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PENSIONS PLANNER

YOUR GUIDE TO FUTURE DEVELOPMENTS

SPRING 2024

Contents

02 Contents

03 Introduction

04 Quarter in review

- 04 General Code published at last
- 04 Lifetime allowance abolished
- 05 New funding regime – the final furlong
- 05 Auto-enrolment – rates and thresholds frozen
- 06 Court of Appeal says Ombudsman not a "competent court"
- 06 Validity of amendments – High Court ruling
- 07 Surpluses and consolidation: DWP consultation
- 08 Dashboards – becoming "connection-ready"
- 08 Cyber security: updated guidance
- 09 TPR expectations as to M&A
- 09 Capital-backed journey plans – TPR comments
- 10 Regulated Apportionment Arrangements: TPR guidance
- 10 Private markets investment: TPR guidance
- 10 DWP launches Small Pots Delivery Group
- 11 PPF levy for 2024-25
- 11 Think-piece on trustee duties and climate change
- 11 VAT on fund management fees: consultation response
- 11 Codification of case-law on equal treatment and PPF compensation
- 12 Ombudsman's corporate plan and performance
- 12 Regulatory Initiatives Grid

14 Timeline

- 16 Next 3 months
  - 16 Consultation on a new VFM framework
- 17 Next 3 to 12 months
  - 17 Virgin Media v NTL Pension Trustees
  - 17 BBC v BBC Pension Trust

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Introduction

This winter has seen the culmination – almost! – of three major pensions initiatives. The Pensions Regulator published its long-awaited General Code of Practice, which replaces 10 existing Codes and sets out new expectations besides. The Finance Act 2024 received royal assent, making good on the Government's commitment to abolish the lifetime allowance, although we may see its return if Labour wins the General Election. And the Department for Work and Pensions published the final version of the Regulations overhauling the DB funding regime.

For trustees grappling with these developments, there is an additional challenge: some pieces of the relevant jigsaws are not yet in place. HMRC has acknowledged that certain elements of the Finance Act will need to be addressed via amending regulations. As regards the new funding regime, we are still wating for TPR to finalise the relevant Code of Practice.

Meanwhile the Government has launched a consultation on two radical DB proposals floated in the 2023 Autumn Statement: a new regime for the use of surplus, and the launch of a public sector consolidator. The pace of change in pensions shows no sign of letting up.

With thanks to Dan Saunders, Mark Howard, Annabelle Stoney, Sophie Pamplin and Will Atkinson for their hard work preparing this quarter's planner.

Richard Evans, Professional Support Lawyer

Quarter in review

General Code published at last

Some three years after The Pensions Regulator first consulted on plans to consolidate 10 of its existing Codes, the new General Code of Practice was published and laid before Parliament on 10 January 2024, with a view to the Code coming into force by the end of March.[1]

The new Code sets out TPR's expectations in 51 short, focused modules arranged under five broad headings:

- the governing body
- funding and investment
- administration
- communications and disclosure
- reporting to TPR.

The intention is to make it easier for trustees to identify TPR's expectations and determine whether, and how, they are meeting them. Upon release of the General Code, TPR's Interim Director of Regulatory Policy warned that there was now "no excuse for failing to know what TPR expects … at the very least [trustees] should be aware of where they fall short of our expectations and have very clear and realistic plans in place to address those shortcomings".

At the heart of the General Code are:

- **Effective System of Governance (ESOG).** Trustees of most schemes must operate an effective system of governance, proportionate to the size, nature, scale, and complexity of the activities of the scheme.[2] The Code sets out TPR's expectations for the processes and procedures to be included in the ESOG. Trustees are expected to review the ESOG at least every three years.
- **Own Risk Assessment (ORA).** Trustees of schemes required to operate an ESOG – with 100 or more members – are also required to carry out and document an own risk assessment. The ORA will assess the functionality and effectiveness of the ESOG, and the management of potential risks. As with the ESOG, the ORA should be tailored by trustees according to the scheme's size, scale, and complexity. The requirement to complete the ORA is deferred, so that trustees will have at least two years from the Code coming into force.

Comment: Trustees should undertake a gap analysis to identify areas where their existing systems of governance may need to be adapted. The Code largely reflects existing good practice, and we would expect well-run schemes already to be operating much as the Code envisages. However, for some schemes significant work will be required. TPR's 2023 survey of trust-based DC schemes showed that 40% of trustees of small and micro schemes were either unaware of TPR's Codes of Practice or had never used them, and that only 23% were aware that the new Code was to be introduced.

Lifetime allowance abolished

The Finance Act 2024 received royal assent on 22 February 2024, with the pension provisions outlined below taking effect from 6 April 2024.

