TRUSTEE KNOWLEDGE UPDATE

Legal Update – November 2021-January 2022

LEGISLATION

New conditions for statutory transfers

(8 November 2021)

These regulations introduce conditions for statutory transfers. They came into force on 30 November 2021 and apply to applications for a statement of entitlement in DB schemes, and requests to make a DC transfer, made on or after that date.

The regulations provide that trustees cannot pay a statutory transfer unless one of two conditions is met. The first condition is that the trustees are satisfied "beyond reasonable doubt" that the receiving scheme is a public service scheme, authorised master trust or an authorised CDC scheme.

The second condition is that the trustees consider that none of the "red flags" is present. One of the red flags is that the trustees have identified an "amber flag" and the member has failed to confirm that they have taken pension scams guidance from MaPS in relation to the transfer.

Other red flags include:

- the member failing to provide a substantive response to a request for information (within specified time limits);
- advice has been given by a person without the appropriate regulatory approvals;
- the member has received unsolicited contact, been offered an incentive (other than by an employer) or feels they have been put under pressure.

Amber flags (requiring the member to take guidance) include:

- the member providing incomplete information in response to a request from the trustees;
- the trustees considering that some or all of the information provided by the member may not be genuine;
- the trustees not being satisfied that the member has a sufficient employment link with the receiving occupational pension scheme or a residency link or employment link with a qualifying recognised overseas pension;
- the trustees decide that the receiving scheme has overseas, high risk, unregulated or unorthodox investments or is charging high fees; and
- there has been a sharp or unusual rise in the volume of requests to make a transfer to the same receiving scheme, or involving the same adviser.

Trustees must notify a member of the new conditions within a month of an application for a statement of entitlement or transfer request (as appropriate).

The Government has published a detailed consultation response alongside the regulations and TPR has produced guidance for trustees on dealing with transfer requests under the new regime.

Comment

Trustees can find themselves in a difficult position in circumstances where they suspect a pension scam, but have a legal duty to make the transfer anyway. The new statutory transfer regime goes some way to resolving this problem, which is welcome. However, the new rules will inevitably introduce additional uncertainty into the trustees' due diligence and decision-making process on transfers.

Charge cap - flat fee restriction for small pots

(10 January 2022)

These regulations apply in relation to the first charges year of a scheme which ends after 6th April 2022. They prohibit flat fee charges

being imposed where the value of the member's rights under the default arrangement is £100 or less, or where the flat fee charge would reduce the member's rights in the default arrangement to less than £100. For other members, only one flat fee may be charged under a single default arrangement on a member in respect of a charges year. The Charge Cap: guidance for trustees and managers of occupational schemes has been updated to reflect this new measure.

Stronger Nudge to pensions guidance

(18 January 2022)

These regulations introduce the "stronger nudge" to pensions guidance. They will apply from **1 June 2022** where trustees receive an application, or communication made in relation to an application, from a "relevant beneficiary" (B) to transfer rights to flexible benefits accrued under the scheme or to start receiving flexible benefits provided by the scheme. A relevant beneficiary is defined as a member of the scheme, or survivor of a member, who has a right or entitlement to flexible benefits.

Where the regulations apply, the trustees must:

- offer to book a pensions guidance appointment on behalf of B;
- where B accepts the offer, take reasonable steps to book that appointment;
- where B does not accept that offer, or where they are unable to make a suitable appointment, provide B with details of how to book a pensions guidance appointment;
- explain to B that they cannot proceed with the application unless—
  - B has received, and notified them of receipt of, appropriate pensions guidance; or
  - B opts out of receiving such guidance by giving them an opt-out notification; and
- explain to B that B can only opt out of receiving appropriate pensions guidance by giving them an opt-out notification.

The opt-out notification must be given in a communication made solely for that purpose unless B has received appropriate pensions guidance or regulated financial advice in connection with the application in the last 12-months, B qualifies for a serious ill-health lump sum or B's application is solely to transfer their rights to flexible benefits.

