



SEPTEMBER 2021

# Pensions Round-Up

# Contents

Introduction .....	3
Changes to the Pensions Regulator’s powers .....	4
Legislation and the DWP.....	8
The Pensions Regulator and the PPF .....	10
GMP equalisation.....	12
Other news.....	13
On the horizon.....	14
Contact details.....	15

# Introduction

Welcome to the latest edition of DLA Piper's Pensions Round-Up newsletter in which we provide an overview of developments in pensions legislation and regulatory guidance.

In this edition we look at key developments from September 2021 including the following.

- **Changes to the Pensions**

**Regulator's powers:** the final version of the Regulator's criminal offences policy; the response to consultation and an updated version of the Regulator's code of practice in relation to contribution notices; and a consultation on draft policies on the Regulator's overlapping powers, monetary penalty powers and information gathering powers.

- **Legislation:** the final version of regulations making changes in relation to DC schemes including on value for member

assessments and reporting of net investment returns.

- **Department for Work and Pensions:** a consultation on changes to the notifiable events regime; the publication of the report of the Taskforce on Pension Scheme Voting Implementation; and a consultation on fixed rate revaluation of GMPs.

- **The Pensions Regulator:** the publication of a joint discussion paper with the Financial Conduct Authority on value for money in DC pension schemes.

- **Pension Protection Fund:**

a consultation on the PPF levy rules for 2022/23.

- **GMP equalisation:** guidance from the GMP Equalisation Working Group on member communications and on anti-franking.

- **Other news:** HMRC's latest pension schemes newsletter; and a report on stewardship from the Work and Pensions Committee.

- **On the horizon:** a timeline of some of the key future developments in pensions to help employers and trustees plan ahead.

If you would like further information about any of the issues raised in this edition of Pensions Round-Up, please get in touch with Cathryn Everest or your usual DLA Piper pensions contact. Contact details are at the end of this newsletter.



# Changes to the Pensions Regulator's powers

The Pension Schemes Act 2021 (Act) includes a number of provisions in relation to the Pensions Regulator's powers. As we reported in the [July/August 2021 edition of Pensions Round-Up](#) (page 9), most of those provisions came into force on 1 October 2021, subject to certain transitional and saving provisions. On 29 September 2021 the Regulator published a number of documents in relation to its new powers.

## New criminal offences

### BACKGROUND

The Act introduces two new criminal offences which relate to DB schemes and which carry maximum penalties of seven years imprisonment or a fine or both: the offence of avoidance of employer debt and the offence of conduct risking accrued scheme benefits.

- A person commits the offence of avoidance of employer debt if they: (1) do an act or engage in a course of conduct that prevents the recovery of the whole or any part of a section 75 debt, prevents such a debt becoming due, compromises or otherwise settles such a debt or reduces the amount of such a debt which would otherwise become due; (2) intended the act or course of conduct to have such an effect; and (3) did not have a reasonable excuse.
- A person commits the offence of conduct risking accrued scheme benefits if they: (1) do an act or engage in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being

received; (2) knew or ought to have known that the act or course of conduct would have that effect; and (3) did not have a reasonable excuse.

### RESPONSE TO CONSULTATION

Following its March consultation, on 29 September, the Regulator published the finalised version of its *Criminal offences policy* which provides guidance on its approach to the investigation and prosecution of the new criminal offences.

The Regulator also published its response to the consultation which reports that most respondents disagreed that the entirety of the draft policy reflected the proposed approach. It also notes a number of issues on which respondents sought more clarity including what might constitute a 'reasonable excuse'.

The Regulator has highlighted in the introduction section of the finalised policy that it does not intend to prosecute behaviour which it considers to be ordinary commercial activity, and that it will investigate and prosecute the most serious examples of intentional or reckless conduct that were already within the scope of its contribution notice power, or would be in scope if the person was connected with the scheme employer. The response states that the Regulator has "sharpened the language" in the finalised version of the policy to clarify that the measures will only be used to target the most serious intentional or reckless instances of behaviour.

The draft and finalised versions of the policy both note that the Regulator is not the only

prosecuting authority for these offences and the policy may not reflect the approach of those other authorities. The response to consultation reports that the Regulator is working with the other prosecuting authorities with the aim of agreeing memoranda of understanding for cooperation in relation to their respective roles in the investigation and prosecution of the new offences.

### THE POLICY

Some changes have been made to the structure of the policy. It is now divided into the following main sections, followed by three appendices: (A) introduction; (B) what the policy covers; (C) the new offences; (D) who is in scope; (E) the Regulator's approach to reasonable excuse; (F) clearance statements and engagement with the Regulator; and (G) selecting cases for investigation and prosecution. Some points of note in the policy include the following.

- The new criminal offences do not have retrospective effect, which means that the Regulator can only prosecute people for acts that took place on or after 1 October 2021. However, the policy goes on to state that: (1) the Regulator may take into account facts from before that date as part of its investigations, and those it is investigating may wish to rely on those facts in their defence; and (2) this would be relevant, for example, where those facts indicate someone's intention for the act which took place on or after 1 October 2021.