The Act abolishes the lifetime allowance (**LTA**), but introduces two new allowances to limit tax relief on lump sums:

- the "lump sum allowance" (**LSA**) – a cumulative limit of £268,275 on the tax-free part of lump sums paid to an individual; and
- the "lump sum and death benefit allowance" (**LSDBA**) – a cumulative limit of £1,073,100 (equivalent to the pre-6 April 2024 LTA) on the tax-free part of lump sums and lump sum death benefits paid to or in respect of an individual.

The above figures apply in respect of those without existing LTA protection. Those with protection will have higher allowances available.

The payment of certain lump sums will be known as "relevant benefit crystallisation events". Where those sums (cumulatively) exceed the allowances, the excess will be subject to income tax at the recipient's marginal rate.

Transitional provisions apply to those who started to take pension benefits before 6 April 2024, but have yet to commence receipt of all their benefits. The transitional provisions set out two methods for calculating the available allowance for these individuals:

- the standard method – whereby 25% of an individual's previously-used LTA will be deducted from both their LSA and their LSDBA; and
- the alternative method – whereby (subject to certain conditions) an individual can obtain from trustees a "transitional tax-free amount certificate", which sets out what the deductions from the allowances will be based upon the actual amount of previous tax-free lump sums. For this purpose individuals will be required to provide "complete evidence" as to the lump sums in question.

Where a tax-free lump sum is paid, administrators will need to provide the recipient with a "relevant benefit crystallisation event certificate", specifying the amount of the LSA and LSDBA which has been used.

The Act abolishes the lifetime allowance excess lump sum, but introduces a new form of authorised payment in its place – the "pension commencement excess lump sum" (**PCELS**). The idea here is that (where scheme rules allow) an individual who has exhausted their LSA may on retirement take a lump sum similar in many ways to a pension commencement lump sum, but subject to income tax at the individual's marginal rate.

With the advent of the Act, HMRC released a series of newsletters dealing with associated issues, including "Q&As" as to the small print and reporting requirements. In particular:

- In its December 2023 LTA Newsletter, HMRC confirmed that trivial commutation lump sums, winding up lump sums and small lump sums would not count towards the LSA, but that an individual would need to have LSA available in order to take any such lump sum.
- In its February 2024 LTA Newsletter, HMRC acknowledged that the PCELS provisions in the Act did not work as intended. Regulations would be made in order to remove the "permitted maximum" for a PCELS, and to ensure that payment of a PCELS was consistent with Pensions Act restrictions on the surrender of benefits.

We outline below some key action points for sponsors and trustees.

- Amend member communications, including retirement packs and handbooks, to reflect the Finance Act changes. Past communications which described the changes in general terms may need to be updated, for example to cover the transitional arrangements.
- Confirm that the scheme is administered in accordance with the new regime, in particular as regards PAYE, reporting, and procedures to deal with requests for transitional tax-free amount certificates.
- Review whether the benefit design remains appropriate, checking for provisions or caps that refer to the LTA, or arrangements which were included alongside the LTA, which may now need to be removed or amended.
- Review trust deeds and rules and make appropriate amendments to remove references to the LTA or add provisions related to the LSA.

Read our blog post on the abolition of the LTA **here**.

Access the HMRC newsletters **here**.

New funding regime – the final furlong

The DWP published a final draft of the Occupational Pension Schemes (Funding and Investment Strategy and Amendment) Regulations 2024 on 26 February 2024, with a view to the Regulations coming into force on 6 April 2024.

The Regulations implement the new funding regime provided for in the Pension Schemes Act 2021. There is however a breathing space for trustees and employers: the new regime will apply only in respect of valuations with an effective date on or after 22 September 2024.

By way of reminder, under the new regime trustees will be required to put in place, as part the valuation process, a funding and investment strategy (**FIS**) which sets out how their scheme will reach a "low dependency funding basis" and be invested in "low dependency" investments by its "relevant date" when it has reached "significant maturity". In most cases the FIS will need to be agreed with the employer. The intention is that the scheme's valuation assumptions and investment strategy should then be broadly consistent with the FIS.

Certain amendments were made to the draft Regulations as they evolved, in the light of consultation responses and Government policy initiatives. In particular:

- The Regulations are now more prescriptive as to the assessment of the employer covenant. Among other things, trustees are expressly required to consider "for how long [they] can be reasonably certain that the employer will continue to support the scheme".
- There is potentially greater flexibility as to the point at which "significant maturity" is reached, especially for open schemes.
- The Regulations now provide that trustees can have regard to the sustainable growth of the employer when deciding on a recovery plan, although it remains the case that, under the new regime, deficits must be made good as soon as the employer can reasonably afford.

The final piece of the jigsaw will be TPR's new DB Funding Code of Practice. In January 2024 TPR announced that this would be published in the summer, to come into force by September 2024. Alongside the Code, TPR is expected to publish parameters for the "fast track" option under its proposed twin-track regulatory approach, and a template for the FIS.

