SPENCE

Your Quarterly Pensions Update

Quarter Three 2022

November 2022

What’s inside?

Welcome to your Quarterly Pensions Update

The purpose of this report is to update sponsors and trustees with recent pensions industry changes in the quarter.

For your convenience, Spence has summarised the key developments and highlighted the necessary actions sponsors and trustees may need to take.

The report combines brief written comment with links to any further relevant information and any deadlines you should be aware of. We trust you will find the update useful and informative. If you require further information about how any of the topics covered might impact on your scheme specifically, please get in touch with alan collins@spenceandpartners.co.uk or your usual Spence contact.

2022 Q3 investment update

Market Review

The cost of living crisis (driven by continued heightened inflation), coupled with political discord in the UK (particularly impacting bond yields and the value of Sterling) led to a negative quarter in the UK (-3.4% and -7.9% year to date, FTSE All Share Index). Investors remain worried about high inflation, slowing growth and the potential for continued monetary policy (of increasing interest rates) resulting in a recession.

As the quarter drew to a close, following the emergency budget announced by the now former UK Chancellor, Kwasi Kwarteng, the market had processed the Government's spending plans. The fact those spending plans were unfunded and not backed-up by independent projections, mixed with reduced market confidence, sent the value of government issued bonds into freefall and the value of Sterling to fell to historically low levels, relative to other developed market currencies.

The fiscal action by the UK Government led to an unusual public rebuke from the International Monetary Fund. The Bank of England also reacted to the market by announcing that it would purchase government debt (having backtracked on their original plan to sell government bonds purchased as part of the Quantitative Easing programme), but only for a timebound period until 14 October 2022.

Despite the focus on UK dynamics, global equities remained volatile over the period (a continuing trend throughout 2022) with all regions posting losses. The FTSE All World returned -5.3% over the quarter and -22.6% over the year to date, in local currency terms. Due to the depreciation of Sterling over the period, unhedged UK investors, investing in overseas markets saw their returns boosted. An unhedged UK investor would have seen a return of 3.2% over the quarter, but those investors hedging back to Sterling would have seen a return of -5.3%, such was the strength of the US Dollar (against global currencies) and the fall in Sterling.

All regions suffered during the quarter. In local currency terms, US equities fell 4.9% during the quarter (-23.9% year to date). Eurozone equities experienced a further slump, driven by the ongoing energy crisis, rising inflation, and concerns over economic growth, finishing the quarter down 4.5% (-21.0% year to date). Despite a positive start to the quarter, Japanese equities sold off in September to end the quarter down 0.8% (-5.5% year to date). The Yen, like Sterling, posted weakness against the US dollar and fell to levels not seen since the 1990s. Emerging markets continued to struggle, albeit to a lesser degree than in previous quarters, posting a loss of 3.8%.

Long-term inflation rates increased by 0.64% driven by the rising energy prices and global recovery from COVID-19. All else being equal, this will increase the value placed on pension schemes' liabilities.

In an attempt to control inflation concerns, the US Federal Reserve raised interest rates on two occasions (July and September) by 0.75% on each occasion. The Bank of England followed suit by twice raising rates by 0.5% (August and September), reaching 2.25% by the quarter end. The rise in rates caused losses in fixed income assets as prices declined (i.e. yields increased). Investment grade credit, which is more exposed to rising rates, underperformed riskier high yield credit.

Long-dated credit spreads increased from 1.22% to 1.34%, which was mainly driven by a rise in corporate bond yields, as investors became risk averse with rising interest rates.

Long-term UK gilt yields (25 year) increased by 0.65% to 4.10%, driven by the UK Government's now ill-fated mini-budget (rates spiking to 5.1% at one point) prior to the Bank of England intervention. Yields also climbed consistently over the quarter as the Bank raised interest rates in an attempt to reduce inflation, with a further 0.75% increase announced in November and future rises expected in the coming months. All else being equal, the move in gilt yields acts to decrease the value placed on pension schemes' liabilities.

Bulk annuity market update

What is the market like?

Extremely busy – with the recent market turmoil, it may be easy to overlook that increasing yields have a positive impact on funding levels for many schemes. Bulk annuity pricing continues to be attractive, partly due to competition in the market, leading to a very high demand for quotations.

How are insurers coping with this?

In reality the capacity crunch has not been around capital (yet), or availability of longevity reinsurance, but mostly in respect of human capital. Most insurers have been recruiting within the pricing and implementation teams, however there is a small pool of experienced candidates and so many teams remain stretched. A result of this is that they continue to be very selective in respect of the schemes they agree to quote for.

How do you make a scheme more attractive to an insurer?

The areas of preparation are well known – good data, legally reviewed specification, matching assets and good governance. The level of preparation should be evidenced to the market in the RfQ and preparatory insurer calls. Having good advisers in place (brokers and legal) is very important; also flexibility on timing, particularly for smaller transactions.

What levels of pricing are we seeing at the moment?

Very much dependent on scheme size and duration – for pensioners, the expectation is gilts +10 to gilts +60. Good pockets of deferred pricing (up to gilts flat).

What types of transactions are being completed?

Full scheme transactions; the appetite for partial buy-ins has decreased as many schemes have jumped through a number of de-risking triggers (and benefited if they were under-hedged on interest rates). While the average transaction size remains reasonably large (£100M+) the market continues to be open to well prepared smaller schemes. Smaller transactions are usually expected to follow a streamlined process (one-round only) and sub £30M schemes may only be able to have a quote in exclusivity.

Will this be a record year for bulk annuities?

