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Regulatory update – July 2018 to September 2018

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New Issues - Clarifying and strengthening trustees' investment duties: consultation response

On 11 September 2018, the DWP published its response to the consultation on clarifying and strengthening trustees' investment duties, together with a final version of the regulations, now called the Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018.

This consultation follows the government's response to the Law Commission report 'Pension funds and social investment', and to the consultation on Occupational pensions: improving disclosure of costs, charges and investments.

From 1 October 2019, trustees will be required to set out, in their statement of investment principles ("SIP"), how they take account of financially material considerations and stewardship.

The Regulations now make clear that the financially material considerations which trustees must consider when making their investment decisions include, but are not limited to, environmental, social and governance ("ESG") factors, including climate change.

Following consultation, the requirement to produce a separate statement on members' views has been removed and replaced with an optional policy on non-financial matters, including not only members' ethical concerns but also social and environmental impact matters and quality of life considerations.

"Relevant schemes" (broadly schemes offering DC benefits) will be required to publish the SIP on a website and, on and from 1 October 2020, produce and publish an implementation statement setting out how they have implemented their investment policies and explaining and giving reasons for any change made to them.

At the same time, the DWP published guidance for occupational pension schemes, providing information on the disclosure and administration requirements. Trustees and managers of relevant schemes must have regard to this guidance on meeting the requirements in The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 and The Occupational Pension Schemes (Scheme Administration) Regulations 1996. Previous guidance has been withdrawn. TPR is due to produce high level guidance on the key changes by the end of November 2018.

For more information (response):
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739331/response-clarifying-and-strengthening-trustees-investment-duties.pdf

For more information (guidance):
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739217/reporting-of-costs-charges-and-other-information-guidance-for-trustees-and-managers.pdf

Department for Exiting the EU

Alongside a speech delivered on 23 August 2018 by Dominic Raab, the Secretary of State for Exiting the European Union, the Government published a series of technical notices on how to prepare for Brexit if there is no deal, and a notice (published the following day) setting out the background to the Government's Brexit work to date.

"No deal" is the situation which could be reached if "the UK leaves the EU and becomes a third country at 11pm GMT on 29 March 2019 without a Withdrawal Agreement and framework for a future relationship in place between the UK and the EU".

The Secretary of State was keen to point out that the Government continues to negotiate for a deal but that it is the Government's duty "to plan for every eventuality". This is why it has now published the first 25 technical notices, in what is due to be a series, setting out what people and businesses may need to do if no deal with the EU is reached. These include notices on "Workplace rights", "VAT", and "Banking, insurance and other financial services". Further technical notices are due to be published in September 2018.

Whilst the notices published so far do not specifically cover pension schemes, some of the issues flagged will be relevant. For example, the note on Banking, insurance and other financial services highlights some potential difficulties for UK-based payment services providers, which could lose direct access to central payments infrastructure. This could lead to increased costs and slower processing times for Euro transactions. In addition, EEA customers (including UK citizens living abroad) could lose the ability to access UK bank accounts, as well as insurance contracts, such as life insurance policies and annuities.

The Government says it is "committed to putting in place unilateral action, if necessary, to resolve these issues as far as possible on the UK side." But reciprocal action from the EU would be needed to address the issues for services provided into the EEA.

For more information (technical notices): https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal

For more information (preparation for no deal): https://www.gov.uk/government/publications/uk-governments-preparations-for-a-no-deal-scenario/uk-governments-preparations-for-a-no-deal-scenario

ESMA issues clarification on clearing obligation for pension scheme arrangements

The European Securities and Markets Authority ("ESMA") has issued a statement on the clearing obligation for pension scheme arrangements ("PSAs"). EMIR introduced a temporary exemption from clearing obligations for PSAs, which is due to expire by 17 August 2018.

While there is no option of further extending this temporary exemption under EMIR, there are proposals to extend it further as part of the "EMIR Refit" review, which is expected to be finalised this year. In the meantime, ESMA indicates it expects national competent authorities to "not prioritise their supervisory actions towards entities that are expected to be exempted again in a relatively short period of time, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in a proportionate manner".