For more details of the changes – and the steps trustees and employers should take to prepare for the new funding regime – please see our blog post **here**.

Auto-enrolment – rates and thresholds frozen

As reported in our **Autumn Planner**, the Pensions (Extension of Automatic Enrolment) Act 2023 received royal assent on 18 September 2023. The Act allows the Government (via regulations) to:

- reduce the minimum age threshold for automatic enrolment (currently 22); and/or

1. The replaced codes are: (1) Reporting breaches of the law, (4) Early leavers, (5) Late payment of contributions (occupational pension schemes), (6) Late payment of contributions (personal pension schemes), (7) Trustee knowledge and understanding, (8) Member-nominated trustees/member-nominated directors, (9) Internal controls, (11) Dispute resolution – reasonable periods, (13) Governance and administration of occupational trust-based schemes providing money purchase benefits, and (14) Governance and administration of public service pension schemes.
2. There is an exception for public sector schemes, schemes established by an enactment, "pay as you go" schemes, authorised master trusts and authorised collective money purchase schemes.

- reduce or abolish the lower limit for qualifying earnings (currently £6,240).

The Government's original stated aim was to reduce the minimum age threshold to 18, and to abolish the lower limit for qualifying earnings so that members would be pensioned from the first pound earned. However, in October 2023 the Government said that it would conduct a consultation and report to Parliament before using any powers under the Act.

This would seem to remain a "work in progress". The Government has not yet brought the Act into force or launched a consultation. And on 6 February 2024, Pensions Minister Paul Maynard confirmed that for 2024-25, the rates and thresholds which applied for 2023-24 will continue to apply, so that:

- the minimum earnings threshold for automatic enrolment will stay at £10,000; and
- the lower and upper limits for qualifying earnings will stay at £6,240 and £50,270 respectively.

The Government has also published a **response** to its 2023 call for evidence as regards the alternative quality requirements for DB schemes. The Government reviews the alternative quality requirements every three years. It has concluded that the requirements should remain as they currently stand.

Comment: Automatic enrolment has undoubtedly increased the number of pensions savers. In 2012, just **55**% of eligible employees were saving into a workplace pension; by 2022 the figure had grown to **88**%. But there has long been a concern that, while the number of savers has increased, many are saving at inadequate rates. The 2017 **review** "Maintaining the Momentum" suggested that the statutory minimum contributions should be raised incrementally in the mid-2020s. There appears to be no political appetite to raise minimum contributions at the current time.

Court of Appeal says Ombudsman not a "competent court"

The Court of Appeal has upheld the High Court's decision that The Pensions Ombudsman is not a "competent court" for the purposes of section 91(6) of the Pensions Act 1995. This would seem to mean that, where trustees wish to recover an overpaid benefit by recoupment (deduction from future benefit payments), they will need either the member's consent or an order from the County Court. Section 91(6) effectively prevents recoupment if the sum in question is disputed, unless the obligation to repay has become enforceable via the order of a competent court.

In light of this judgment, The Pensions Ombudsman issued a factsheet to explain how trustees could effect recoupment following an Ombudsman determination. The Ombudsman will provide a certified copy of its determination, setting out a repayment schedule for the recovery of the overpayment, and the trustees can then apply to the County Court for an enforcement order.

The factsheet stresses that the County Court's role is not to reconsider the merits of the complaint, but just to enforce the Ombudsman's determination, since a determination can only be appealed to the High Court.

The Ombudsman expressed its disappointment at the judgment, and indicated that the Department for Work and Pensions is supportive of legislative changes to enable the Ombudsman to resolve overpayment disputes without the need for County Court involvement.

Read The Pensions Ombudsman's factsheet **here**.

CMG Pension Trustees v CGI IT UK

Validity of amendments – High Court ruling

A High Court case considered the validity of amendments, and the position where an amendment is found to have been partially invalid: *Avon Cosmetics Ltd v Dalriada Trustees Ltd* [2024].

The principal employer, Avon Cosmetics Ltd, brought Part 8 proceedings concerning the validity of a 2006 amendment of the Avon Cosmetics Pension Plan (**the Plan**), part of a series of amendments which closed the Plan to future final salary accrual and introduced accrual on a career average revalued earnings (**CARE**) basis. The amendment purported to treat members' final salary benefits as if they had retired or left employment on the date of the amendment, so that they would receive statutory revaluation on those benefits.

The trustees had taken legal advice at the time which indicated this change could be made. However, the Plan's power of amendment prevented any amendment which would prejudice "benefits accrued or secured up to the date on which the amendment takes effect" (the **Fetter**). The effect of the Fetter was that members were entitled to a final salary link – their accrued final salary pension should be based on salary when they eventually left employment or retired.