Probably not, given that higher yields lead to lower premiums in money terms. Current guess is £35bn for the year, well below 2019 (driven mostly by a number of jumbo transactions) but in line with 2020 and 2021.

Any changes to the cost of longevity reinsurance post Covid?

Slight downward trend, but nothing significant. There would not seem to be a rationale to delay settlement activity because a scheme is waiting for longevity to become cheaper to insure.

Are bulk annuities safe?

This is a question that is now regularly coming up within trustee boards and, increasingly, from members. As a result, we are seeing increased demand for insurer due diligence (DD) as part of the broking process. There are two levels of DD which insurers can seek – desktop information on the market and the financial regime (the earlier the better) and detailed DD on insurer selected for exclusivity. There are a number of providers in this space, with costs in the £15K-£30K range.

Any market trends to be aware of?

Nothing specific – insurer appetite to offer residual risk is variable/low, so schemes should only seek this if there is a specific reason for it. Also smaller schemes may be expected to simplify benefits where possible, or amend if there are aspects which would result in non standard administration processes. This is an extra element in the benefit specification preparation which can be overlooked if there isn't a settlement specialist involved early.

Consultation on Scheme Funding Code

Summary

The long-awaited Government consultation on new funding and investment regulations for DB occupational pension schemes was finally launched over the summer. The new regulations are expected to come into effect from September 2023 and so affect actuarial valuations from that date. The consultation also paves the way for the second draft of the Pension Regulator's new Funding Code of Practice to be published, although it would have been helpful if the Code could have been issued alongside the Government consultation.

Key Points

While some of the details in the final regulations are still to be ironed out, the direction of travel is clear and has been for some time. Schemes will be required to determine a Long Term Funding Target (LTFT) and devise a Journey Plan to reach this destination. Schemes will need to attain their LTFT by the time they have reached "significant maturity".

The reference point for achieving this state is known as the "relevant date", and is determined as being no later than the end of the scheme year in which the scheme reaches significant maturity. By the relevant date, a scheme will need to be both fully funded on its LTFT and invested in assets consistent with this measure.

The LTFT will need to be a low dependency measure such as being able to buy-out benefits in full with an insurance company, transferring to a consolidator, or being self-sufficient. In other words, the scheme will need to be funded to an extent whereby it is not expected to have to rely on the sponsoring employer for further support.

The Pension Regulator's new Code of Practice on scheme funding is currently expected to define significant maturity as when the scheme's liability duration reduces to 12 years. Our understanding is that when this figure was initially considered it was intended to be a reasonable proxy for when a scheme is expected to be made up almost entirely of pensioners. However, as a result of recent market volatility and, in particular, the increases in gilt yields we have seen at the end of September 2022, liability durations have been falling and, in many cases, sharply. This means that schemes could be reaching significant maturity far earlier than previously anticipated. It remains to be seen whether the final wording in the Code of Practice will be revised in light of this. And of course, the landscape could easily change again in the meantime.

Setting a LTFT and Journey Plan to get there will require trustees and sponsoring employers to review and agree on their funding and investment strategies. This will mean specifying:

- The LTFT measure e.g. buy-out with an insurance company, transfer to a consolidator or continue on a self-sufficient basis
- The funding level the scheme is expected to achieve at the relevant date
- The scheme's expected investment allocation at the relevant date
- For schemes which have not yet reached their relevant date, the expected maturity at the relevant date.

Trustees of schemes that are close to their relevant dates and / or which have weaker employer covenants will be expected to take less risk in their Journey Plans, with greater flexibility for schemes which are further away from their relevant date and / or which enjoy support from a stronger employer.

Trustees will need to document their plans in a Statement of Strategy, which will need to be submitted to the Pensions Regulator along with the usual documentation from the actuarial valuation.

Furthermore, trustees will be required to ensure that Technical Provisions are determined in a manner which is consistent with their longer-term strategy. In terms of Recovery Plans, the draft regulations require that funding deficits must be recovered as soon as the employer can reasonably afford, which could add pressure to quicker funding of future deficits.

Reviews of the longer-term funding and investment strategies are expected to take place alongside the usual actuarial valuation process, with the first such taking place within 15 months of the effective date of the first actuarial valuation after the regulations come into effect. Out of cycle reviews may be needed under certain circumstances; for example, following a significant change to the covenant strength of the sponsoring employer.

ACTIONS

While the new regulations are not yet finalised and are not expected to come into effect for around another year, trustees and sponsoring employers should engage with their advisers now and start making plans on how they will deal with the new funding and investment requirements.

Helpful Links

Consultation document: The draft Occupational Pension Schemes (Funding and Investment Strategy and Amendment) Regulations 2023 - GOV.UK (www.gov.uk)

SI/SR Template (publishing.service.gov.uk)

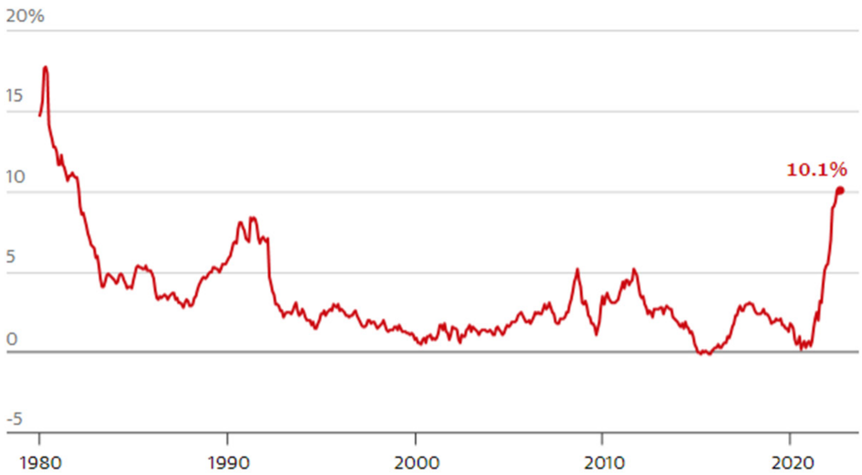
Inflation and cost of living - What are trustees, employers and members thinking about?