For more information (announcement): https://www.esma.europa.eu/sites/default/files/library/esma70-151-1462_communication_on_clearing_obligation_for_pension_scheme_arrangements_0.pdf

New Issues - TPR announces new approach to workplace pensions regulation

On 17 September 2018, TPR announced that more workplace pension schemes will come under closer scrutiny from TPR, as part of a significant shift in its approach to protect pension savers. TPR intends to work proactively with more schemes through a new range of interventions, with a view to addressing risks sooner.

These changes result from TPR's major review of the way it regulates, an update on which has been published in TPR's Future report 2 – Making workplace pensions work. The changes will include:

- dedicated, one-to-one supervision for 25 of the biggest DC, DB and public service pension schemes from October 2018, with the approach being rolled out to more than 60 schemes over the next year. This will involve regular and ongoing contact with trustees or managers and, in some cases their sponsoring employers. Schemes will be selected based on a range of criteria, including size, risk and previous interactions with TPR. TPR will build relationships with schemes whose size means they are strategically important, regardless of whether they trigger its traditional risk indicators;
- higher volume supervisory approaches (through calls, emails and letters) to address risks and influence behaviours in a broader group of schemes. This type of intervention will be piloted with approximately 50 DB schemes to assess compliance with the messages in TPR's 2018 annual DB funding statement, specifically concerning whether schemes are being treated fairly when it comes to dividend payments to shareholders.

TPR notes that hundreds of schemes are expected to experience higher volume supervisory approaches over time to tackle different risks across the pensions landscape.

For more information: http://www.thepensionsregulator.gov.uk/press/milestone-for-workplace-pensions-regulation-as-tpr-launches-new-approach.aspx

New Issues - PPI Briefing Note on default investment strategies

The PPI's Briefing Note 108, the first of two to examine default investment strategies, looks at how well the objectives of pension schemes' default investment strategies meet the needs of their memberships.

The note observes that default strategies are often a good option for many members as they generally cost less, reduce the need for stakeholders to tackle inertia, and avoid triggering the behavioural biases that can lead to poor investment decision making when members are left to their own devices. However, it goes on to state that default funds are not always the best option for all members as they are generally designed to meet the needs of the average member, and may not meet the needs of members who have different characteristics from the average.

Briefing Note 108 focuses primarily on objective setting, but also touches on the use of language around default strategies, beliefs and constraints (especially costs), how these flow through to default strategy design, and how they can help support a quantitative approach to assessing value for money.

For more information:
http://www.pensionspolicyinstitute.org.uk/uploaded/documents/Briefing%20Notes/201809%20BN108%20-%20Default%20investment%20strategies%20-%20AB%206th%20Sept.pdf

Law Commission – consultation on electronic signatures

The Law Commission has confirmed that electronic signatures can be used to sign formal legal contracts under English law, and has published early conclusions which aim to sweep away current legal uncertainty and to allow businesses to speed up transactions by going fully digital.

Currently, the EU-wide eIDAS regulation (which sets out the rules for electronic identification and trust services) provides that an electronic signature cannot be denied legal validity simply because it is electronic and that electronic signatures are admissible in evidence in legal proceedings. However, although the Electronic Communications Act 2000 mirrors this admissibility provision, it does not expressly provide for the validity of electronic signatures. The Law Commission believes that this lack of clarity is discouraging businesses from executing documents electronically, when it would be quicker and easier to do so.

Therefore, in plans published on 21 August 2018, the Law Commission seeks to end that uncertainty by setting out their view that electronic signatures are valid and will generally meet the statutory requirements where there is an intention to authenticate the document. It is also consulting on possible steps designed to further boost business and to help the UK capitalise on new technologies, by proposing:

- that electronic signatures could be witnessed through shared online platforms, such as by webcam or video link, and
- the formation of a Government backed industry working group to consider the ongoing practical issues around the use of electronic signatures, and how these can be improved.

The Law Commission also asks whether there should be a further project on the concept of deeds, and whether these are "fit for purpose in the 21st century".

Law Commissioner Stephen Lewis said: "Contract law in the UK is flexible, but some businesses are still unsure if electronic signatures would satisfy legal requirements. We can confirm that they do, potentially paving the way for much quicker transactions for businesses and consumers. And not only that, there's scope, with our proposals for webcam witnesses, to do even more to make signing formal documents more convenient, speed up transactions and get business booming."

