

Snapshot

June 2022

Overview

- **“Stronger nudge” requirements came into effect from 1 June 2022**
New requirements require trustees to offer to book a Pension Wise appointment for members who make applications (or communicate in relation to an application) on and from 1 June 2022 to access or transfer defined contribution (**DC**) or cash balance benefits.
- **Bringing ESG claims by way of derivative action (McGaughey v USSL)**
A novel claim was brought whereby members of a scheme attempted to bring a derivative action against a corporate trustee for failing to disinvest in fossil fuels. The claim ultimately failed.
- **The Pensions Regulator (TPR) and Financial Conduct Authority (FCA) issue joint feedback statement on “value for money” (VFM) in DC schemes**
TPR and the FCA emphasise the importance of VFM in DC schemes. They will continue to develop a common approach to allow members and advisers to properly compare the VFM of DC schemes. A framework will be put in place for both occupational and personal DC schemes but the approach will be phased, with the initial focus being on occupational schemes.
- **DWP publishes response to trustee oversight of investment consultants and fiduciary managers consultation**
Regulations are planned by the DWP which will require trustees to:
 - carry out a tender process for fiduciary management services, subject to certain limited exceptions; and
 - set objectives for their investment consultants and review their performance against these objectives at least every 12 months.

These are expected to come into force on 1 October 2022. Until this time, trustees must still comply with the requirements of the Competition and Markets Authority's (**CMA**) Order on this topic.
- **HMRC not permitted to withdraw fixed protection as correct auto-enrolment details were not supplied to the employee**
A member's fixed protection was revoked by HMRC after he was enrolled into his employer's pension scheme. The member had not been aware of the enrolment and opted out when he realised. It was held that his opt-out was in time and therefore fixed protection should be reinstated. The time limit for opting out did not start to run until the correct enrolment information had been given.

Further information

"Stronger nudge" requirements came into effect from 1 June 2022

New regulations came into effect from 1 June 2022. When a member or beneficiary makes (i) an application, or (ii) communicates in relation to an application with trustees about transferring or accessing defined contribution or cash balance benefits, trustees must:

- refer the member or beneficiary to Pension Wise guidance;
- offer to book a Pension Wise appointment for the member or beneficiary. If the offer is accepted, trustees must book the appointment. If the offer is not accepted, or where the trustees are unable to book an appointment despite having made reasonable efforts to do so, the trustees may provide details to the member or beneficiary about booking a Pension Wise appointment; and
- explain to the member or beneficiary that they cannot proceed with the application unless they have received the appropriate Pension Wise guidance or have otherwise opted out of receiving the guidance. If the member or beneficiary decides to opt out, they will need to supply the trustees with an opt-out notification.

The new Pension Wise guidance requirements do not apply to applications processed before 1 June 2022 (this extends to related communications sent after 1 June 2022).

Bringing ESG claims by way of derivative action (McGaughey v USSL)

This case involved two members of a pension scheme who applied for permission to bring a multiple derivative action against the directors of the corporate trustee of the scheme. A claimant would only have sufficient interest to bring a multiple derivative claim if they had suffered loss reflective of the loss suffered by the company.

The claimants alleged, amongst other claims, that the directors had continued to invest in fossil fuels without an immediate plan for divestment, contrary to the company's long-term interests to achieve net zero, and that this was causing the scheme loss.

The court dismissed all claims. In relation to the ESG claim, the claimants had not established a prima facie case that the company had suffered any immediate financial loss as a consequence of the directors' failure to adopt a plan for long-term divestment from fossil fuels. Further, the claimants did not have sufficient interest or standing to continue the claim as there was no suggestion of a causal connection between investment in fossil fuels and the benefit changes.

This claim is one of the first attempts to challenge a scheme or company's investment strategy on environmental grounds.

TPR and FCA issue joint feedback statement on "value for money" in DC schemes

TPR and FCA have issued a joint feedback statement in relation to VFM in DC pension schemes. This statement summarises the 61 consultation responses received on TPR's and FCA's joint discussion paper from September 2021 on the following key elements of VFM:

- investment performance;
- customer service and scheme oversight; and

- costs and charges.

The responses received from this consultation will be used to inform new proposals on developing a holistic framework and related metrics to allow members and advisers to assess and compare VFM in DC schemes. Consultation on these proposals is expected towards the end of this year.

In the meantime, TPR and the FCA have confirmed:

- that they continue to think the time is right to encourage a more consistent and structured approach to VFM assessment that drives long-term value for pension members. There is value in enabling consistent comparisons of VFM across all types of DC pension scheme (occupational and personal), which will support engaged pension savers in making decisions about whether, and how, to transfer or consolidate their pension savings. TPR and the FCA will therefore continue to develop a common approach to allow savers and advisers to properly compare the VFM of DC schemes.

Those responsible for providing oversight of VFM in DC schemes should be supported in their focus on what matters most for member outcomes i.e. investment performance, service and oversight, and costs and charges. The level of contributions is a separate, but equally important, consideration.