Background

Inflation in the UK has risen above 10% for the second time this year reflecting, amongst other factors, high energy costs and soaring food and drink prices. Lest we forget, this compares to the Bank of England's target of keeping CPI inflation between 1% and 3%.

Further, on average, poorer households are experiencing higher inflation than better-off households, by up to three percentage points. This is because those areas where prices are rising most quickly (such as energy) tend to make up a greater proportion of lower-income household budgets.

All of this means that the September inflation figure is a key one, as it is typically used by the Government to uprate pensions and benefits from the following April. It is also the benchmark rate used by a number of defined benefit pension schemes for uprating pensions, whether in payment or deferment. Given years of relatively low inflation (see below chart), while pension increases in payment will be capped in most schemes, it is likely that the full level of inflation will be passed through to the majority of deferred members, where the cap on pension increases in deferment is a cumulative one.



Source: ONS

Defined benefit schemes

Two key issues for defined benefit schemes relate to investments and benefits.

In the context of investments, it is currently impossible to separate the impact of high inflation from the extreme changes in yields that have been experienced in late-September / early-October. While the demise of pension schemes arising from the "LDI issue" has been greatly exaggerated, and widely misunderstood, a number of schemes have seen their funding position improve substantially during the first half of Q4. Key is to understand where the scheme is on its long-term journey plan and what opportunity there is to adjust the investment strategy as a result.

Trustees should also review whether the inflation hedging strategy they have in place remains appropriate in the context of their wider investment strategy.

From a benefit perspective, trustees should ensure that scheme factors (e.g. cash commutation factors, early retirement factors and transfer values) appropriately reflect market conditions. While transfer values typically reflect current market conditions (albeit a formal quotation is guaranteed for a period of three months), other factors will need more thinking about. As ever, the key starting point will be what the Rules say.

Trustees and employers will also be faced with difficult decisions on discretionary pension increases. Failing to top up increases will result in pensioners’ incomes falling in real terms, but will protect the funding position of the scheme. The decision is particularly finely balanced for schemes that are close to full funding on a low risk measure. Ultimately, employers will find it challenging to agree to increases for former employees when wage increases for current employees are being tightly controlled.

Defined contribution schemes

For DC schemes, the main issue is the affordability of contributions for members, which could lead to employees deciding to stop contributing to the scheme. Trustees will need to ensure that members understand the consequences of this decision, which would typically lead to a reduction in employer contributions and the loss of valuable life insurance protection.

From an employer perspective, the key decision will be whether to offer flexibility through this challenging period and, if so, how long this will be available to employees. Clearly, the employer will need to ensure that auto-enrolment obligations are met.

Members taking drawdown will also find it more difficult to keep pace with inflation, which could have a significant impact on their income in later life.

Regardless of the type of scheme, clear communications are needed to help members understand their options, the impact on their benefits and the way in which their decisions will affect their benefits in the years to come.

Case law update

High Court throws out RPI/CPIH judicial review case

On 1 September 2022, the High Court handed down judgment in the case of BT Pension Scheme Trustees v UK Statistics Authority. The well reported action concerned a claim for judicial review by the trustees of the BT Pension Scheme, Ford Pension Schemes and Marks & Spencer Pension Scheme against:

- the decision of the UK Statistics Authority (UKSA) in February 2019 to align the Retail Prices Index (RPI) with the Consumer Prices Index including owner occupiers' housing (CPIH) by bringing into the RPI the methods and data sources of the CPIH (the RPI decision)
- the decision of the Chancellor of the Exchequer in March 2020 to withhold his consent under section 21(3) of the Statistics and Registration Service Act 2007 (SRSA 2007) to the RPI decision being implemented before 2030, and
- the decision of the Chancellor in March 2020 that the Government would not pay compensation to the holders of UK index-linked gilts because of the UKSA's decision to align the RPI with the CPIH from 2030.

In short, the claim was dismissed but, that said, the decision contains useful background and insights around measures of price inflation used for pensions indexation.

The claim

In a bit more detail, the claimants relied upon the following grounds of challenge:

- The UKSA's RPI decision falls outside the scope of its power to amend the RPI.
- The UKSA failed to take into account the impact of its RPI decision on the holders of RPI index-linked gilts and bonds and persons entitled to index-linked pensions (legacy users), or wrongly decided that it was not entitled to take that impact into account. Consequently, the UKSA also failed to comply with its Public Sector Equality Duty (PSED). Also, in making his compensation decision, the Chancellor failed to have regard to the interests of legacy users and to comply with the PSED.
- The UKSA failed to consult the public on its RPI decision and to take into account their views when that proposal was at a "formative stage". Also, the Chancellor failed to consult with legacy users on the issue of compensation and to take into account properly their representations on compensation.