Individual member outcomes could only be assessed when a member's benefits crystallised on retirement or termination of employment, depending on the impact of salary increases in comparison to the rate of inflation. The judgment considered:

- members who would be better off due to the CARE amendments – ie where revaluation would result in a greater pension than a salary link (**Revaluation Winners**); and
- members who would be worse off due to the CARE amendments – ie where a salary link would result in a greater pension than revaluation (**FS Winners**).

The parties were proposing a compromise in relation to the FS Winners (which was due to be sanctioned by the Court). The matter which the Court was asked to decide was, if the CARE amendments were invalid for FS Winners, would the amendments also be ineffective for the Revaluation Winners?

The **judgment** handed down on 17 January 2024 contained a detailed review of the case-law on the exercise of powers and the principle of severance. The Court concluded that the concepts of FS Winners and Revaluation Winners were sufficiently clear to allow different treatment. The Court also concluded that the substantial purpose of the CARE amendments was to remove the final salary link and move to statutory revaluation. That was precisely what the Revaluation Winners would receive – and so the CARE amendments could be effective for the Revaluation Winners whilst being invalid for the FS Winners.

In a subsequent **judgment** handed down on 19 February 2024, the Court approved a compromise agreement in relation to the FS Winners. The proposed compromise resulted, broadly, in the majority of affected members receiving an uplift to their benefits equivalent to 70% of the difference between benefits calculated on the FS basis and benefits calculated on the CARE basis. The Judge was satisfied that this proposed calculation was appropriate and that the compromise was advantageous to all parties.

Comment: Trustees looking to secure benefits with insurers will need to undertake a review of the history of the scheme and its documentation, to ensure that the correct benefits are secured. The *Avon* case illustrates the historic problems which can be revealed as part of this necessary step on the road towards winding-up.

Surpluses and consolidation: DWP consultation

On 23 February 2024, the DWP launched a consultation (closing on 19 April 2024) with radical proposals to:

- facilitate payments from DB surplus to employers and members; and
- establish a public sector consolidator, targeted at DB schemes unattractive to commercial providers.

The proposals build on plans outlined in the 2023 Autumn Statement, and are intended in part to boost investment in "productive finance".

Surpluses

The Government is concerned that as things stand trustees may be unable (under scheme rules) or unduly reluctant to extract surplus from DB schemes. The Government's position is that trustees should be able to do so provided that members' interests are suitably protected. To this end, the following changes are being considered:

- An enabling statutory power – this might in itself allow payments to be made from surplus, or instead might allow scheme rules to be amended so as to allow such payments.
- Changes to legislation so that one-off payments to members from surplus are authorised for tax purposes.
- A relaxation of the funding conditions associated with payments from surplus. It would no longer be essential for a scheme to be fully-funded on a buy-out basis. The scheme would however need

to be fully-funded on a suitably prudent basis. This would likely be the scheme's "low dependency funding basis" plus a specified margin, the margin perhaps depending on the investment risk.

- A possible further safeguard for members (over and above the funding condition), whereby trustees could opt for a 100% PPF underpin subject to paying a "super levy" as well as the normal levy. Initial PPF analysis suggests that, even for the most secure schemes, the super levy would be significant – perhaps 0.6% of buy-out liabilities per year.
- New TPR guidance for trustees as to issues relevant to the extraction of surplus.

Public sector consolidator

The Government intends to establish a public sector consolidator for DB schemes by 2026. The aim is to provide an alternative endgame solution which will suitably-protect members' interests, while at the same time enabling greater investment in high-growth UK assets. The Government envisages that:

- The consolidator will be administered by the PPF, but will be separate from the existing compensation fund.
- The consolidator will primarily target smaller, less-well funded schemes which are likely to be unattractive to commercial providers. This would be one of the consolidator's statutory objectives. However, eligibility would be determined mainly by reference to general principles rather than prescriptive criteria.
- The consolidator will operate as an unsegregated fund, and on a "run-on" basis (ie it will not seek to buy out benefits with insurers).
- The consolidator will not undertake to mirror the benefit structures of ceding schemes. Instead it will offer a small range of standardised benefit structures. So for members transferred to the consolidator there could be changes to benefit terms, but actuarial equivalence would be maintained and the "headline level" of benefits would not be reduced.
- The consolidator will be expected to meet the same funding standards as superfunds. That suggests that technical provisions will be determined by reference to a discount rate of gilts plus 0.5-0.75%. This will be the starting point for determining the "entry price" for ceding schemes and employers, but with some flexibility eg to take account of prevailing market conditions.
- A ceding employer's liability will be severed when its scheme transfers to the consolidator. But if the scheme is in deficit relative to the entry price, the employer will be required to make good the deficit over an agreed period. If the employer fails to do so then relevant members' benefits will be scaled down (with PPF compensation as an underpin – see below).
- The consolidator's investment strategy should combine prudence with "an increasing productive asset allocation". To support this, the consolidator will have to be given recourse (where necessary) to additional capital. The options being considered are either Government underwriting or the use of PPF reserves on a commercial basis (eg so that a loan was made to the consolidator from reserves, with the consolidator paying interest on the money loaned).
- Any such recourse would be finite. Accordingly the consolidator would pay the PPF levy and members would be covered for PPF compensation in the normal way.

