STEPHENSON HARWOOD
pensions law group

Snapshot

November 2022

Overview

- Pensions dashboards
  The Government has published its response to a consultation relating to the notice period to be given prior to pension dashboards going live to the public (known as the Dashboards Available Point (**DAP**)). The initial consultation document suggested that 90 days' notice would be given of this date. Following concerns raised with this proposal, this will now be extended to 6 months. Draft guidance has also been published regarding the very limited circumstances in which a scheme's dashboard onboarding date can be deferred.

- The Pensions Regulator sets out expectations for trustees in managing investment and liquidity risk
  The Pensions Regulator (**TPR**) has set out steps that trustees of both DB and DC schemes should be taking in light of the recent increase in gilt yields and collateral calls under liability-driven investments (**LDIs**) and its aftermath.

- The Pensions Regulator has published its response to the consultation on its draft enforcement and prosecution policies
  TPR has now published its response to the consultation on the draft enforcement and prosecution policies. The new drafts are largely in the same form as the initial draft versions. These set out how TPR will approach exercising its wide variety of powers. TPR has also published an enforcement strategy which provides an insight into the overarching framework that is applied when selecting cases for enforcement action.

- The Pension Regulator's blog on mergers and acquisitions
  A blog from TPR highlights the importance of trustees in M&A deals remaining vigilant in protecting pension funds in the current economic climate. TPR stresses that trustees must be robust when defending the interests of scheme members in M&A deals to ensure that member benefits are paid.

- PASA issues DC transfer guidance
  PASA has released its DC transfers guidance. This sets out standardised and non-prescriptive process flow for transfers, as well as recommending that trustees agree acceptable Service Level Agreement timescales for processing transfers upfront with their administrators. The guidance also provides template communications for improving transfer processes.

- PPF Levy Consultation published
  The PPF has noted a £200 million levy estimate for 2023/24 which is down from £630m in 2020/21 and £390m in 2022/23.Almost all PPF levy payers will see a reduction in their levy next year.The Chief Executive of the PPF has stated that he hopes that schemes will use the reduction in their levy payments to further strengthen the position of their own scheme and improve the outlook and security for their members.

In more detail

Pension Dashboards

Extension of notice period prior to Dashboard Available Point

In our July 2022 snapshot, we discussed the DWP's further consultation in relation to pension dashboards which considered:

- the notice period to be given before the 'go live' date of pension dashboards (the DAP). This is the date dashboards will be available to the public. The consultation suggested the Secretary of State would give 90 days' notice prior to the DAP; and
- the disclosure of information between the Money and Pensions Service (**MaPS**) and TPR.

The Government has now provided a response to this further consultation. The notice period to be given prior to the DAP has now been extended to 6 months. The reason for the extension is to provide sufficient time for the pensions industry to make final preparations for the public launch of the dashboard service.

The response also confirms that the government will be proceeding as planned with respect to the disclosure of information provisions between TPR and MaPS to allow these bodies to support each other in delivering the pension dashboard services.

Comment

An extension to the notice period to be given before the DAP is likely to come as a welcome development for most schemes. Responses to the further consultation, where the original 90 days was proposed, showed a clear concern that schemes would not have enough time to get the resources in place to deal with the anticipated significant increase in member queries that are expected after the DAP.

Draft guidance on deferred connection

In scope occupational pension schemes will have to connect to a dashboard service by their staging deadline. The proposed staging dates of schemes are set out in the recently amended draft Pensions Dashboard Regulations 2022 (**Dashboard Regulations**). The new draft of these regulations reflects the decision to delay the first two cohorts in stage one by two months. The current proposed staging timetable is as follows:

Stage	**Compulsory staging date**	**Size (pensioner members not included)**	**Further information**
One: Large schemes	August 2023 – September 2024	1000+ relevant members	Priority order for this stage will be: ▪ Large master trusts ▪ Other large schemes providing money purchase benefits for automatic enrolment purposes ▪ All remaining large occupational schemes and public sector schemes
Two: Medium schemes	October 2024 – October 2025	100 to 999 relevant members	Relevant occupational pension schemes
Three: Small and micro schemes	Not covered by regulations, but expected to stage from 2026	99 or fewer relevant members	The timing for these schemes will be set out in future regulations

Trustees are able to apply to defer their staging deadline by up to 12 months:

- within 12 months of the coming into force of the Dashboard Regulations; and
- at least 2 months before their relevant staging date.

They can only make such an application if, before the coming into force of the Dashboard Regulations, they had either:

- embarked on a programme to transfer the data held by the pension scheme to a new administrator; or
- entered into a contract requiring the retender of the administration of the scheme, the timetable of which is reasonable and would conflict with the staging deadline.