The claimants also brought a private law claim in the event of the court deciding that the RPI decision is lawful. They submitted that the effect of implementing the RPI decision in 2030 will be that the RPI will cease to be published and so the 'cessation clause' in gilts issued from 2005 onwards will be triggered. The Chancellor would, therefore, be obliged to select a replacement index for the RPI. The Chancellor submitted that the clause will not be triggered because, once the RPI decision is implemented, the RPI will still continue to be published.

The claimants failed on all grounds

- The court rejected ground 1 holding that: as a matter of law, the UKSA has the power to amend the RPI by bringing the methods and data sources of the CPIH into the RPI. That power includes the making of "fundamental changes" to the coverage or basic calculation of the RPI. The court also rejected the claimants' argument that the UKSA's RPI decision was simply an attempt to circumvent the need to repeal s. 21 of the SRSA so that the RPI need no longer be produced.
- The court rejected both of the claimants' contentions under ground 2 holding that: it is common ground that, because the RPI is used in so many different situations, the effect of leaving the RPI as it is, or changing it in accordance with the RPI decision, produces winners and losers in many parts of society and the economy. On the claimants' second point, the Chancellor received ample briefing from his officials on the effects of the RPI decision on legacy users and the PSED. That was taken into account in his decision that compensation should not be provided out of the public purse.
- The court consequently rejected both of the claimants' contentions under ground 3. In respect of the claimants' second point, the court decided that they failed to demonstrate any legal basis for their assertion that the

Chancellor was legally obliged to consult on whether compensation should be paid to legacy users.

Finally, in relation to the 'cessation clause', the court explained why the RPI will not cease to be published when the RPI decision is implemented from 2030. Accordingly, there will be a declaration that that decision will not cause the cessation clause in index-linked gilts issued from 2005 to be triggered.

As things stand, the reform of RPI will go ahead as planned and HM Treasury has already updated its consultation outcome for the consultation on reform to the RPI methodology.

What does it all mean for pension scheme sponsors, members and trustees?

Well, that depends.

- For **members** who have benefits linked to CPI or do not receive increases, there will be no change. However, where members have all or part of their benefits either in deferment or payment linked to RPI then they will see a change in how their pension increases in future (from 2030). Many members may feel like this is a reduction in their pension promise and telling members that the current calculation in RPI is overstated, due to an error in the formula, will provide little comfort!
- For pension scheme **sponsors** the impact will also depend on what measure of inflation is used when calculating pension increases and how much inflation hedging is in place. Most assets that hedge inflation are hedging RPI as there are very limited assets that are linked to CPI. In the same way that there has been a 'lottery' in whether pension scheme increases are linked to RPI or CPI under scheme rules, there will be a lottery in the impact of the change to the calculation to RPI for scheme sponsors.
- **Trustees** will be tasked with explaining the impact to members where their pension increases are affected and liaising with sponsors on the funding impact of any change on the pension scheme. When CPI-H replaces RPI, will some trustees feel moved to ask for discretionary increases or for changes to be made to scheme benefits to compensate pensioners?

Payments to employees for changes to pension scheme benefits were not 'from' employment for tax purposes

In E.ON UK plc v Revenue and Customs Commissioners, there was a successful appeal to the Upper Tribunal (UT) by an individual taxpayer from a decision of the First-tier Tribunal (FTT) which decided that payments made to employees in respect of alterations to their rights under a defined benefit pension scheme were 'from' the employment, within the meaning of section 9(2) of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) and section 3(1)(a) of the Social Security Contributions and Benefits Act 1992. The UT held that the payments were not from the employment, applying the decision in Tilley v Wales and Kuehne + Nagel Drinks Logistics Ltd v HMRC. This is a classic case of whether or not a payment by an employer is 'from' the employment or is something else—in this case compensation for giving up certain pension rights.

Employer not liable to pay pension arrears on proper construction of pension scheme forfeiture rule

In Re CMG UK Pension Scheme, sub nom CMG Pension Trustees Ltd v CGI IT UK Ltd, the High Court held that an IT company does not have to compensate its pensioners for unpaid benefits that were due for payment more than six years before the pension scheme's trustees raised issues over the scheme's benefit structure in 2019. The court ruled that a forfeiture clause meant that the employer, CGI UK Ltd, does not have to make good the arrears.

It was found that the scheme had a forfeiture clause where 'any benefit or instalment of a benefit which has not been claimed within six years of the date on which it fell due for payment is forfeited and the entitlement to that benefit or instalment is extinguished'. This is not limited to missing beneficiaries and rather applies to all unclaimed benefits once the six-year period has expired. The clause is *'a forfeiture rule and takes effect whenever a benefit or instalment has not been claimed for more than six years after it fell due and, in particular, whether or not the beneficiary is missing or is aware that the benefit or instalment remains unpaid'.*

The sole trustee, CMG Pension, had argued that the clause at issue was not a matter of forfeiture and that its purpose was only to deal with missing beneficiaries even though the clause made no distinction between benefits unclaimed because the beneficiary is missing and those unclaimed because the beneficiary is unaware of the entitlement. The court held that *'If the purpose of the rule was to draw such a distinction, one would have expected the drafter to use clear language to that effect'.*

Even though the clause did not use the word 'forfeit' or 'forfeiture', setting a time limitation for claiming benefits in all circumstances was still found to be its aim.

Helpful Links

BT Pension Scheme Trustees -v- UK Statistics Authority | Courts and Tribunals Judiciary

E._ON_UK_PLC_v_HMRC_UT-2021-000161_Final_decision.pdf (publishing.service.gov.uk)

CMG forfeiture case

Data Protection and Digital Information Bill

The Data Protection Act 1998 stood for some twenty years before it was replaced by the UK General Data Protection Directive (GDPR) and Data Protection Act 2018. Following Brexit, however, it appears that the current legislation will have a much shorter shelf life.