For the consultation paper, see **here**.

For the July 2023 call for evidence, see **here**.

Dashboards – becoming "connection-ready"

Following the Pensions Minister's July 2023 announcement confirming that the final dashboards connection date will be 31 October 2026, the Pensions Administration Standards Association (**PASA**) published the first release in a new series of guidance documents, explaining what it means for a scheme to be "connection-ready".

A scheme is considered connection-ready if the trustees and administrators are:

- ready to commence the process of actual connection to the dashboard ecosystem; and
- confident that their preparation will enable them to meet their dashboard duties post-completion.

The guidance refers to five main pillars:

- governance
- matching
- value data
- technology
- administration.

Each of the pillars has components which underpin being connection-ready, and the guidance details the main factors for readiness, outlining the approach for trustees and administrators to follow.

PASA suggest that the expected timeline for reaching a point of being connection-ready is around 18 months due to industry-wide capacity constraints.

The guidance is available alongside a "Call to Action" outlining the top five actions for schemes to take imminently. The Call to Action emphasises the importance of early consideration and action in reducing the risk of non-delivery.

Separately the Government has issued regulations which provide that operating a pensions dashboard service will be a "regulated activity" for the purpose of the Financial Services and Markets Act 2000. This means that any entity wanting to operate a dashboard will need either to be authorised under the Act to carry out the activity or be exempt.

Read the PASA guidance **here**.

Cyber security: updated guidance

The Pensions Regulator has published an updated version of its guidance on cyber security, to help trustees assess and understand the risk and ensure they have controls in place to respond appropriately to incidents.

This is the first update since the guidance was published in 2018, and comes after a huge increase in incidents reported by pension schemes to the Information Commissioner's Office (**ICO**) – up from six in 2021-22 to 246 in 2022-23.

The guidance details the steps which trustees should take to safeguard their member information and scheme assets, and urges schemes, their advisers and providers to, for the first time, report significant cyber security incidents to TPR on a voluntary basis as soon as reasonably practicable.

TPR defines a "significant" cyber incident as one which is likely to result in:

- a significant loss of member data;
- major disruption to member services; or
- a negative impact on several other pension schemes or pension service providers.

Not all cyber security incidents will involve data breaches, but many will. Trustees are reminded that reporting to TPR should be in addition to, rather than in place of, any report of a data breach which needs to be made to the ICO.

Cyber security incidents can be reported to TPR at **report@tpr.gov.uk**.

Comment: It is important that trustees have a robust plan for responding to any cyber incident, which among other things will involve assessing the position of their administrators. This point is made by TPR in the General Code of Practice.

TPR expectations as to M&A

The Pensions Regulator published a speech given by its Chief Executive, Nausicaa Delfas, explaining its expectations and approach as to the protection of DB pension schemes in merger and acquisition transactions.

Ms Delfas emphasised that TPR was "not here to prevent M&A transactions" but rather to ensure that members' interests were protected. She noted that some businesses may have become more attractive targets for M&A as a result of improved scheme funding. TPR estimates that, as at September 2023, over 80% of schemes were in surplus as against their technical provisions, compared to around 50% at the start of 2022.

Ms Delfas outlined the tools potentially available to TPR as regards transactions which are deemed materially detrimental to DB schemes, including criminal sanctions under the Pension Schemes Act 2021. She directed the audience to TPR's published policy on criminal sanctions, saying that prosecution would be considered only in "the most egregious cases".

Comment: The message about criminal sanctions is reassuring. But bear in mind that there are other tools at the Regulator's disposal: contribution notices, financial support directions and civil penalties. Corporates contemplating an M&A transaction should consider at the outset the impact on any DB scheme; whether and when to engage with the trustees; and what mitigation (if any) may be appropriate.

Capital-backed journey plans – TPR comments

TPR has published a **blog post** on capital-backed journey plans (**CBJPs**), promising further guidance in 2024.

"Capital-backed journey plan" is a generic term for a developing form of alternative funding and security support for DB pension schemes. In broad terms, a third-party provider contributes capital to support an investment strategy and/or the delivery of a particular investment return, which would not otherwise be supportable by the employer covenant. The provider will typically stand to profit to the extent that the actual return exceeds a specified threshold.