The deadline for responses is 23 November 2018.

For more information:
https://www.lawcom.gov.uk/electronic-signatures-are-valid-say-governments-legal-experts/

CMA publishes provisional decision on the investment consultancy market

On 18 July 2018, the Competition and Markets Authority ("CMA") published its provisional decision report as part of its investigation into investment consultancy.

The report proposes a series of recommendations to deal with market issues, including the information firms make available to trustees, the appointment of firms and regulatory oversight and guidance.

The CMA's report identifies competition problems within the investment consultancy and fiduciary management markets. Its provisional findings include:

- around half of pension schemes choose the same provider for fiduciary management that they use for investment consultancy. This means companies which offer both services have an advantage over other firms, when it comes to getting this business from existing clients;
- a number of pension trustees have low levels of engagement with providers in the sector when choosing their first fiduciary manager. Only a third of trustees ask firms to compete for their business through a tender process, meaning little competitive pressure;
- pension trustees often do not have sufficient information on the fees or quality of these services to be able to judge if they're getting a good deal from their existing investment consultant or fiduciary manager, or if they could do better elsewhere.

The CMA has therefore proposed a number of changes to these markets to deal with its concerns, including:

- pension trustees selecting their first fiduciary manager must run a competitive tender. Trustees who have already appointed a fiduciary manager without doing this must also put the role out to tender within five years;

- fiduciary management firms must provide clearer information on fees and how they have performed for other clients, so that pension trustees have the information they need to make meaningful comparisons between providers;
- the CMA is also making recommendations for new guidance from TPR, to provide trustees with advice on how to choose and scrutinise providers. It is also proposing that the government broadens the FCA's regulatory scope, to ensure greater oversight of the industry.

The CMA is inviting feedback on the provisional decision report by 24 August 2018. The statutory deadline for the CMA's final report is 13 March 2019.

For more information (provisional decision report):
https://www.gov.uk/cma-cases/investment-consultants-market-investigation#provisional-decision-report

DWP consults on changes to PPF compensation regulations

On 3 July 2018, the DWP launched a consultation seeking views on the draft Pension Protection Fund (Compensation) (Amendment) (No.2) Regulations 2018.

The DWP states that "an important principle of the PPF is that compensation should be based on the member's total pension benefits within a scheme, and that this should be subject to an overall compensation cap where appropriate." In October 2017, the High Court held in Beaton v the Board of the PPF, that benefits not attributable to pensionable service in the scheme in question (in this case, benefits which were transferred in on the basis of a fixed pension) cannot be aggregated with other relevant pension benefits derived from pensionable service in the scheme for the purposes of applying the PPF compensation cap – the cap should apply separately to each tranche of benefit. According to the DWP, this has "resulted in the legislation being interpreted in a way that does not reflect PPF practice or the policy intent in cases where a person has benefits derived from a fixed pension".

The consultation therefore proposes changes to PPF compensation rules which aim "to remedy the immediate problems caused by the judgment and ensure that the PPF have the legal basis to administer the compensation regime as intended".

In particular, the draft regulations seek to clarify that a relevant fixed pension is regarded as attributable pensionable service for the purpose of calculating PPF compensation, including the application of the PPF compensation cap where relevant.

The consultation closed on 24 July 2018.

For more information:
https://www.gov.uk/government/consultations/changes-to-the-pension-protection-fund-ppf-compensation-regulations/changes-to-pension-protection-fund-ppf-compensation-regulations-public-consultation

New Issues - DWP and TPR clarify signposting provisions

The DWP and TPR have issued a joint statement to clarify the signposting provisions for referring matters to TPO and TPAS, following the transfer of the TPAS dispute resolution function to TPO in March 2018.

The statement confirms that all complaints and disputes about occupational and personal pension schemes should go to TPO, while general requests for information and guidance should be directed to TPAS.

While relevant legislation (including the Disclosure Regulations) has yet to be updated to reflect the change, the statement also confirms that "despite the current absence of legislation, there would be no purpose served in considering penalties for schemes referring disputes and complaints to TPO that have not first gone through the scheme's internal dispute resolution process (IDRP)".