A new Data Protection and Digital Information Bill was introduced in the House of Commons on 18 July 2022. The Government has said that the Bill is intended to update and simplify the UK's data protection framework, to reduce burdens on organisations whilst maintaining high data protection standards. The governance structure and powers of the Information Commissioner's Office (the ICO) would be reformed and transferred to a new body, the Information Commission. The Bill would also:

- establish a framework for the provision of digital verification services to enable digital identities to be used with the same confidence as paper documents
- increase fines for nuisance calls and texts under the Privacy and Electronic Communications Regulations (PECR)
- update the PECR rules to cut down on 'user consent' pop-ups and banners
- allow for the sharing of customer data, through smart data schemes, to provide services such as personalised market comparisons and account management
- reform the way births and deaths are registered in England and Wales, enabling the move from a paper-based system to registration in an electronic register
- facilitate the flow and use of personal data for law enforcement and national security purposes
- create a clearer legal basis for political parties and elected representatives to process personal data for the purposes of democratic engagement.

As data protection is a reserved matter, the Bill's data protection reforms would extend to the whole of the UK - apart from one provision relating to the Information Commission's seal, which does not extend to Scotland. Other provisions in the Bill would require legislative consent motions from the devolved administrations.

The House of Commons Library has published a research briefing on the Data Protection and Digital Information Bill 2022–2023. The briefing covers what the Bill intends to do with the UK's data protection framework, digital verification services, and customer and business data, and also provides further information about digital information and the regulation of the Bill.

In terms of the implications for pension scheme trustees, when enacted and brought into force, the Bill will mean that Privacy Notices will need updated along with other documents that refer to the ICO and legislation that is consequently repealed.

NB At the time of writing, the UK data protection framework reform has been delayed after the Government pulled the second reading of the Bill just hours before it was due to start in order to "allow ministers to further consider this legislation".

Helpful Links

Data Protection Bill briefing paper

Defined Contribution (DC) Update

Supporting pension scheme members to make informed decisions: A call for evidence

The DWP recently launched a call for evidence seeking views on how it can support pension scheme members make informed decisions on using their savings. In the call for evidence, DWP sets out member expectations, the current position in the trust-based market and plans for the future.

The consultation could lead to the introduction of new measures to support trust-based scheme members, the extension of collective defined contribution (CDC) schemes to multi-employer schemes and master trust, and the National Employment Savings Trust (NEST) may also be developed to offer further decumulation options.

The call for evidence ended on 25 July 2022 and the DWP will now deliberate over what, if any, government action is required.

The conclusion to the consultation provides some insight into government thinking –

"Understanding the views of both pension savers and providers is key to DWP's assessment of what support may be needed by members of trust-based pension schemes to allow them to make informed decisions about their pension savings and ultimately achieve their desired outcomes. …

"In addition to this call for evidence, we will also be seeking further direct engagement with members. This will give more insight into their views on what support they need to help make informed decisions and achieve their desired pension outcomes. We will consider this alongside the formal responses to this call for evidence, as we develop our policy thinking."

Simplified Benefit Statements from October 2022

From 1 October 2022, automatic enrolment schemes that only provide money purchase benefits must issue simpler annual benefit statements, having regard to statutory guidance and an illustrative template published by the DWP. By way of reminder –

- The simpler benefit statement must not exceed two sides of A4 (or equivalent if printed from an online version) and font and typeface must be easy to read
- The DWP's template is split into five sections and illustrates how the information should be ordered and presented to ensure consistency
- Schemes can use their own branding, as long as it does not obscure the flow or increase the length of the statement beyond that permitted
- Alternative formats may also be necessary to satisfy the Equality Act 2010.

There is no change to the statutory minimum content that must be included in the body of the statement or to the information that must be signposted. The new guidance does though suggest that other information may be included or signposted; e.g. it encourages schemes to include costs and charges information in the body of the statement.

If in paper format, the simpler statement must always feature at the front of any pack (or immediately after any covering letter) with additional information appearing after this.

Annual benefit statements issued after **1 October 2022** must follow the new simpler format.

Helpful Links

Helping savers understand their pension choices - GOV.UK (www.gov.uk)

How to provide simpler annual benefit statements - GOV.UK (www.gov.uk)

CMA order transposed into regulations with TPR oversight

Summary

New regulations - The Occupational Pension Schemes (Governance and Registration) (Amendment) Regulations 2022, SI 2022/825 - have been made in order to transpose, into pensions legislation, Parts 3 and 7, and related provisions of Parts 9-11, of the Investment Consultancy and Fiduciary Management Market Investigation Order 2019 made by the Competition and Markets Authority (CMA) on 10 June 2019 ('the CMA Order'). The new regulations came into force on 1 October 2022.

What you need to know

The CMA Order, which introduced a range of reforms to address issues of competition in the investment consultancy and fiduciary management sector, has been with us since 10 December 2019. It was always the intention for compliance to be transferred from the CMA to The Pensions Regulator (TPR). This has though taken much longer than expected, partly because of the COVID-19 pandemic. The long-awaited regulations have though finally been made and will take effect from the start of October.

The regulations:

- require trustees of occupational pension schemes, subject to certain limited exceptions, to carry out a qualifying tender process for fiduciary management services (replacing 'Remedy One' of the CMA Order), set objectives for their investment consultants, and review performance against those objectives at least annually (replacing 'Remedy Seven');
- include as "registrable information" (for TPR's Exchange) information concerning persons who provide fiduciary management services or investment consultancy services to the trustees of a relevant trust scheme (see 'Registrable Information', below); and
- allow TPR to oversee the requirements.