There are some parallels between CBJPs and superfunds, but also a major difference: under a CBJP, the sponsoring employer's liability to the scheme will not normally be severed.

The blog post reports significant activity around CBJPs, including in situations of employer distress and even imminent insolvency. TPR intends to issue specific guidance on CBJPs and alternative funding arrangements in due course. In the meantime, TPR says that:

- Trustees who are contemplating a CBJP should engage with TPR at the earliest opportunity. TPR will need "two to six months" in which to assess a proposal.
- For the purpose of its assessment, TPR will adapt the requirements of its DB Superfund Guidance. Different elements of the Guidance may be "turned on or off" depending on the nature of the CBJP.
- Trustees will need to balance any additional investment risk against the level of capital put in place. They should have ultimate say over the level of risk taken.
- Trustee boards need to have sufficient collective knowledge and skill to ascertain the pros and cons associated with the proposed CBJP.

Comment: In TPR's Superfund Guidance for Prospective Ceding Trustees and Employers, there is a section dealing with "Transfers to superfunds where there is no immediate severance". This should be the first port of call for trustees who are considering a CBJP.

Regulated Apportionment Arrangements: TPR guidance

The Regulator has published new **guidance** on Regulated Apportionment Arrangements (**RAAs**), replacing its 2017 "quick guide" and initial guidance published in 2010. The new guidance is more detailed than previous iterations and places an emphasis on the criteria required for RAA approval.

An RAA allows an employer otherwise facing insolvency to detach itself from its DB pension scheme so that it may continue trading. Under the RAA the distressed employer's s75 liabilities will be apportioned to a new statutory employer which is created specifically for the purpose. The distressed

employer will typically agree to make a cash payment to the scheme, following which it will be off the hook.

An RAA will be valid only if prescribed conditions are met. Among other things, the RAA must be approved by TPR and the PPF must not object to it. TPR has warned that it "will not approve an RAA lightly and all other options should be considered and ruled out before an application for an RAA is made".

The guidance lays out the conditions for TPR approval and examples of the evidence which may be needed:

- The employer's insolvency is inevitable within the next 12 months.
- The cash payment proposed is significantly greater than the recovery expected for the scheme in the case of the employer's insolvency.
- A better outcome could not be attained for the scheme by other means, including the use of TPR's powers where relevant.
- It would not be reasonable for the wider employer group to support the scheme or employer in the future.
- The scheme is receiving equitable treatment in comparison to the employer's other creditors, shareholders, and other stakeholders.
- The scheme receives an appropriate portion of the equity in the employer.

The guidance also sets out TPR's expectations as to the process which trustees and employers should follow, both when considering a potential RAA and when applying for approval. A key point to note is that clearance should be sought, since an RAA is a "type A event" for the purposes of TPR's clearance guidance.

Comment: Although RAAs are not common – with TPR saying that they typically participate in only two or three restructurings each year – this is an area where we might see more activity, given the current economic headwinds.

Private markets investment: TPR guidance

The Pensions Regulator has published guidance for trustees on investment in private markets. The guidance follows on from the Government's Mansion House reforms, announced last July and confirmed in the Autumn Statement, which are intended to "unlock capital for our most promising industries and increase returns for savers, supporting growth across the wider economy".

The guidance:

- provides an overview of the types of private market assets and how the markets can be accessed;
- highlights key opportunities and risks when investing in private markets;
- reminds trustees of their legal duties when investing, including that they must predominantly invest in investments traded on regulated markets and maintain a diverse portfolio; and
- sets out key considerations for trustees – which includes that the trustees have the right knowledge and understanding of private market investments before investing – and the different considerations for DB and DC schemes.

TPR says that with the right advice and effective governance, private market assets can play a valuable part in a diversified portfolio which aims to improve and protect savers' benefits. But trustees who do not have the skills or resources to explore a more diversified portfolio should consider consolidating or changing their governance model.

DWP launches Small Pots Delivery Group

Our Autumn Planner covered the call for evidence on the consolidation of small DC pots. Briefly, the Government proposed that pots below £1,000 should be eligible for automatic consolidation 12 months after the last contribution was made.

On 8 February 2024, the DWP announced a new group comprising Government and pension industry representatives to discuss the design and implementation of the consolidation arrangements. Pensions Minister Paul Maynard said, "This group will help in crafting a cost-effective and efficient system, ensuring better financial security and greater value for money for millions of savers."

The new Small Pots Delivery Group will provide recommendations on how best to implement the proposed multiple default consolidator approach, which was originally set out in the Government's consultation response in November 2023. Members include individuals from the FCA, TPR, the Association of British Insurers, the Pensions and Lifetime Savings Association and others.