TPO has also published a signposting template which schemes can use, for example on their website and in communications with members, to inform them of the right to refer complaints to TPO.

For more information:
https://www.pensions-ombudsman.org.uk/wp-content/uploads/Final-Signed-Letter-on-the-move-of-Dispute-Resolution-from-TPAS-to-TPO.pdf
For more information (signposting template):
https://www.pensions-ombudsman.org.uk/wp-content/uploads/Final-Signposting-template.doc

New Issues - TPR publishes annual DC survey

TPR published its annual DC survey on 14 September 2018.

The research claims that many smaller pension schemes are failing to demonstrate they provide good value for members. TPR states that the trustees of just one in ten small schemes, and one in three medium schemes, are doing everything which TPR believes is essential to assess value for members. This includes trustees having good knowledge and understanding of the costs and charges paid by members, and carrying out an annual assessment of the value the scheme represents.

The survey also found that only 41% of scheme trustees are researching and taking into account what members value, and that the worst performing area across all schemes was investment governance with, on average, less than a quarter of trustees meeting TPR's expectations.

TPR has also published findings from its thematic review into value for members in small and micro pension schemes. Of the 68 chair's statements reviewed, TPR found that the majority provided inadequate or incomplete explanations of how the scheme's costs and charges represent good value for members.

TPR will review its guidance as part of its ongoing campaign to improve clarity and be more "directive". It will also continue to use its 21st Century Trusteeship communications which go to those who run schemes, to drive up standards.

For more information (survey):
http://www.thepensionsregulator.gov.uk/docs/dc-research-summary-report-2018.pdf
For more information (review):
http://www.thepensionsregulator.gov.uk/docs/thematic-review-value-for-members.pdf

New Issues - TPO publishes guidance on non-financial redress

On 13 September 2018, TPO published revised guidance on redress for non-financial injustice caused by maladministration.

The guidance introduces fixed amounts for non-financial injustice awards (commonly referred to as "distress and inconvenience" awards), with the aim of enhancing transparency, creating consistency and managing expectations for all parties to complaints.

Going forward, non-financial injustice will now (generally) be placed into one of five categories, with commensurate levels of award. The guidance lists factors to help categorise each case. Additionally, the upper limit for an award for "severe" cases of non-financial injustice has increased to £2,000. Less serious cases retain a lower limit of £500, a figure that was reviewed in 2015.

The new approach replaces the previous guidance and takes immediate effect for all open and new cases.

For more information:
https://www.pensions-ombudsman.org.uk/wp-content/uploads/Updated-Non-financial-injustice-September-2018-2.pdf

New Issues - TPR acts to address issues in small schemes

Research and a response published by TPR on 10 September 2018, indicates that the majority of DB pension savers are in relatively well-run schemes that are showing year on year improvements, but that smaller DB schemes are lagging behind. The research was carried out with a view to understanding the extent to which trustees and employers meet the expectations TPR sets out in its DB funding code and related guidance, and what barriers trustees face in running their schemes. As well as assessing compliance with the principles set out in the DB code, the survey covered TPR's expectations on scheme governance and tested awareness, and the action trustees have taken as a result of TPR's 21st Century Trusteeship campaign.

As part of its new regulatory approach, TPR explains that it is stepping up its proactive involvement with smaller schemes to assess their performance in key risk areas, including governance, covenant, investment and funding. It will provide clear, directive feedback to the trustees of all small schemes. Schemes which do not act on the feedback may face further action.

To set clear expectations for DB trustees, TPR has started work on a new DB funding code, as outlined earlier this year in the Government's DB pensions White Paper. The code will aim to introduce clearer funding standards to help trustees and employers to agree good funding outcomes for their schemes and which should, alongside any expansion of TPR's powers, better equip TPR to take enforcement action.

For more information (research):
http://www.thepensionsregulator.gov.uk/docs/db-research-summary-report-2018.pdf
For more information (response):
http://www.thepensionsregulator.gov.uk/docs/db-research-response-2018.pdf

New Issues - ONS publishes Occupational Pension Schemes Survey

On 6 September 2018, the ONS published its Occupational Pension Schemes Survey for 2017.