In addition, certain information that is no longer required by TPR will be removed from the registrable information requirements.

The CMA Order requires trustees to submit an annual Compliance Statement. That obligation will continue after TPR takes over compliance from the CMA, but the process will change. When the Regulations are in force, information about compliance with the above duties will have to be submitted to TPR via the Scheme Return.

The scope of the Regulations is slightly greater than that of the CMA Order. Page 8 of the Impact Assessment estimates there are eight pension schemes that are in scope of the DWP requirements but not currently in scope of remedies 1 and 7 of the CMA Order.

Also notable is the clarification that the provision of high-level commentary provided by actuaries in actuarial valuations is not by itself the provision of investment consultancy services.

Other points worth highlighting are that:

- carrying out transition management services alone will not mean that a person is a fiduciary management provider for the purposes of the regulations
- asset-backed contributions and buy-in policies are not to be taken into account when determining if the asset management threshold is or would be met and so are excluded from the calculation of 20% of a scheme's assets, which is used as a threshold for mandatory re-tendering
- the revised definition of 'fiduciary management services' ensures that where an asset manager and a provider of investment consulting services are connected via a joint venture, the asset manager can be a fiduciary management provider and the duty to tender for the provision of fiduciary management services can apply
- the requirement to review the objectives set for investment consultants is changed to at least every three years, and without delay after any significant change in investment policy, in order to ensure this issue does not become inadvertently prolonged.

Registrable Information

Trustees will be required to provide the name, address and appointment date of each of their fiduciary management providers and whether the trustees carried out a qualifying tender process in relation to that provider. If they did not carry out such a process in relation to that FM provider, the trustees have to state why it was not carried out. Trustees will also be required to confirm the name, address and appointment date of each of their investment consultancy providers and whether the trustees have set and reviewed those objectives, and reviewed the performance of the provider, and if not, why that is the case.

The Pensions Regulator (TPR) has guidance available to support compliance.

Helpful Links

The Occupational Pension Schemes (Governance and Registration) (Amendment) Regulations 2022 (legislation.gov.uk)

Set objectives for your investment consultant | The Pensions Regulator

Choose an investment governance model | The Pensions Regulator

Pensions Ombudsman determinations

Lump sum death benefits and trustee discretion - Ombudsman refuses to remit flawed decision

In this determination (Mr Y, PO-24832), the Pensions Ombudsman upheld a complaint that the trustees of the pension scheme failed to consider the complainant as a possible beneficiary of a lump sum death benefit. However, even though the complaint was upheld, the Ombudsman did not remit the matter back to the trustees because he concluded that they would just make the same decision again.

The facts

Mr Y was, until his death, a member of the Pat Eddery Pension Fund. He was divorced and had a 23-year-old son, also Mr Y, who was a potential recipient of lump sum death benefits under the Fund. The divorce was intended to be a ‘clean break’, providing a final financial settlement for his family. Further, the deceased member nominated only Ms O (his new partner) in his letter of wishes and also left her his entire estate.

Ms O was a trustee of the Fund, and an additional trustee was also appointed to address conflicts of interest. The trustees decided to distribute the death benefits to Ms O, who planned to use them to pay off the debts of the late Mr Y’s estate.

Mr Y complained to the Pensions Ombudsman, arguing that the trustees had not exercised their discretion properly.

The decision

The Pensions Ombudsman upheld the complaint.

The Ombudsman could only overturn the decision if the trustees had asked the wrong questions, considered irrelevant factors or reached a perverse decision. In this case, the trustees had correctly decided that Mr Y was a potential recipient of the lump sum death benefit. However, they were then wrong to proceed on the basis that the divorce settlement precluded Mr Y from benefitting. Also, they had not really exercised a discretion in that they had effectively decided that the nomination and the terms of the will precluded a payment being made to Mr Y. So, the trustees process was flawed.

All that said, on the facts of the case, the Ombudsman saw no point in remitting the decision to the trustees because the outcome would be the same. However, he awarded Mr Y £500 compensation for distress and inconvenience.

The lessons

The case is a reminder of trustee duties when exercising discretion over death benefits. The trustees should make reasonable enquiries as to potential beneficiaries, should not treat nomination forms as binding and need to manage conflicts. The case is also interesting because of the determining not to remit the flawed decision back to the trustees. Whilst the Ombudsman thought that the trustees decision would not change, even if they were asked to reconsider it, the Ombudsman should not effectively take decisions on behalf of trustees.

Trustee not liable for mis-statement where ‘good faith’ test not met

In this case (Mr R, CAS-50949-Z3M6), the Pensions Ombudsman partially upheld a complaint that a scheme provided incorrect information to a member who was assessing his retirement options. However, the Ombudsman found that it was unreasonable for the member to rely on incorrect statements and that he should have realised the figures provided would be subject to a caveat about reliance. Moreover, given the significant disparity in his pension from figures previously quoted, he should have queried the position. The member was though awarded £3000 for distress and inconvenience caused by material failings of both scheme and administrator.

The facts

Mr R was a member of the Jaguar Pension Scheme. In 2018 he was given his annual benefit statement (which included the usual caveats about not relying on it) showing a pension of £11,962. In 2019, he was offered voluntary early retirement and was told that his pension would be £19,904. Mr R retired and was subsequently informed that his pension would actually be £15,847. He complained to the Pensions Ombudsman.