The DWP contends that, without consolidation, the administrative costs associated with small deferred pots could exceed £200m by 2030, and that consolidation could benefit the average saver by £700 at retirement.

PPF levy for 2024-25

Following a consultation process, the Pension Protection Fund published its policy statement and levy rules for 2024-25 on 14 December 2023.

The PPF confirmed that it will target a total levy collection of £100 million, down from £200 million in 2023-24, and estimated that 99% of schemes will pay lower levies as a result.

The levy methodology remains broadly unchanged, as favoured by respondents to the consultation.

The PPF reiterated that, as things stand, it may not be able to reduce levies further. Under current legislation, there is a 25% cap on any year-on-year increase to the levy target. The cap now effectively constrains how low the levy can fall without

undermining the PPF's ability to respond to a funding challenge should one arise in future.

Almost all respondents to the consultation favoured a change to the legislation, to enable the PPF to move to a much lower, or even a zero, levy. The PPF has shared these responses with the DWP, which says that it will revisit the legislation as soon as parliamentary time allows.

See the PPF's press release **here**.

See the PPF's policy statement **here**.

Think-piece on trustee duties and climate change

On 6 February 2024 the Financial Markets Law Committee (**FMLC**) published a short paper, entitled "Pension fund trustees and fiduciary duties: decision-making in the context of sustainability and the subject of climate change".

The Government asked the FMLC to consider these issues in connection with its 2023 Green Finance Strategy. The FMLC is an educational charity which focuses on the operation of financial law.

The paper discusses when climate change and sustainability factors should be considered by trustees. It draws on the Law Commission's 2017 report on "Pension Funds and Social Investment" and the distinction between financial factors and non-financial factors. Sustainability and climate change (the paper argues) are both factors which relate to the reduction of risk or the improvement of returns and, as such, should be seen as financial factors which can be taken into account when making investment decisions. The paper sets out points to assist with decision-making, and suggests that trustees should be able to explain their decisions by "numbers and narrative".

At the Work and Pensions Committee hearing on 21 February 2024, panel members called for the DWP and TPR to incorporate the FMLC paper into guidance for trustees.

TPR subsequently published a blog post encouraging trustees to build their understanding of, and to plan for, wider ESG risks, considerations and opportunities.

For the FMLC paper, see **here**.

For the 2023 Green Finance Strategy, see **here**.

For a transcript of the Work and Pensions Committee's oral evidence session, see **here**.

For TPR's blog post, see **here**.

VAT on fund management fees: consultation response

The Government has published its response to a technical consultation on the tax treatment of fund management services. The consultation related to the VAT exemption in EU and UK law in relation to special investment funds, including certain pension funds such as DC pooled funds.

The Government has concluded that existing UK VAT legislation covers the vast majority of fund types for which management services should be VAT-exempt. The Government is satisfied that the list-based approach under the Value Added Tax Act 1994 (as to the types of funds which are exempt) provides sufficient legal certainty.

Some respondents had suggested that legislation should be changed, in order to clarify or broaden the definition of fund management. The Government has declined to change the legislation, but will seek to provide additional clarity via guidance.

Read the consultation response **here**.

Codification of case-law on equal treatment and PPF compensation

As anticipated in our Autumn Planner, two sets of regulations have been made under the Retained EU Law (Revocation and Reform) Act 2023, to codify into UK law certain principles which were established under EU law.

The Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023 codify the following principles as to equal treatment:

- A real-life comparator is not required for the purposes of GMP equalisation (*Allonby v Accrington and Rossendale College* [2004])
- A same-sex survivor is entitled to a full survivor's pension, rather just in respect of pensionable service post-December 2005 (*Walker v Innospec Limited* [2017]).

The Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023 codify the following principles as to PPF compensation (for assessment dates on and after 1 January 2024):

- Compensation must cover at least half of a member's accrued benefits (*Grenville Hampshire v PPF* [2018])
- The disapplication of the compensation cap (*Secretary of State for Work and Pensions v Hughes* [2021]).

Comment: Whilst the Government has accepted the decisions in *Hampshire* and *Hughes* and codified them in legislation, it has not codified the European Court's decision in *Pensions-Sicherungs-Verein v Bauer* (2019). In *Bauer*, the Court decided that a reduction in the amount of pension benefits paid to an employee on their employer's insolvency would be regarded as being manifestly disproportionate – and so incompatible with the Directive on the protection of employees in the event of the insolvency of their employer – where, as a result of the reduction, the employee would have to live below the at-risk-of-poverty threshold.

Ombudsman's corporate plan and performance

The Pensions Ombudsman has published its corporate plan for 2023-26, outlining its strategic goals for the next three years and providing updated key performance indicators for 2023-24.