- If the Regulator decides to prosecute, the determination of whether a person has a reasonable excuse is ultimately a matter for the criminal courts, but the Regulator would need to form its own view on reasonable excuse as part of its investigation. When considering whether a person had a reasonable excuse, the Regulator will: (1) consider each person's reasons for acting in the way that they did, and the reasonableness of those reasons; (2) take account of the circumstances in which the act took place; and (3) take account of the person's own circumstances, including their duties, skills and experience and other relevant attributes.
- The Regulator also states that there are three factors that will generally be significant in its assessment of whether a person has a reasonable excuse for either offence: (1) the extent to which the detriment to the scheme was an incidental consequence of the act or omission; (2) the adequacy of any mitigation provided to offset the detrimental impact; and (3) where no, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact. The Regulator will also assess all other relevant factors, and the policy notes that these may include, in the case of a person who owes fiduciary duties to the scheme, whether they complied with those duties when doing the act or carrying out the course of conduct.
- The response to consultation states that the policy now includes Appendix 2, which sets out a number of common situations in which the Regulator would generally expect a person

to have a reasonable excuse.

These include: (1) where a person is able to establish a statutory defence to a material detriment contribution notice; (2) where a person enters into an easement under the Employer Debt Regulations, provided that certain conditions are met; and (3) some restructuring mechanics.

- Appendix 3 is also new and sets out an illustrative case study concerning a restructuring scenario that looks at events from the perspective of the employer, the parent company of the employer, lenders and an arm's length customer.

## Contribution Notices

### BACKGROUND

The Act introduces two new grounds for issuing a contribution notice (CN), both of which are subject to a statutory defence.

- The "employer insolvency test" which would be met in relation to an act or failure to act if the Regulator is of the opinion that: immediately after the relevant time, the value of the scheme's assets was less than the amount of its liabilities; and, if a section 75 debt had fallen due, the act or failure would have materially reduced the amount of the debt likely to be recovered by the scheme.
- The "employer resources test" which would be met in relation to an act or failure to act if the Regulator is of the opinion that: it reduced the value of the resources of the employer; and that reduction was a material reduction relative to the estimated section 75 debt.

### REGULATIONS

In the [June 2021 edition of Pensions Round-Up](#) (page 9), we reported on the government response to a

DWP consultation on regulations which provide further information about the employer resources test. The Pensions Regulator (Employer Resources Test) Regulations 2021 were subsequently made on 15 September and came into force on 1 October 2021. In summary, the regulations: (1) provide that, for these purposes, the resources of the employer are the profits of the employer before tax; (2) set out the basis for how the value of the resources of the employer is to be determined, calculated and verified; and (3) provide for the exclusion of non-recurring or exceptional items (which the Pensions Regulator may determine) in order that a normalised position can be established on which to assess any impact of the act or failure to act.

### CODE OF PRACTICE AND GUIDANCE

In May the Regulator published a consultation on changes to its code of practice 12 in relation to the material detriment test for CNs, so that it will additionally cover the employer insolvency test and the employer resources test. The consultation stated that the Regulator had also taken the opportunity to update and clarify the circumstances in relation to the material detriment test, and corresponding examples in its guidance, based on its experience to date. On 29 September the Regulator published the response to its consultation and updated drafts of the code and accompanying guidance. The Regulator also states that the updated code has been laid before Parliament and the existing version of the code and guidance remain in force until the new code completes the parliamentary process.

The updated draft code lists the following circumstances in which the Regulator expects to issue a CN if it is of the opinion that one or more of the tests discussed in the code could be met.

- Employer covenant is removed, substantially reduced or becomes nominal (any of the tests).
- Significant weakening of the scheme's creditor position (material detriment and/or employer insolvency tests).
- Some instances of paying a cash dividend or a return of capital by the sponsoring employer (material detriment and/or employer insolvency tests).
- Early redemption or repayments of other significant creditor balances, before they are contractually due, that favour other creditors to the employer over the scheme (material detriment and/or employer insolvency tests).

Some amendments have been made to the wording of this list since the consultation draft. In particular, in the consultation draft: (1) the second point in the list referred to weakening, rather than significant weakening; (2) the final circumstance in the list referred to payments favouring other creditors of the employer over the scheme where no such sums are then due to those creditors; and (3) the last two circumstances in the list were stated to be relevant to any of the tests.

As was the case in the consultation draft, the updated draft code notes that: a CN may only be issued if it is reasonable to impose liability on the person to pay the sum specified; and it is possible for the relevant 'act' test to be met, but for the Regulator to conclude that it is not reasonable to issue a CN in the circumstances.

The updated draft also notes that neither the circumstances in the code, nor the examples provided in the accompanying guidance, include an assessment of reasonableness.

The updated draft code-related guidance sets out: some examples which the Regulator considers would not normally be materially detrimental to the likelihood of members receiving their accrued benefits or meet the employer insolvency or employer resources tests; and some examples of actions that it considers do fall within the circumstances outlined in the code. The examples are for illustrative purposes only, and they do not illustrate all instances where the Regulator may or may not act. The Regulator's response to consultation notes that, since the consultation, it has updated many of the examples to improve clarity, removed two examples and added three new examples.