Trustees would then also need to show that complying with the staging deadline would be:

- disproportionately burdensome; or
- put personal data of members at risk.

Draft guidance has been issued to trustees looking to use deferral. The guidance makes clear that changing administrator alone will not be sufficient. Deferral will not be granted if the application does not include sufficient supporting evidence or if it is suspected a change in administrator has been delayed or undertaken deliberately to avoid needing to meet the connection requirement. Trustees should also have considered reasonable alternative options for securing compliance and determined these to be unviable.

Comment

Both the draft legislation and guidance make clear that deferral of a scheme's staging date can only be granted in very limited circumstances. Even when those circumstances are satisfied, trustees will need to show there was no bad faith in their timing in changing administrator. Clear documentation will need to be provided as well as evidence that alternative ways to meet the staging deadline have been considered but are not viable. Trustees should not, therefore, bank on relying on a deferred staging date when embarking on their dashboard projects.

The Pensions Regulator sets out expectations for trustees in managing investment and liquidity risk

TPR has set out its expectations on trustees regarding the management of investment and liquidity risks in the face of current market conditions.

Historically, LDIs have been a useful investment tool that protect schemes from adverse rise and falls in interest rates and inflation. LDIs achieve this by matching the assets of a pension scheme to its liabilities.

The risk of gilt yields rising is well understood by trustees, and pre-planned for by keeping aside liquid assets, which can be used as collateral. However, it was the unprecedented speed at which gilt yields increased at the end of September that created liquidity pressures. As a result, LDI managers urgently sought collateral. These pressures caused the Bank of England (**BOE**) to conclude that there was a significant risk to the financial markets. Consequently, the BOE intervened in the gilt market to restore stability.

The impact of current market conditions

DB schemes

Whilst DB schemes were not at risk of collapse, the challenge was to access liquidity at short notice to maintain their liability hedging positions in an environment where long-term interest rates rose rapidly. Those DB schemes that could not meet demands for more collateral lost some of their hedging protection.

DC schemes

DC schemes do not use leverage in their default strategies, so the collateral call issue affecting DB schemes does not apply. However, DC schemes may have experienced a reduction in the value of their savings if they invested in gilts (as these have fallen in value). DC schemes tend to have a higher allocation to gilts as they approach their expected retirement date. Therefore, members who are closer to their expected retirement date are more likely to have seen a greater fall in the value of their pension.

Actions for Trustees – advice from TPR

TPR has recommended that trustees take the following steps in the current climate:

DB schemes

- *Review operational processes:* Trustees should ensure schemes can implement their liquidity and cash management plans quickly to adapt to market changes quickly.
- *Review liquidity position:* It is likely the balance of liquid to illiquid investments will have changed within the scheme. Therefore, trustees might wish to ask the employer(s) whether they would provide additional collateral.
- *Review liability hedging position:* There may be market opportunities for some schemes to increase or replace hedging, or lock in some funding improvements. However, trustees must consider the level of leverage and the implications of collateral calls at this time of higher volatility.
- *Review funding and risk position:* Schemes may find themselves ahead of their target or expected position. The balance of risk in the scheme's portfolio may also have changed. Trustees should consider a rebalancing of their risk profile.
- *Consider how current yields impact other areas of the schemes:* As higher yields impact transfer values, trustees should monitor the appropriateness of the assumptions used in calculating transfer values.

DC schemes

- Maintain a long-term perspective when reviewing recent market volatility and performance;
- Review their investment strategy and operational factors in executing this strategy;
  - Communicate with savers who are approaching retirement to make them aware of their options and emphasise the importance of seeking financial advice;
  - Encourage savers to seek regulated financial advice or speak to Money Helper before making decisions about their pension savings in light of market conditions;
  - Remain vigilant for scams and suspicious transfers; and
  - Review processes to ensure they can act at speed where necessary.

The Pension Regulator's enforcement strategy and policy

The Pensions Regulator has published its response to the consultation on its draft enforcement and prosecution policies

We have previously discussed, following the new powers granted to TPR by the Pension Schemes Act 2021, TPR's consultation on an enforcement and prosecution policy which details how TPR will approach exercising its powers. The enforcement policy sets out TPR's general approach to the investigation and use of its enforcement powers in respect of defined benefit schemes, defined contribution scheme, public service schemes and some aspects of master trust enforcement.

The revised enforcement and prosecution policies are largely the same as the initial draft versions.

Some changes to the enforcement policy include:

- TPR making clear that it would not usually expect to take action against trustees of transferring schemes in instances of pension scams; and
- A new section on settlement which provides that an outcome of TPR using its powers may be that a settlement is agreed.

In the consultation response to TPR's prosecution policy, TPR makes clear that, other than for strict liability offences, TPR is unlikely to consider genuine unintentional breaches as justifying the use of its criminal powers (as distinct from intentional acts).