The new requirements will not apply to transfers where B is under the age of 50, receiving flexible benefits is not the purpose, or one of the purposes, of the application or where B has been referred by the trustees of a different pension scheme to appropriate pensions guidance in relation to the same application.

Trustees must keep a records of the receipt by relevant beneficiaries of appropriate pensions guidance and of any opt-out notifications.

The Government's response to its July 2021 consultation has also been published.

Comment

Following closely behind the new transfer conditions requirements, these regulations add additional protection for members with DC benefits on transferring or drawing their pensions. Trustees will need to work with their administrators to ensure that member communications and internal processes are in place for 1 June.

CONSULTATIONS AND DRAFT LEGISLATION

Finance Bill - increase in NMPA

(4 November 2021)

As previously announced, normal minimum pension age (NMPA) will be increased to 57 on 6 April 2028 (other than for members of uniformed public service schemes). The Bill includes provisions giving a lower protected pension age (PPA) in certain circumstances (where the protection provisions in relation to previous increases in NMPA do not already apply).

The new provisions will enable a member to have a PPA from 6 April 2028 where either the "entitlement condition" or "block transfer condition" are met. Where a condition is met then the member will have a PPA of the higher of 55 and the age from which the member had an actual or prospective right to any benefit immediately before 4 November 2021.

The "entitlement condition" will be met if:

- immediately before 4 November 2021 the member had an actual or prospective right under the scheme to any benefit from an age of less than 57,
- the rules of the scheme on 11 February 2021 included provision conferring such a right on some or all of the members, and
- the member either had such a right under the scheme on 11 February 2021 or would have had such a right had the member been a member of the scheme on 11 February 2021.

This will also apply where a transfer request was made before 4 November 2021 to a scheme conferring such a right.

Broadly the "block transfer condition" is met if the member is a member of the transferee pension scheme as a result of:

- a block transfer on or after 4 November 2021 from a pension scheme (the "original pension scheme") where the entitlement condition is met,
- a block transfer from the original pension scheme on or before 3 November 2021 where immediately before the transfer the member had an actual or prospective right under the original pension scheme to any benefit from an age of less than 57 and the rules of the original pension scheme met the other requirements of the entitlement condition, or
- a subsequent block transfer.

A "block transfer" is a transfer, in a single transaction, of all of the sums and assets held under a pension scheme which relate to the member and at least one other member of the scheme.

The Bill also protects a PPA between age 55 and 57 where the member makes a recognised transfer to another scheme. The PPA will only be in relation to the transferred sums or assets (or benefits derived from them).

Comment:

The increase in NMPA was first announced in 2014 and so comes as no surprise. The Government has however closed the window of opportunity for individuals to transfer benefits into schemes to take advantage of the new PPA. The new PPA provisions are complex, particularly in relation to transfers, and trustees and scheme administrators will need to keep detailed records to ensure member expectations are met.

Pensions dashboards: consultation on the draft Pensions Dashboards Regulations 2022

(31 January 2022)

The Government is consulting on a range of policy questions about the creation of pensions dashboards. Indicative draft Regulations set

the requirements for a "qualifying pensions dashboard service" and the requirements on trustees in relation to connecting to the Money and Pensions Service (MaPS) and the data they must provide to individuals. The Regulations will apply to all registrable UK-based occupational pension schemes with active or deferred members.

A 'staging profile' sets out the timeline for connecting schemes to the digital architecture. The Government confirms that the three staging 'waves' will be large schemes (1,000+ members, April 2023 to September 2024); medium schemes (100+ members, October 2024 to October 2025) and then remaining small and micro schemes (expected to stage from 2026).

Alongside the DWP consultation, the Pensions Dashboards Programme (PDP) has published information on the scope of its mandatory standards and how they will be set.

Consultation ends on **13 March 2022**.

Comment:

Although final policy decisions in some areas are still to be made, the consultation finally puts some meat on the bones of the proposed pensions dashboards framework, and the new duties this will place on pension scheme trustees.