It is not enough for pension schemes and providers to consider these factors in isolation. Effective assessments of VFM require external comparisons which, in turn, require transparency of data on key-value metrics from schemes and providers across the DC industry. TPR and the FCA therefore want to work towards a framework that allows industry stakeholders to assess and compare VFM on a consistent basis, with data published in a format readily accessible to third parties such as trustees, independent governance bodies, investment consultants and employee benefit consultants.

Improved disclosures should encourage better outcomes for consumers through higher standards and competition in consumers' interests. TPR and the FCA recognise that additional disclosure requirements incur costs, which would be borne by schemes and their members, but consider that the benefits to pension savers make this worthwhile.

- The VFM framework must work across all DC pensions, both workplace and non-workplace. However, TPR's and the FCA's approach will be phased, with the initial focus being on workplace schemes (and, in particular, default arrangements). TPR and the FCA will also consider how best to extend the framework to self-select options and pensions in decumulation.

[DWP publishes response to trustee oversight of investment consultants and fiduciary managers consultation](#)

After a period of delay, with the pandemic being cited as the reason for its reprioritisation, the DWP has published the Government's response to the consultation '*Delivering the Competition and Markets Authority recommendation for trustee oversight of investment consultants and fiduciary managers*' launched in July 2019. The Government committed to taking forward the recommendations put to the DWP to make the relevant legislation. The regulations planned by the DWP, which are intended to integrate the CMA's Order on 10 June 2019 into pensions law, require trustees to:

- carry out a tender process for fiduciary management services, subject to certain limited exceptions; and
- set objectives for their investment consultants and review their performance against these objectives at least every 12 months.

The CMA's report into the investment consultancy and fiduciary management services that are provided to pension schemes found reduced competitive pressure on investment consultants and fiduciary managers. The parts of the Order relating to mandatory tendering and investment consultancy "objective setting" came into effect on 10 December 2019. From that date, trustees who wish to delegate investment decisions for 20% or more of their scheme assets must run a competitive tender exercise. Trustees who had already appointed a fiduciary manager without conducting a competitive tender process prior to the Order being made must put the service out to tender within five years after the appointment of the fiduciary manager.

The DWP regulations are to go ahead broadly as intended and are expected to come into force on 1 October 2022. Until the new regulations are in force, trustees must continue to comply with the CMA Order. TPR, whose current trustee guidance reflects the contents of the CMA Order, is to update its guidance by 1 October 2022. The new regulations will enable TPR to oversee the new duties on trustees.

For most trustees this change from the CMA Order to DWP regulations should have little impact, with the DWP largely proposing to reproduce the relevant parts of the CMA's Order in legislation with some minor changes. One such change is the reporting compliance - the CMA Order required trustees to send a compliance statement to the CMA each year certifying that they had complied with their obligations. However, the regulations provide for TPR to carry out the appropriate monitoring, compliance and enforcement activity.

[HMRC not permitted to withdraw fixed protection as correct auto-enrolment details were not supplied to the employee](#)

In the case of *Ian Moan v Revenue and Customs Commissioners [2022] UKFTT 118 (TC)*, the employee had started new employment but was close to using up his lifetime allowance.

The member therefore asked to be excluded from participation in his new employer's pension scheme. Despite this, the employer started deducting contributions from the employee's salary and paying them into the pension scheme in early 2017. It was not until June 2017 that the employee noticed that contributions had been deducted and paid into the pension scheme. He then applied to opt out of the scheme and applied for transitional relief from HMRC (Fixed Protection 2016) in order to prevent an incidence where a lifetime allowance charge could be incurred. However, the opt-out from the scheme was out of time. The pension scheme provider would not refund the member's contributions meaning there had been accrual of benefits in the scheme. This led to HMRC withdrawing his fixed protection.

The member appealed this decision. The first-tier tribunal allowed the appeal to reinstate the fixed protection. This was because the employee had not been given the correct information regarding his auto enrolment start date and the employee could only opt out of the scheme once the correct auto enrolment information had been provided. The opt-out notice was therefore *not* out of time as the time limit for opting out did not start to run until the correct auto enrolment information had been given. This meant that the employee's subsequent opt-out from the pension scheme was valid. There was therefore no accrual by reference to which fixed protection could be withdrawn.

The case highlights the importance for employers of being careful when enrolling staff into pension schemes. They must ensure they provide members with the correct information; failure to do so could have unintended consequences for the employee's personal tax position.

Contacts



NAEEM NOOR

SENIOR ASSOCIATE, Pensions

T: +44 20 7809 2092

E: Naeem.Noor@shlegal.com



DAN BOWMAN

CONSULTANT, Pensions

T: +44 20 7809 255

E: Daniel.Bowman@shlegal.com

This note does not constitute legal advice. Information contained in this document should not be applied to any particular set of facts without seeking legal advice. Please contact your usual Stephenson Harwood pensions law group member for more information.