Enforcement strategy

TPR has published a new enforcement strategy alongside the final enforcement policy. These are to be read in conjunction when seeking to understand TPR's approach to enforcement action.

This strategy provides an insight into the overarching framework that is applied when selecting cases for enforcement actions (excluding automatic enrolment).

The strategy states that any action will aim to achieve one of the following outcomes: prevention; remedy; restoration; and/or deterrence. It outlines some examples:

i) Prevention: the person may need to take steps to address and prevent repeating the action that contravened pensions legislation, or other duties;

ii) Remedy: the person may need to provide funding or other financial support to the pension scheme or take steps to put things right and correct the contravention of pensions legislation or other duties;

iii) Restoration: the person may need to restore loss or detriment caused to a scheme and/or its savers, by putting them into the position they would have been in had the contravention of pensions legislation or other duties, or the act or conduct which caused the loss or detriment not occurred; and

iv) Deterrence: even if a contravention of pensions legislation or other duties can be put right or remedied, a sanction may be appropriate to punish the person responsible. This acts a deterrent to change the future behaviour of not only that person but also the wider pensions industry.

The strategy also states that TPR will normally publish the outcomes of its enforcement activity to raise awareness of their expectation and the consequences when those expectations are not met, in order to improve standards and behaviour.

TPR blog on mergers and acquisitions

A blog from TPR highlights the importance of trustees in M&A deals remaining vigilant regarding protecting pension funds in the current economic climate. TPR stresses that trustees must be robust when defending the interests of scheme members in M&A deals to ensure that member benefits are paid.

The blog picks out two key ways that trustees can do this:

- First, trustees should support the ingoing and outgoing executive management teams to implement a robust funding plan (i.e. one that is underpinned by cash/and or security with sustainable value). Employers have a duty to make sure that scheme members are treated fairly and equitably in major corporate transactions and should consult trustees about a proposed transaction. Trustees should encourage employers and bidders to communicate with schemes as the primary creditor when structuring a financing package and not to treat them as an afterthought; and
- Second, trustees should be provided with direct access to the bidder and their advisers at the earliest opportunity in the transaction process. This will allow them to set out to bidders the liabilities in the scheme and begin negotiating protection for the Schemes. The blog states that if the proposed business plan is likely to impact the strength of the employer's ability to support the scheme, then protections for the scheme should be negotiated by the trustees. Ideally, a legally binding agreement should be reached with the trustees ahead of completion to avoid any weakening of an arrangement after the transaction.

PASA issues DC transfer guidance

PASA has released its DC transfers guidance. This builds upon a legislative backdrop of:

- the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021, which place additional obligations on those involved in pension transfers to further protect individuals against pension scams; and
- the Stronger Nudge to pensions guidance regime, which is aimed at ensuring members over 50 either receive Pension Wise guidance or explicitly opt out before transferring their DC assets.

Given that the regulatory requirements may increase processing times for transfers out, PASA's new guidance sets out standardised and non-prescriptive process flow for transfers, as well as recommending that trustees agree acceptable Service Level Agreement timescales for processing transfers upfront with their administrators. The guidance also provides template communications for improving transfer processes.

PPF Levy Consultation published

The PPF has published its consultation on the levy rules for 2023/24 which sets out its proposals for how it will calculate the levy for invoices issued in autumn 2023. The consultation will close on 10 November 2022.

The PPF has noted a £200 million levy estimate for 2023/24 which is down from £630m in 2020/21 and £390m in 2022/23. The PPF has redefined its funding objective to focus on maintaining financial resilience. The PPF has stated that this is a position created by excellent investment performance and reduced risk of claims.

This means that the levy can now be actively reduced without risking the long-term security of current or future members and almost all PPF levy payers will see a reduction in their levy next year. The Chief Executive of the PPF has stated in a press release that he hopes that schemes will use the reduction in their levy payments to further strengthen the position of their own scheme and improve the outlook and security for their members. The PPF expects its reliance on levy will further reduce over time.

Contacts

Philip Goodchild

Partner, Pensions

T: +44 20 7809 2166

E: philip.goodchild@shlegal.com

Julia Ward

Senior knowledge lawyer, Pensions

T: +44 20 7809 2028

E: julia.ward@shlegal.com

This note does not constitute legal advice. Information contained in this document should not be applied to any particular set of facts without seeking legal advice. Please contact your usual Stephenson Harwood pensions law group member for more information.

© Stephenson Harwood LLP 2022. Any reference to Stephenson Harwood in this document means Stephenson Harwood LLP and its affiliated undertakings. The term partner is used to refer to a member of Stephenson Harwood LLP or a partner, employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Stephenson Harwood LLP's affiliated undertakings. LONADMIN 16577978/141122