Other points of note in the response to consultation include that: (1) the Regulator reports that some respondents asked for more practical guidance on the use of its CN power, but states that it believes it would be more helpful to do this as part of a separate piece of guidance and will consider publishing such guidance in the future; (2) some respondents asked for more information about how the Regulator will approach the materiality assessment in the new tests, but the Regulator states that what is material will depend on the circumstance of the case, so it would not be practical for it to set out materiality thresholds; and (3) the purpose of the code and guidance is to set out the circumstances where a CN could be issued and illustrate them by way of examples, and because of this, the Regulator does not believe that it would be helpful

to set out how it would assess whether a target could make the statutory defence as this will depend on the circumstances of a case.

#### CLEARANCE GUIDANCE

The Regulator has also published a revised version of its clearance guidance which has been updated as a result of the Act, including to refer to the two new CN tests. The updated version notes the Regulator's new powers in relation to the criminal offences and financial penalties. However, the guidance states that any clearance statement will only be effective in relation to the Regulator's contribution notice and/or financial support direction powers, and that it does not provide any reassurance in terms of any of its other powers including its criminal powers or financial penalty powers. The Regulator also states that the updated guidance "reflects the way that both we and the market have developed since clearance was introduced in April 2005".

#### Consultation on new policies

The Act also contains other new powers for the Regulator including imposing a civil penalty of up to GBP1 million in certain circumstances. The Regulator reports that, in response to the consultation on its criminal offences policy, it received a number of comments seeking further clarification on its approach to these other powers and how they interact where more than one power may be available. On 29 September the Regulator also published a consultation on the following three policies. The consultation closes on 22 December and the Regulator plans to finalise the policies early in 2022.

### OVERLAPPING POWERS POLICY

The Regulator states that by 'overlap' it means that there may be situations where more than one power could be used in relation to the same set of facts, and it reaches the view that it has sufficient evidence to bring both regulatory and criminal proceedings. For example, a situation that could meet the 'act' test for a material detriment contribution notice (CN) and be the subject of a prosecution for the offence of conduct risking accrued scheme benefits. The Regulator states that its approach will depend on the facts of each case, the issues identified, the resulting impact and the outcomes that each different route might secure. The policy provides further information about the Regulator's approach in different types of situations, looking at: breaches of legislation other than the employer-related investments (ERI) legislation; breach of the prohibition on ERI; breaches of a direction or restriction imposed by the Regulator; avoidance; investigations; and non-pensions legislation offences. It also includes case examples relating to ERI, CNs and information gathering. The Regulator makes the point that it will always be clear which power it is seeking to exercise.

### MONETARY PENALTY POWERS POLICY

This draft policy relates to the Regulator's new power to issue a civil penalty of up to GBP1 million and is divided into two parts: (1) high fines (avoidance); and (2) high fines (information gathering).

The part concerning avoidance relates to the ability to use the new power in relation to failure to comply with a CN without reasonable excuse, avoidance of employer debt or conduct risking accrued scheme benefits. In summary, the draft policy includes that, in the case of non-payment of a CN: the penalty value will be 20% of the CN value, capped at GBP1 million; or, if payment of the CN is received before the Determinations Panel's hearing, the value of any penalty issued by the Panel will be 10% of the CN value, capped at GBP500,000. In relation to avoidance of employer debt or conduct risking accrued scheme benefits, the draft policy states that the value of the penalty will depend on: the applicable band level (which depends on the person's level of culpability and the harm caused to the scheme and saver outcomes); and any aggravating and mitigating features present. The potential band levels are: Band HF1 (low culpability/low harm) which is GBP100,000 to GBP400,000; Band HF2 (high culpability/low harm or low culpability/high harm) which is GBP250,000 to GBP650,000; and Band HF3 (high culpability/high harm) which is GBP400,000 to GBP1 million.

The part concerning information gathering relates to the ability to use the new power in relation to failure to comply with the notifiable events regime or providing false or misleading information to the Regulator or to trustees in certain circumstances. The value of the penalty in these cases will also

depend on the applicable band level (which depends on the person's level of culpability and the harm caused to the scheme and saver outcomes) and any aggravating and mitigating features. In these cases there are four band levels: HF1, HF2 and HF3 noted above and Band 'R' (breach of regulatory requirement with minimal harm to the scheme) which is GBP0 to GBP100,000.

Each of the two parts of the draft policy includes examples of culpability, harm and aggravating and mitigating factors.

### INFORMATION GATHERING POWERS POLICY

The Act also expands the Regulator's interview and inspection powers, and introduces powers to issue fixed and escalating civil penalties for non-compliance in relation to information-gathering powers. Regulations made in June, which came into force on 1 October 2021, provide that the level of the fixed penalty will be GBP400 and that, where the person is an individual, the level of the escalating penalty will be GBP200 for each day that the non-compliance continues. In the case of escalating penalties imposed on those other than individuals, the rate will be GBP500 for the first day and will increase cumulatively on each subsequent day by that amount until, after 20 days, the daily rate is GBP10,000. The draft policy outlines the Regulator's information gathering powers, how it will engage with those involved and the options for enforcement action for failure to comply.

