case

## Background

When age discrimination requirements were first introduced back in 2006, two important exemptions were included for occupational pension schemes:

- the first exemption allows certain common practices and measures to be maintained or used without needing to be separately objectively justified by employers and trustees. Examples include minimum ages for scheme entry or for access to benefits
- the second exemption excludes periods of pensionable service prior to 1 December 2006 from the scope of the age discrimination requirements.

A recent ET hearing, *Beattie and others v (1) 20-20 Trustee Services Ltd (2) Federal Mogul Limited*, looks set to challenge the second exemption.

## The Beattie case

The *Beattie* case was a preliminary hearing which required the ET to consider whether it had jurisdiction to hear claims from individuals who ceased pensionable service before 1 December 2006 (ie the period covered by the second exemption) regarding whether the PPF compensation rules are age discriminatory.

**ET declared exemption incompatible with EU law**

The ET found that it did have jurisdiction to hear the case. In doing so, it also concluded that the second exemption is incompatible with the EU Framework Directive for equal treatment in employment and occupation, which is the Directive the UK was required to implement to outlaw age discrimination. As a result, the ET said that the second exemption should be disapplied (in effect, ignored).

## What happens next?

**DWP to appeal ET decision**

ET decisions only bind the parties to them. However, we know that the DWP intends to appeal and that the appeal should be heard before November 2022. Although no immediate action is required at this stage, any decision by higher courts would be binding across all affected schemes. Given this, trustees should be aware of the implications in the event the appeal is not successful.

## What's the potential impact on schemes?

If the second exemption were to be disapplied, this would mean measures which relate to periods of pensionable service prior to 1 December 2006 would now fall within the scope of the age discrimination legislation. How significant this would be will vary from scheme to scheme, depending on whether:

- a pre-1 December 2006 practice or measure is specifically permitted by any other statutory exemptions (assuming they remain unchallenged), and
- whether the particular practice or measure is capable of being separately objectively justified, ie the trustees and/or employer being able to demonstrate that it was a proportionate means of achieving a legitimate aim. Demonstrating this retrospectively is unlikely to be straightforward.

### Trustee action

This case is clearly one to watch. Trustees should ask their legal advisers to keep them updated on the outcome of the appeal.

# Sackers

## 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.

| | | |
|---|---|---|
| Trustee training: pensions for new trustees | 03/11/2022 | In person seminar<br>This interactive seminar is a full day session aimed at new trustees, where we focus on the key legal issues for new trustees of DB, DC and hybrid schemes (as well as those who would like to refresh their knowledge). You will have the opportunity to ask questions and share your experiences with other trustees. |
| Quarterly legal update | 17/11/2022 | Online webinar<br>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

## 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

The Finance & investment briefing – September 2022 takes a look at current issues of interest to pension scheme investors.

The Pensions litigation briefing – June 2022 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