THE PENSIONS REGULATOR

Delay in new DB funding regulations

(15 December 2021)

TPR has confirmed that the DWP's consultation on draft funding and investment regulations is now expected to be published in Spring 2022 and TPR's second consultation on the DB funding code will be launched in the late summer of 2022. Schemes with valuation effective dates on or after the code's commencement date will be subject to the new requirements. In the meantime, TPR's expectations for DB schemes is in line with the most recent Annual Funding Statement.

Guidance on the governance and reporting of climate-related risks and opportunities

(16 December 2021)

TPR has published guidance on the governance and reporting of climate-related risks and opportunities. The guidance is aimed at trustees who are required to comply with the climate change governance and reporting regulations. However, TPR suggests that trustees of schemes that are not currently in scope could consider applying those aspects of the guidance they feel are likely to have the most impact on their scheme. The guidance complements and should be used alongside the DWP's statutory guidance 'Governance and reporting of climate change risk: guidance for trustees of occupational schemes'. TPR will be publishing an additional step-by-step guide to the whole process in early 2022. They will also be consulting on updated covenant guidance in 2022.

DB and hybrid scheme return

(25 January 2022)

TPR has updated the information on its website relating to DB and hybrid scheme returns. This year the scheme return will be issued in two parts, the first part containing new questions to be completed in a separate online form, and the second part containing the rest of the questions to be completed in Exchange. Scheme return notices will be issued from the end of January 2022 and should be completed and submitted by 31 March 2022.

THE PENSION PROTECTION FUND

Policy Statement - Levy rules 2022/23

(16 December 2021)

The PPF has published its final 2022/23 levy rules. There are no proposed changes to the key levy parameters (the levy scaling factor, scheme-based multiplier or risk-based levy cap) or to the Dun & Bradstreet insolvency risk model. The policy statement suggests that over 80% of schemes paying the risk-based levy will see their levy fall, and for those that do see increases there will now be a one-off cap for 2022/23 limiting their increase to no more than 25%. However, the cap will not apply to alternative covenant schemes.

The PPF is retaining the 'small scheme adjustment' (halving levies for schemes with under £20m of liabilities and tapering them for schemes with between £20m and £50m of liabilities) and a lower cap on the risk-based levy (0.25% instead of 0.5% of liabilities). It is also retaining the COVID-19 easement option (offering levy payers a limited interest-free payment extension).

The PPF is also, as flagged in consultation, updating its rules for alternative covenant schemes (which include commercial consolidators, and schemes without a substantive sponsor).

A useful PPF levy timeline can be found here.

Comment:

The Statement seeks to maintain levy stability for most schemes, with the PPF remaining in a strong funding position. Trustees and employers should progress the annual task of reviewing the likely scheme levies and considering whether they need to take any further action to reduce them.

MISCELLANEOUS

FCA

Climate-related disclosures by asset managers and asset holders

(17 December 2021)

The FCA has published a policy statement (PS21/24) and final rules setting out how FCA-regulated asset managers and asset owners, including life insurers and pension providers, will have to disclose how they take climate-related risks and opportunities into account in managing investments. There will be phased implementation with those firms with assets under management (AUM) of £50 billion or more coming in scope on **1 January 2022** and those with £5-50 billion AUM on 1 January 2023. Firms with AUM of less than £5 billion will be exempt but this is to be kept under review.

Other organisations

PLSA DB master trust self-certification regime

(27 October 2021)

The PLSA has launched a new self-certification regime for DB master trusts with a standard template allowing schemes to provide information on their structure and how they operate. They are intended to help trustees and employers who may be considering a DB master trusts among their consolidation options to understand the key features.

Dates for diaries: Trustee training remains one of the most important ways of ensuring that trustees have the knowledge and understanding required to perform their duties. CMS runs regular trustee training days. If you would like to be updated of upcoming dates or have any other enquiries about this course, please contact Megan Thorogood (megan.thorogood@cms-cmno.com).