# Legislation and the DWP

## Notifiable events

On 1 October 2021 certain changes in the Pension Schemes Act 2021 in relation to notifiable events came into force, subject to saving provisions where the duty to notify arose before that date. These changes provide that: (1) the new civil penalty of up to GBP1 million will apply in relation to non-compliance; and (2) it is an offence knowingly or recklessly to give the Regulator false or misleading information about a notifiable event.

The Act also contains provisions on notifiable events which are designed to require employers to provide advance notice to the Regulator in relation to a wider range of scenarios and in more detail than currently. These provisions have not yet been brought into force and the detail of the new requirements will be set out in regulations.

On 8 September the DWP published a consultation on the draft regulations providing further information about the proposed changes, which, in summary, include the following.

- The existing notifiable event of sale of a controlling interest in a sponsoring employer is proposed to be amended to create a notifiable event when there is a decision in principle by a controlling company to relinquish control of the employer company, or when an offer to acquire control of the employer company is received (where a decision in principle has not been made).
- New notifiable events are proposed in respect of decisions in principle by the employer to: (1) sell a material proportion of its business or assets; or (2) grant or extend a relevant security over

its assets on a debt to give it priority over the scheme's ranking in the order of priority for debt recovery in the event of employer insolvency.

- The new requirement under the Act to provide a notice to the Regulator, with a copy provided simultaneously to the scheme trustees, is proposed to apply in respect of similar circumstances to the three notifiable events listed above, but with this new requirement applying once the main terms of the relevant event have been proposed.

Further information on the draft regulations is included in our September [Pensions Alert](#).

On 13 October the DWP published a revision to the section of the consultation document in relation to the meaning of "relevant security" to ensure consistency with the draft regulations. The consultation document now states that a relevant security "is a security granted or extended by the employer, or one or more subsidiaries of the employer, comprising more than 25 percent of either the employer's consolidated revenues or its gross assets".

## DC scheme regulations

Following a June 2021 response to consultation on proposed changes (reported on page 8 of [that month's edition of Pensions Round-Up](#)), the Occupational Pension Schemes (Administration, Investment, Charges and Governance) (Amendment) Regulations 2021 were made on 20 September. The regulations came into force on 1 October 2021, although many of the provisions apply from different dates. In summary, the changes include the following.

- A new requirement for relevant schemes (i.e. schemes which provide money purchase benefits, subject to exceptions, including schemes in which the only money purchase benefits are attributable to AVCs) with total assets of less than GBP100 million, and that have been operating for at least three years, to carry out a more detailed assessment of how their scheme delivers value for members. This applies from the first scheme year ending after 31 December 2021. Trustees will have to report on the outcome of the assessment in the chair's annual statement and in the scheme return.
- A new requirement for trustees of all relevant schemes (regardless of size) to report in the chair's annual statement on net investment returns for their default and self-selected funds. This applies for the statement for the first scheme year which ends after 1 October 2021.
- An option to allow schemes to smooth performance fees over five years for the purposes of the charge cap. This change applies from the first charges year for the scheme which ends after 1 October 2021.

On 23 September the Regulator published a press release reminding smaller DC schemes of the new requirement for a more detailed value for member assessment, and it has also updated several pages of its guidance to reflect the changes. This includes an update to its quick guide to the chair's statement, which provides a checklist of the issues that the statement should cover, to refer to the new value for members assessment and the requirement to report net investment returns.

## Climate change governance and reporting

Regulations which introduce new governance and reporting requirements in relation to climate change for trustees of certain occupational pension schemes also came into force on 1 October 2021, with the new requirements being introduced in stages. Further information on the regulations is on pages 6 to 7 of the [June 2021 edition of Pensions Round-Up](#).

## Taskforce on Pension Scheme Voting Implementation

On 1 December 2020, the Minister for Pensions and Financial Inclusion announced the launch of a new working group to address stewardship barriers (the Taskforce on Pension Scheme Voting Implementation), and on 20 September, the Taskforce's report was published. The Taskforce states that its focus has been: first, on how to facilitate more voting and better quality voting by occupational pension schemes by encouraging them to set voting policies; and second, making recommendations that will support the changes in behaviours needed from service providers to meet this objective. The report is divided into three parts. Part one sets the context and examines some key background problems (looking at issues including complexity in pension and investment structures and in how voting is delivered, and issues with splitting the vote in pooled funds). Part two makes recommendations by examining the current problems facing a pension scheme seeking to set and implement a voting policy. Part three makes brief comments on the future.

The Taskforce's recommendations addressed to the DWP include that: (1) trustees should either set their own voting policy or, if they have not done so, acknowledge responsibility for the voting policies that asset managers implement on their behalf; (2) the DWP should encourage trustees to take more account of voting and engagement policies in their appointment and ongoing monitoring of investment managers; (3) the DWP should encourage trustees (especially of larger schemes) to report more effectively on how votes relating to their investments were cast; and (4) the DWP, in conjunction with industry bodies, should promote a vote disclosure reporting template. The Taskforce also recommends that the DWP or the Regulator should provide guidance on what good quality voting policies look like. Other recommendations include that: all asset managers should offer pooled fund investors the opportunity to set an expression of wish; the FCA should issue clarification (for example, via guidance) to indicate that there is no breach of fund rules in acting on an expression of wish; and the DWP should publish guidance on the ability of trustees to set an expression of wish over their own voting policy in pooled funds. The report also includes recommendations addressed to the FCA relating to disclosure and reporting by asset managers.