The survey, which gathers information about scheme membership, benefits and contributions from a sample of both private and public sector occupational trust-based pension schemes, aims to provide a detailed view of the nature of occupational pension provision in the UK. According to the ONS, in 2017:

- total membership of occupational pension schemes in the UK was an estimated 41.1 million (compared with 39.2 million in 2016) – the highest level recorded by the survey;
- active membership of occupational pension schemes was 15.1 million, split between the private sector (8.8 million) and the public sector (6.3 million);
- active membership of private sector DC schemes was 7.7 million (6.4 million in 2016).

For private sector DC schemes, the average total contribution rate (member plus employer) was 3.4%, falling from 4.2% in 2016.

For more information:
https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/pensionssavingsandinvestments/bulletins/occupationalpensionschemessurvey/uk2017

New Issues - DWP sets out its agenda for workplace pensions

Guy Opperman, the Parliamentary Under Secretary of State for Pensions & Financial Inclusion, made a written statement in both Houses of Parliament on 4 September 2018 setting out some of the DWP's priorities in relation to workplace pensions. Among other things, the statement notes that:

- the pensions dashboard will be industry-led and "facilitated by government", with the government seeking to "protect pension savers and personal information by legislating where necessary";
- the new Single Financial Guidance Body is expected to be established in October 2018, ahead of a formal launch in January 2019, when it will deliver money and pension guidance, and debt advice;
- the DWP is currently considering responses to its consultation on "Protecting defined benefit pension schemes – a stronger Pensions Regulator" and hopes to publish its conclusions "towards the end of this year";
- the DWP is investigating how to facilitate consolidation of DB schemes, looking among other things at the establishment of 'superfunds'. It intends to publish a consultation on this "in the autumn";
- collective DC schemes are back on the agenda. The DWP is currently working through proposals for the first CDC schemes in the UK and intends to launch a formal consultation "in the autumn".

For more information:
https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-09-04/HCWS933/

The Pensions Advisory Service – a starting point for independent and impartial pensions guidance

Drawing parallels between Bank Holidays and pensions often leaving people feeling "discombobulated", TPAS took the opportunity of the long weekend to encourage people to become "empowered consumers of pension expertise".

TPAS notes that people may need more than just education when it comes to their finances and retirement planning. It therefore reminds people that it offers independent and impartial guidance, and can be a "great place to start" for retirement planning. From there, "the customer may go to the provider or, with the enormity of the decision, pay for regulated advice." TPAS goes on to state that it, providers and financial advisers are not in competition and that they "should be working harder to allow customers [to] move between [their] complementary services".

For more information:
https://www.pensionsadvisoryservice.org.uk/news/tpas/bank-holiday-weekend

TPR continues to roll out 21st Century Trusteeship campaign

TPR has released further guidance over the summer, in its 21st Century Trusteeship campaign to protect workplace pension savers by driving up the standards of governance across pension schemes.

The latest instalments look at "managing conflicts of interest", "meetings and decision making" and "value for members".

For more information:
http://www.thepensionsregulator.gov.uk/21st-century-trusteeship.aspx

PASA publishes DC administration guidance

On 27 July 2018, PASA published DC Administration Governance Guidance for administrators, employers and trustees. The guidance aims to support the management of responsibilities in five core areas – data, decumulation, controls and processes, management information and transitions. As with PASA's recent Administration Governance Checklist for trustees, the latest guidance has been developed in response to TPR's drive to improve the governance of pension schemes, under its 21st Century Trusteeship initiative.

For more information:
http://www.pasa-uk.com/system/files/PASA%20DC%20Governance%20Guidance%20FINAL%20270718.pdf

PASA launches administration governance checklist for trustees

PASA has announced the publication of its Administration Governance Trustee Checklist. This has been developed in response to TPR's drive to improve the governance of pension schemes, under its 21st Century Trusteeship initiative.

The checklist is intended to work as "an additional tool to help trustees to evidence and action appropriate levels of governance over their administration provider".

For more information:
http://www.pasa-uk.com/publications/trustee-administration-governance-checklist-guidance

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