The plan reports that productivity has been above the target of 575 average monthly pension complaint closures. The average was 648 cases closed per month in 2022-23, compared with 435 in 2021-22.

The Ombudsman experienced a cyber incident in June 2023 which temporarily reduced its ability to deliver services and manage enquiries. It says that it continues to work with the relevant agencies, including the National Cyber Security Centre, to fully understand the impact.

The Ombudsman has secured a further two years of funding for the Pensions Dishonesty Unit, which investigates "allegations of serious breaches of trust, misappropriation of pension funds and dishonest behaviour by pension scheme trustees", and has been applauded for its work in protecting pension schemes' integrity.

Priorities for the next three years are similar to those for 2022; in particular, maintaining a strong quality of service, sustaining and improving efficiency, and strengthening relationships with stakeholders.

Read the corporate plan **here**.

Regulatory Initiatives Grid

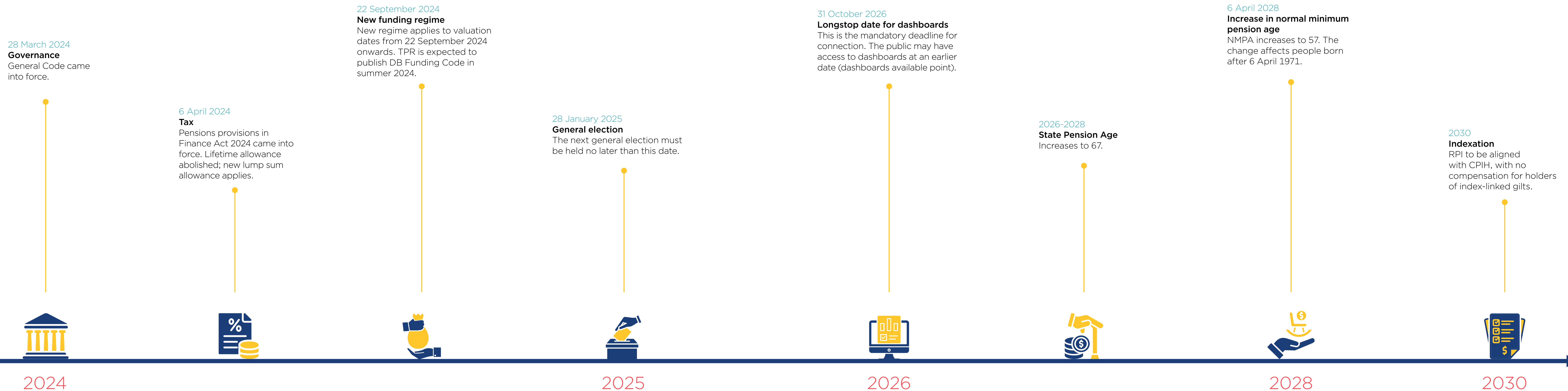
On 30 November 2023, the Financial Conduct Authority published the latest edition of the Regulatory Initiatives Grid from the Financial Services Regulatory Initiatives Forum.

Published biannually, the Grid outlines the expected regulatory initiatives over a 24-month horizon, to enable stakeholders to understand and plan for any initiatives which may have a significant operational impact. For each initiative, the Grid outlines the regulatory lead, the expected key milestones and the impact on regulated firms.

The Grid notes the introduction of TPR's new General Code of Practice and the deadline for pension providers to meet their dashboard obligations (see above).

See the Grid **here**.

Timeline



In the spotlight

Next 3 months

Consultation on a new VFM framework

In Spring 2024, the FCA will consult on a new value-for-money (**VFM**) framework for DC workplace pensions. This follows joint papers with DWP and TPR.

The new framework is likely to shift the focus from cost to long-term value. To assess VFM, schemes will be tested against others in the market, including those with the scale to invest in diversified investment strategies.

Schemes which are underperforming, and make no progress, may be subject to regulatory action. TPR may also be given powers to force consolidation of unperforming schemes. The Government has said that legislation for these purposes will be introduced when time allows.

In the spotlight

Next 3 to 12 months

Virgin Media v NTL Pension Trustees

A Court of Appeal hearing in the *Virgin Media* case has been fixed for 25 June 2024, and is expected to last for two days. The grounds for appeal have not been published.

Our Autumn Planner explained the background. The case is of industry-wide significance, and concerns the need for actuarial confirmation in respect of changes made to benefits under schemes which were contracted out on the salary-related (**COSR**) basis.

Trustees of former COSR schemes will need to consider the Court of Appeal judgment in connection with amendments made between April 1997 and April 2016.

BBC v BBC Pension Trust

Also commencing on 25 June 2024, and expected to last for three days, the Court of Appeal will hear the BBC's appeal against last year's High Court ruling regarding the interpretation of the BBC Pension Scheme's amendment power.

Notes

Notes

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