A press release published by the DWP about the report includes that the Minister for Pensions and Financial Inclusion will study the findings closely and respond at the earliest possible opportunity.

## GMP revaluation

On 23 September the DWP published a consultation (that closes on 18 November) on *Guaranteed Minimum Pension Fixed Rate Revaluation*, which it states is mainly aimed at pension administrators and employers who sponsor formerly contracted-out DB schemes. The consultation explains that: (1) the revaluation rate to be used by schemes that have chosen to revalue the GMPs of early leavers using the 'fixed rate method' is set out in legislation; (2) the revaluation rate is reviewed every five years; and (3) a new rate needs to be applied for those who leave pensionable service on or after 6 April 2022. The current fixed rate is 3.5% per annum. The consultation notes that the DWP has always undertaken the review of the rate having taken the advice of the Government Actuary's Department (GAD), and GAD's report in relation to the current review is included at Annex A to the consultation. GAD recommends a rate of between 3% per annum and 3.5% per annum, based on a short to medium term view on earnings assumptions being applied, given that most individuals leaving pensionable service between 6 April 2022 and 5 April 2027 (when the next review takes place) will be less than 10 years from the age at which GMPs are payable. The DWP proposes taking the middle point of the range set out in GAD's report, so that the fixed rate will be 3.25% per annum for members who leave pensionable service in the period 6 April 2022 to 5 April 2027.

# The Pensions Regulator and the PPF

## Value for money – discussion paper

Value for money is identified as a priority area in the Regulator's and the Financial Conduct Authority's (FCA) joint strategy and, on 16 September, they published a joint discussion paper on *Driving Value for Money in defined contribution pensions*. The paper invites views on developing a holistic framework and related metrics to assess value for money (VFM) in all DC pension schemes regulated by the FCA and the Regulator. Introducing a framework is intended to complement, rather than duplicate, the existing workstreams on the issue of VFM.

In the discussion paper, the Regulator and the FCA explain that: (1) to enable good value schemes to compete on the quality of their offerings, regulators, industry, employers and ultimately savers must be able to access information that allows them effectively to compare and assess VFM; (2) therefore, there needs to be a common framework for disclosing this key information; (3) availability of comparable information will make it easier for independent governance committees (IGCs) and trustees to compare the VFM their scheme offers; and (4) in turn, this will drive competition on performance through comparison and benchmarking. The discussion paper explores what a common framework should look like, and proposes a framework, building on existing concepts, that looks at value through three lenses: investment performance; customer service and scheme oversight; and costs and charges. The paper includes a separate chapter on each of these three elements of VFM, in which each is explored further to look at

how an appropriately calibrated framework for transparency could be designed. The paper is focused primarily on assessing VFM in the accumulation phase, and the Regulator and the FCA state that they have "paid particular attention to features of workplace default schemes, given the growth in this market". However, they state that what they learn through the feedback to the paper will, over time, also help them to develop proposals for self-select options and for the non-workplace space.

The Regulator and the FCA note that working towards greater transparency and use of common metrics would represent a significant change for the industry and could only be realised over the longer term. They state that the discussion paper gives them the opportunity to explore views before formalising any concrete proposals for consultation. The closing date for responses to the discussion paper is 10 December, and the Regulator and the FCA will publish a feedback statement setting out next steps in 2022.

## DC investment – blog post

On 30 September the Regulator published a blog post by its Executive Director of Regulatory Policy, Analysis and Advice entitled *DC: Investing for the future*, which relates to the Productive Finance Working Group's report, *A Roadmap for Increasing Productive Finance Investment*. The industry-led Working Group was convened by HM Treasury, the Bank of England and the FCA in November 2020, to develop practical solutions to the barriers to investment in long-term, less liquid assets, with a focus in particular on barriers faced by

DC pension schemes. The Working Group's report, which was published on 27 September, sets out four recommendations, underpinned by 13 specific actions, with a focus on supporting DC pension schemes to invest and developing the long-term asset fund (LTAF) structure. The four recommendations relate to: shifting the focus to long-term value for DC pension scheme members; building scale in the DC market; a new approach to liquidity management; and widening access to less liquid assets.

In the blog post, the Regulator welcomes the report and notes that one of the action points directly relates to it. In relation to that action point, the Regulator states that: it will prepare some additional guidance for trustees on investing in illiquid investments; and in the fourth quarter of 2021, it will engage with a range of industry stakeholders to scope out the form and extent of the guidance that might best meet the needs of trustees. The Regulator intends to publish the guidance in 2022. Other points in the blog post include that: (1) in setting out a roadmap and putting in place a structure around it to deliver change, the Regulator believes that the Working Group will, in time, create an opportunity for trustees to consider investing in a wider set of investments, with fewer barriers to implementation and with the potential to improve saver outcomes; and (2) as these industry developments flow through, the Regulator would expect trustees to consider, with their advisers, whether new investment opportunities that arise as a result would be appropriate for their scheme.