The decision

The Ombudsman partially upheld the complaint, determining that:

— The member was only entitled to benefits under the Scheme rules. It was not reasonable to rely on the incorrect statements as Mr R should have realised that the figures he was given would have been subject to a caveat about reliance. Moreover, given the large increase / discrepancy in his pension from the figures quoted only a year earlier, he should have queried the position.

— There was no actionable ‘estoppel’. Given the caveats on the statements, there had been no clear and unambiguous statement about his benefits and it was also not reasonable for him to rely on them.

The Ombudsman also found, however, that there had been a series of administration errors and a poor complaint handling process. He directed the Scheme and the Scheme Administrator to pay respectively £1,000 and £2,000 compensation for distress and inconvenience.

The lessons

A key issue in obtaining compensation for financial loss in incorrect information cases is that it must be reasonable to rely on the information and the member must be acting in good faith. In this case, given the caveats in the information and the large disparity in the quoted pension from a year earlier, neither test was met.

Helpful Links

PO-24832.pdf (pensions-ombudsman.org.uk)

CAS-50949-Z3M6.pdf (pensions-ombudsman.org.uk)

TPR Corporate Plan 2022: ‘Protecting savers’ is top priority for next two years

The Pensions Regulator (TPR) has published its latest Corporate Plan, setting out key actions the Regulator expects to take in relation to each of its five strategic priorities:

- Security – ensuring pension savers’ money is secure
- Value for Money – ensuring pension savers get good value for money
- Scrutiny of decision-making – ensuring decisions made on behalf of pension savers are in their best interests
- Embracing innovation – responding as the market innovates to meet pension savers’ needs
- Bold and effective regulation – being a bold and effective regulator.

What does all this mean for those involved with workplace pensions? Read on …

Security

TPR confirms that changes to the notifiable events regime (which were expected in April 2022) “will become operational in due course”. More generally, it will implement and embed its new and extended powers under the Pensions Schemes Act 2021.

On pension scams, TPR is concerned that savers are at heightened risk due to the pressures people are facing with personal finances. Its work will therefore continue to deliver communications that flag clear warnings for savers and schemes will continue to be encouraged to sign up to the Scams Pledge. The Regulator promises to publish a revised Pension Scams Strategy during 2022 and, at the time of writing, that promised has been delivered on.

TPR will continue to engage with key areas of the market in relation to cyber risk and discuss steps that can be taken to assess risk and develop resilience. Pilot activity to gather information will end in December 2022. So, look out for feedback!

Value for Money

TPR wants to drive a long-term focus on value for money across the pensions market. In 2022, the Regulator will assess how to identify and address instances of non-compliance and how it will engage with schemes that need to make improvements; schemes that have confirmed they offer good value for money; and schemes that will consolidate. This work will be taken forward into 2023 and 2024.

Scrutiny of decision-making

TPR confirms that it will publish its new single code of practice during the second half of this year and is planning to launch its second scheme funding consultation in Autumn 2022 (with the new code becoming operational from Autumn 2023). Changes resulting from the new code will be forward-looking, which means that schemes with valuation effective dates on or after the code’s commencement date will be affected. TPR may undertake a regulatory initiative (RI) ahead of the code becoming operational, potentially focusing on scheme management of risk and resulting covenant strength.

An update to the FCA-TPR joint regulatory strategy (issued in 2018) will be published in the second half of 2022 too, outlining the shared strategic outcomes that will continue to draw the regulators’ focus in the years ahead.

TPR recognises the need to improve equality, diversity, and inclusion (EDI) within their regulated community and along with its industry working group the Regulator is creating an action plan which will be implemented during the remaining period of its corporate plan. This is likely to include improving data on diversity and inclusivity; setting out TPR’s expectations of schemes, employers and trustees; and providing the tools, guidance, and support to meet and exceed those expectations.

Also under this heading, TPR will continue to implement the PSA 2021 requirements on climate change, including assessing TCFD reports for the largest schemes and master trusts. More generally, the Regulator will develop a regulatory initiative focused on the ESG / investment regulations and the publication by schemes of compliant statements of investment principles and implementation statements.

Embracing innovation

TPR will continue to work with the Pension Dashboard Programme, DWP and FCA as the legislative and technological frameworks are set. It will also launch a programme of education.

In relation to superfunds and other innovative DB models, TPR expects the de-risking market for DB schemes to continue to develop, a wider set of options and opportunities for trustees and employers to have emerged, and a number of schemes to have transacted with these. The Regulator will continue to engage with prospective providers, undertake research and analysis and assess risks. It will also complete a review of certain elements of its superfund guidance and produce any further guidance on the broader landscape of options as necessary.

With regard to other types of new pension scheme, TPR will support the development of new regulations to enable a broader market for CDC schemes to be established.

Bold and effective regulation

TPR continues to assess its operational effectiveness and find ways to improve it. TPR will explore several operational changes, such as preparing for a future office location from July 2023, upgrading day-to-day systems, and a major review of its Auto-Enrolment (AE) Operational Strategy. A Digital, Data and Technology directorate will be created to develop organisational capability.

As with other organisations, TPR recognises the need to reduce its environmental impact and improve its resilience to the impacts of climate change. By 2024, it will set out plans to achieve net-zero carbon emissions by 2030.

‘Other’

The Corporate Plan provides a useful update on key activity at TPR.

It also sets out how TPR will use key outcome indicators and key performance indicators to measure its performance against objectives over the five strategic priorities.