## Compliance and enforcement bulletin

On 9 September the Regulator published its latest compliance and enforcement bulletin. These bulletins have previously been published quarterly, but the latest report covers the period from January to June 2021 and, going forward, the reports will be published every six months. The Regulator's accompanying press release notes that the figures in the report show that the overall use of its automatic enrolment enforcement powers is back to pre-pandemic levels. For example: the total use of automatic enrolment powers between January and June 2021 increased to 77,032, compared to 41,398 for July to December 2020; and the figure for October 2019 to March 2020 was 73,164. In terms of the Regulator's other powers, the bulletin includes that, in the period January to June 2021, it issued 53 mandatory penalty notices in relation to failure to comply with the chair's statement requirements.

## PPF levy – invoices

On 1 September, the PPF announced that (as was the case for the 2020/21 levy), schemes and sponsoring employers impacted by COVID-19 can apply for an extension of up to 90 days interest free to pay their 2021/22 levy bill. To be considered for the extension, applicants must complete an online form on the PPF's website within 28 days of receiving their levy invoice, explaining how they continue to be affected by the pandemic, and they will also need to commit to paying their levy bill within 90 days. The PPF also notes that schemes or sponsoring employers that need longer than 90 days can make an application under the existing repayment plan process.

## PPF levy 2022/23 – consultation

On 28 September the PPF published a consultation on the levy rules for 2022/23 which reports that it proposes to leave the key levy parameters unchanged from last year. The consultation states that the full economic impact of the pandemic is yet to unfold, which means the risks the PPF faces have the potential to increase, with the possibility of significantly higher claims. However, it states that the PPF's strong funding position means that it is able to wait to see what happens to the level of claims it receives, rather than pre-emptively seeking to increase the levy.

The PPF states that it is proposing very limited changes to other areas of its methodology for calculating scheme levies. However, it notes a small number of proposed changes to the rules including: (1) bringing together the previously separate rules covering commercial consolidators and schemes without a substantive sponsor into a single appendix, widening the definition so that all schemes without a conventional sponsorship structure can be treated consistently; and (2) a revision to its approach to over-riding scores for companies that have had a restructuring plan or other insolvency related event. The PPF notes that it also proposes to retain the lower risk-based levy cap of 0.25% and the small scheme adjustment (that were introduced in 2021/22). The consultation also explains that: (1) following the updated section 179 assumptions guidance which came into force earlier this year, the PPF proposes to update the output basis for transforming and rolling forward section 179 valuations from version A9 to A10 of its assumptions guidance; and (2) these changes bring its assumptions in line with

the bulk annuity market and are expected, typically, to reduce schemes' section 179 liability values used to calculate the levy. It states that, if the impact of the move from A9 to A10 is looked at in isolation (that is, the effects of changes in insolvency risk and other variables are removed), the PPF's analysis shows that 99% of schemes forecast to pay a risk-based levy are expected to see a reduction as a result of this change.

The PPF also reports that improved scheme funding and stability in levy rules mean the levy estimate for 2022/23 is GBP415 million, which is a reduction of GBP105 million compared to 2021/22. It notes that a significant proportion of the reduction is due to the incorporation of the latest actuarial assumption basis (version A10 noted above) for measuring funding levels. In terms of the impact on schemes, the consultation includes that the PPF's analysis suggests that around 82% of schemes paying a risk-based levy in 2021/22 are expected to see a lower levy in 2022/23, although some schemes will see significant levy increases where there has been a worsening in the sponsor's insolvency score (with the PPF's modelling indicating that 2% of schemes may see a doubling of their levy, which is a similar proportion to previous years).

The consultation closes on 9 November and the PPF expects to publish the final rules in December.

# GMP equalisation

## Communications guidance

On 27 September the GMP Equalisation Working Group published *Guide to GMP Communications – Implementation Stage*, which follows the publication of its August 2020 communications guidance designed for schemes in the early planning stages of GMP equalisation. The Working Group states that the *Implementation Stage* guidance is designed for schemes in the implementation stages of GMP equalisation where they are getting ready to start (or may have already started) communicating with members and are actively working with other specialists to deliver equalisation.

The guidance has sections on: (1) guiding principles for communicating, which considers issues including layering the information, using different channels and avoiding jargon; (2) the member's perspective, which sets out some things for schemes to think about which could play a part in how they communicate with each person; (3) timing your communications, which looks at legal requirements, other best practice considerations, the timing of communication relative to GMP reconciliation or other exercises, member expectations, and communications in relation to past transfers out; (4) who to communicate with, what to tell them and why, with this section looking at the different positions for pensioners and non-pensioners and depending on whether the dual record or conversion method is being used; (5) planning for data to use in communicating; and (6) post equalisation considerations for 'business as usual' communications, which sets out a checklist of

communications which may need to be amended in light of GMP equalisation.

## Anti-franking

On 29 September the GMP Equalisation Working Group published Supplemental Guidance on *Allowing for Anti-franking when achieving GMP Equality* which supplements the Group's September 2019 *Guidance Note on Methods*. The Supplemental Guidance, which has been produced following requests from the industry, examines the interaction of anti-franking and GMP equalisation in more detail, considering why anti-franking is important and suggesting approaches to deal with key areas of uncertainty. The Working Group notes that the Supplemental Guidance does not provide a full manual for anti-franking calculations, and it recommends that "schemes consult the relevant legislation/their legal advisors for the exact requirements".

In short, anti-franking refers to complex rules in the GMP legislation designed to make sure that the revaluation applied to GMPs in deferment cannot be offset against a member's other benefits (other than in limited circumstances). The Supplemental Guidance notes some of the types of members for whom anti-franking is particularly likely to be an issue. However, it also states that: even for schemes where the benefit structure is such that anti-franking uplifts are not usually required, there may still be individual members who are due uplifts; and all schemes should therefore consider anti-franking as part of achieving GMP equality.

The Supplemental Guidance states that anti-franking is defined under legislation as a whole of service test and, for members who commenced

service prior to 17 May 1990, it is legislatively unclear how anti-franking should be applied for equalisation purposes. The Supplemental Guidance looks at three potential techniques, although noting that other techniques are possible and have been used within the industry. In summary, the three techniques considered are: (1) Ring-fence Technique which ring-fences the 1990 to 1997 benefits (and is the technique set out in the September 2019 *Guidance Note on Methods*); (2) DWP 2012 Technique which relates to examples set out in a January 2012 DWP consultation and involves calculating a mixed sex benefit underpin; and (3) Apportionment Technique which performs the whole of service test and then attempts to allocate part of the resulting uplift to the 1990 to 1997 period. The Supplemental Guidance provides more detail about all three techniques, including a table which summarises each technique and gives examples of situations where the outcomes of the DWP 2012 and Apportionment Techniques may differ from the Ring-fence Technique. It also notes that: the different techniques require differing amounts of data and calculations (with the DWP 2012 and Apportionment Techniques noted typically to require more data and calculations than the Ring-fence Technique); and the Working Group recommends that schemes confirm with their administrators that they can implement their preferred approach. The Working Group states that it expects the Ring-fence Technique to be the starting point used for discussion for many schemes, because it is "relatively simple and will often be appropriate". The Supplemental Guidance provides practical examples following the Ring-fence Technique.

## Other news

### HMRC pension schemes newsletter

HMRC's August 2021 managing pension schemes service newsletter included an update about the migration of pension schemes from the Pension Schemes Online service to the Managing Pension Schemes service which stated that, from 19 October 2021, scheme administrators will be able to view a list of pension schemes they need to migrate. The list will only include schemes with a status of 'open' on the Pension Schemes Online service and will be a read only list. On 30 September, HMRC published pension schemes newsletter 133 which reports that, due to the level of development and testing that is required, it has decided to delay the delivery of this feature by a few weeks, so that it will instead be released in November 2021. HMRC states that it will provide further information and guidance in its newsletter to be published at the end of October 2021.

### Work and Pensions Committee

On 30 September the Work and Pensions Committee published its report in relation to its inquiry (which was launched in April) on pension stewardship and COP26. The report looks at reporting standards, scheme governance, and investment and stewardship, and the Committee's conclusions and recommendations include the following.

- The Committee states that trustees will need detailed and regularly updated guidelines provided by the Pensions Regulator to explain how they

should consider the effects of climate change on pension scheme members, and recommends that the Pensions Regulator continuously monitors and updates these guidelines.

- The Committee states that, without a standardised definition of "net zero alignment", there is a risk that different pension schemes will interpret "net zero" in different ways, and that will make it more difficult for savers to understand the approach that their scheme is taking or to compare schemes. It therefore recommends that the Pensions Regulator define net zero alignment.
- The report also looks at trustees' fiduciary duty, consideration of the impact of climate change and net zero targets. The Committee recommends that the Regulator should establish a working group to develop guidance for schemes looking to set net zero targets.
- The Committee recommends that the government consult on the case for mandating that the default options which DC schemes used for automatic enrolment are required to provide, should align to UK government climate goals.
- The report includes a section on the issue of divestment. The Committee recommends that the DWP sets out "what specific steps it is taking to ensure that its policies do not incentivise divestment over good stewardship – while making clear that schemes could nevertheless consider divestment when there is no other option".

### Pensions Dashboards Programme

On 16 September, the Pensions Dashboards Programme (PDP) published new consumer protection information on its website and an accompanying blog post. The PDP states that: (1) in the context of pensions dashboards, consumer protection covers the design and operation of the dashboards ecosystem, compliance with existing and new regulations, rules and standards, as well as the context within which consumers will use dashboards; and (2) the PDP sits at a nexus between government, the regulators and industry and its work to protect consumers takes place in concert with its delivery partners. The information on the PDP's website looks at: potential consumer harm associated with using dashboards; organisations responsible for consumer protection; PDP deliverables that will protect consumers; and focusing on consumer needs. In terms of PDP deliverables that will protect consumers, the PDP states that, at a high level, potential harms will be mitigated by the ecosystem's compliance with the UK GDPR, strict ecosystem security and technical requirements, and provision of design standards to ensure clarity of information for consumers.