The plan incorporates a Financial Summary highlighting the agreed 2022-23 budget of £111.5m, a decrease of £0.4m against 2021-22. TPR is planning to increase staff numbers from 825 in 2021-22 (actual) to 886 in 2022-23 (budgeted).

Helpful Links

Corporate Plan 2022 to 2024 | The Pensions Regulator

Update on Pensions Dashboards

As a reminder, pensions dashboard services are an electronic communications service which will allow individuals to see their pensions information (including the State Pension) in one place online. Pensions dashboard services aim to help individuals to be reunited with lost pensions and support people in better planning for their retirement.

The DWP has recently published the government response to the second consultation on the creation of pensions dashboards. This considered the requirements that will have to be met by trustees of occupational pension schemes. It also updates the Regulator's initial guidance on dashboards for trustees to reflect the response. Amongst other things this includes an option for trustees to apply for a deferral of their staging deadline.

The final draft of the Pensions Dashboards Regulations 2022 were laid before Parliament on 17 October. Schedule 2 contains a staging profile that outlines when different types and sizes of schemes will have to connect to pensions dashboards. While the larger schemes, and schemes providing benefits of a money purchase nature will be among those to stage first, the staging dates for the defined benefit schemes that Spence administer don't fall until the latter half of 2024, and throughout 2025, exact date depending on number of members, excluding pensioners.

Further details of the requirements relating to connection, the display of data, and the design of pensions dashboard services will be set out in standards (subject to approval by the Secretary of State), which are referred to in the regulations. A consultation on these standards was published in July. In any event, the Regulators guidance notes that there will be significant work involved in connecting to dashboards and that it could take 12-18 months to prepare. Trustees are strongly advised to start preparing as early as possible.

ACTION
Trustees should ensure that dashboard preparation is on their meeting agendas and action plans, to include issues such as connection, scheme data and matching. Where administration is outsourced the third party administrator should be asked to evidence what it is doing to meet the dashboard requirements, particularly around issues such as generation of Estimated Retirement Incomes (ERIs) and the way in which they propose connecting to the dashboard.

Helpful Links

The Pensions Dashboards Regulations 2022 (legislation.gov.uk)

Government response to the Pensions Dashboards: further consultation - GOV.UK (www.gov.uk)

Coming up next

Another quarter, another period of volatility and, at the time of writing, another two Prime Ministers. When it comes to producing our Quarterly Update, we often lament that it just feels like yesterday that we were sitting down to discuss the previous quarter's report. This time, it almost feels like 12 months were in the last quarter, considering the upheaval of events that have transpired – political and economic. It feels like the world is turning more swiftly on its axis by the day, like a spinning top… hopefully not to topple over after the recent wobbles!

As shaken and stirred as we may be, we must resolve to settle ourselves, look to the future with a steady eye and a calm mind, be ready to take action and continue planning for our schemes. To that end, here are some of the topics that we do know about, which may be impacting your pension schemes in the coming months.

Pensions Dashboard

- The DWP has published the government response to the second consultation on the creation of pensions dashboards, and draft Pensions Dashboards Regulations, which have now been laid before Parliament. DWP also published draft guidance for trustees and their advisers regarding the issues trustees need to consider if they are applying for a deferral of their staging deadline (the deadline for the scheme to be connected to a dashboard of digital architecture).
- The article earlier in the report provides a more detailed update on the pensions dashboard, but it is worth reiterating the importance of trustees preparing now for their staging deadline. As mentioned, time is passing by so quickly and it is so easy for months to be eaten up by unforeseen events. So, while the staging dates may feel distant and like a problem for tomorrow, schemes need to be treating it as a(nother) priority, now.
- We have produced a guide covering everything you need to know about dashboards which, if not already provided to you, is available on request.

TPR Codes of Practice

- Repeatedly asking for things, over and over again, is a tactic that seems to work quite well for this writer's children. So, perhaps if I keep mentioning TPR's long-awaited Single Code of Practice and the new DB funding code in the Coming Up Next article, it will come to pass!
- The industry has been busy over the past months, putting out various fires, so it is entirely understandable that these codes have yet to be published. However, we do expect TPR to publish the code of practice within the next six months (before TPR's financial year end of 31 March 2023), combining at least 10 of the 15 current codes of practice into the single, "super-code". While the DB funding code is expected before the end of this calendar year. The new regimes are unlikely to take effect until later in 2023, but trustees and sponsoring employers should get familiar with the proposed changes now, so that their schemes are ready to go with the revised requirements.
- In the meantime, TPR has just published its enforcement strategy, which sets out TPR's approach to its enforcement work (excluding 'auto-enrolment') and aims to provide insight into the framework applied when selecting cases for enforcement action. Following a consultation earlier this year, TPR has also published its consolidated enforcement policy, updated prosecution policy and consultation response.

Building on those selected topics, here are some key dates to keep in your diary as we approach the end of 2022 and look to the New Year:

- **31 October 2022** – Next deadline for applications to become a signatory of the 2020 UK Stewardship Code.
- **Before 2023** – Government consultation on multi-employer collective defined contribution (CDC) pensions expected to be launched.
- **Before 2023** – TPR, DWP and the FCA plan to issue a consultation setting out proposals relating to the measurement of Value for Money in DC schemes.
- **From 2023** – More information on assets to be collected by TPR in scheme returns for DB pension schemes.
- **16 January 2023** – Dominic Harris due to take up his role as the new Pensions Ombudsman.
- **April 2023** – Start of the phased compulsory on-boarding of schemes to the pensions dashboard.

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