The information also notes that the DWP will create regulations around pensions dashboards, which will also determine the conditions that dashboards will have to meet to be a qualifying dashboard service. It states that the DWP plans to consult on regulations this winter, with the results of the consultation expected in summer 2022.

## On the horizon

DATE	DEVELOPMENT
2021	In April 2019 the DWP published guidance on GMP conversion which notes that the government is considering changes to this legislation to clarify certain issues. The <b>GMP Equalisation Working Group</b> has already published a number of guidance documents on GMP equalisation and its administration sub-group plans to publish a Q&A document.
1 October 2021	The Pension Schemes Act 2021 includes provisions in relation to the <b>Regulator's powers</b> . Changes in relation to contribution notices, the introduction of new criminal offences, a new power to issue a civil penalty of up to GBP1 million in certain circumstances and expanded interview and inspection powers came into force on 1 October 2021.
1 October 2021	The Pension Schemes Act 2021 includes provisions on <b>climate change</b> risk which set out powers to make regulations imposing requirements on trustees of specified schemes in relation to governance and disclosure. The regulations came into force on 1 October 2021.
October 2021	Annual Reports produced on or after 1 October 2020 have to include <b>implementation statements</b> . The information to be included in these statements depends on whether the scheme is a relevant scheme or a DB scheme. The first report for DB schemes and certain information for relevant schemes must be published by 1 October 2021.
October 2021	In September 2020 the DWP published a consultation on <b>proposals to improve outcomes for DC members</b> which looked at issues including assessing value for members, reporting information on net returns and the charge cap. The regulations came into force on 1 October 2021, although they provide further detail about the date from which the different requirements will apply.
Autumn 2021	In August 2017 the government confirmed that it will proceed with proposals to <b>limit the statutory right to transfer in order to tackle pension scams</b> . Regulation-making powers are included in the Pension Schemes Act 2021. The DWP published a consultation on draft regulations on 14 May 2021. The regulations are expected to be introduced in autumn 2021.
December 2021	The Regulator's second consultation on its <b>DB funding code</b> , which will focus on the draft code itself, is expected to be published in December 2021.
2021 2023	Provisions in relation to <b>pensions dashboards</b> are included in the Pension Schemes Act 2021. An indicative timeline published by the Pensions Dashboards Programme (PDP) estimates that phase 4 of the development of pensions dashboards, which will be the phase in which schemes will begin to be compelled by law to connect to the dashboards ecosystem, will run from 2023. In May 2021, the PDP published a call for input in relation to the order and timing of when data providers will connect to the pensions dashboards ecosystem. The DWP plans to consult on proposed regulations in relation to pensions dashboards in the winter, with the results of the consultation expected in summer 2022.
April 2022	On 17 May 2021 the DWP published a consultation on draft regulations introducing simpler <b>annual benefit statements</b> for DC schemes used for automatic enrolment. It is proposed that the regulations will come into force on 6 April 2022.
April 2022	Following the publication of its October 2020 Statement of Policy Intent entitled <b>Stronger Nudge to Pensions Guidance</b> , on 9 July 2021 the DWP published a consultation on draft regulations to implement its proposals. The draft regulations include a provisional coming into force date of 6 April 2022.
2022	On 17 March 2021 the Regulator published a consultation on the first phase of its work to combine its current codes to form a <b>single code of practice</b> which includes information about a new requirement for trustees to carry out an own risk assessment of the system of governance. In August the Regulator published an interim response to the consultation which states that it does not expect to lay the new code in Parliament before spring 2022 and it is therefore unlikely that it will become effective before summer 2022.
2022	A consultation on changes to the <b>notifiable events</b> regime was published on 8 September 2021. The consultation closes on 27 October 2021 but does not state the date on which the regulations will come into force. The Regulator's Corporate Plan 2021-24 refers to changes to the notifiable events regime being introduced in 2022.

## Contact details

**Cathryn Everest**

Senior Professional Support  
Lawyer, London

+44 (0)20 7153 7116

cathryn.everest@dlapiper.com

**Megan Sumpster**

Professional  
Support Lawyer, London

+44 (0)20 7153 7973

megan.sumpster@dlapiper.com

**Ben Miller**

Head of Pensions

+44 (0)151 237 4749

ben.miller@dlapiper.com

**Tamara Calvert**

Partner, London

+44 (0)20 7796 6702

tamara.calvert@dlapiper.com

**Joel Eytel**

Partner, London

+44 (0)20 7796 6673

joel.eytel@dlapiper.com

**Andrew McIlhinney**

Partner, Leeds

+44 (0)113 369 2141

andrew.mcilhinney@dlapiper.com

**Matthew Swynnerton**

Partner, London

+44 (0)20 7796 6143

matthew.swynnerton@dlapiper.com

**Amrit Mclean**

Head of Pensions De-risking

+44 (0)20 7796 6613

amrit.mclean@dlapiper.com

