

PENSIONS BULLETIN

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In this month's Pensions Bulletin we cover:

1. Performance fees to be excluded from the DC charge cap.
2. Authorisation of Clara-Pensions superfund makes road to buy out feasible for some schemes.
3. Deadline for submitting investment oversight statements was 7 January 2022.
4. Progress on removing obstacles for ridding schemes of GMPs through conversion.
5. One step closer to collective money purchase schemes.
6. Flexible solutions for recovering mistaken overpayments.
7. List of legislation and regulation expected from 2021 to 2023.

GOVERNMENT PROPOSES TO REMOVE PERFORMANCE FEES FROM THE DC CHARGE CAP

Consultation on excluding performance fees from the charge cap for default arrangements of occupational DC schemes used for auto-enrolment. Aim is to encourage investment in green infrastructure, private equity, and venture capital.

Despite very recent amendments to allow smoothing of performance fees, the Department for Work and Pensions (DWP) now proposes removing performance fees altogether from the scope of the charge cap.

Following a March 2021 consultation on incorporating performance fees within the charge cap, the Charges and Governance Regulations were amended to allow schemes, from 1 October 2021, to smooth the performance fee element of their charges regime over a five-year period, with the aim of allowing greater investment in illiquid assets. For more details, please see our [Pensions Bulletin June 2021](#). The Government is now looking further at ways to remove barriers that currently prevent trustees of DC schemes making long-term, illiquid investments. The DWP's 30 November 2021 consultation (*Enabling Investment in Productive Finance*) asks for views on proposals to change the treatment of fees based on the investment performance of the underlying assets, so that they do not fall within the charge cap. Consultation closes on 18 January 2022 and, if the DWP proceeds, it intends to consult on draft regulations early this year with legislation coming into force in October 2022.

The consultation explains that although the amendments to the Charges and Governance Regulations provided trustees with more flexibility to incorporate performance fees within the charge cap, a key barrier that has been raised consistently is the fact that variable performance fees are regulated through a flat cap.

The Government proposes an exemption for “well-designed performance fees that are paid when an asset manager exceeds pre-determined performance targets”. The exemption would not apply to fees that are not related to performance and all other investment administration charges currently in scope of the cap would remain. For example, the fixed fee part of the most common structure, “carried interest” (a fixed annual management fee, paid regardless of return, combined with a performance-based element payable on returns exceeding a “hurdle rate”) would continue to be subject to the charge cap.

The Government hopes that the proposed change may incentivise schemes and managers to reach fee agreements that link payment of additional fees directly to the net benefit to members. Previous consultations have indicated that the high fixed fees payable for some assets, such as venture capital, have deterred trustees from investing.

The consultation contains a series of illustrative examples showing the potential impact on fees of allowing DC schemes to charge members uncapped performance-based fees.

If the DWP goes ahead with the proposal, it would look to protect against abuse (asset managers reforming existing fee structures for other asset classes to fit within the easement, for example). Potential solutions include specifying the asset classes to which the performance fee exemption would apply (venture capital, private equity, infrastructure, and/or private credit) or creating a tighter definition of performance-based fees.

There would be two consequential changes if the proposal proceeds:

- The Scheme Administration Regulations would be amended so that performance-based fees would have to be disclosed to members in the annual Chair's Statement, in a similar way to transaction costs. (Currently, charges within the charge cap have to be disclosed in the Statement, for the purposes of compliance with the charge cap, but other charges do not have to be disclosed, with the exception of transaction costs.)
- The amendments to the Charges and Governance Regulations on the smoothing of performance fees, and the removal (in the same amending regulations) of performance fees from the requirement to pro-rate charges for members who spent less than a full year in the scheme, will no longer be needed and will be deleted.

Next steps for trustees: Trustees of affected schemes to consider if the changes impact their strategy for investment choices.

DB SUPERFUNDS: FIRST COMPLETED ASSESSMENT

Authorisation of Clara-Pensions by the Pensions Regulator means the first pension schemes can now prepare for transition to DB superfunds.

On 30 November 2021, the Pensions Regulator (TPR) [announced](#) that defined benefit (DB) superfund Clara-Pensions has passed TPR's assessment process. It is the first superfund to do so, and has been added to a list of assessed funds on TPR's website. This gives it the green light to transact with employers and trustees. The TPR assessment process is a temporary regime, launched in 2020, pending legislation expected in the next few months.

TPR's announcement notes that, although its assessment process is rigorous, it is vital that trustees and employers carry out their own due diligence to ensure they are confident a superfund is the right option for their scheme and its members. TPR expects employers to apply for clearance in relation to a transfer from their scheme to a superfund.

TPR published [guidance](#) in October 2020 for trustees and employers considering transfers to DB superfunds, including its three "gateway principles":

1. That the scheme cannot afford to buy-out now.
2. That there is no realistic prospect of buy-out "in the foreseeable future" (broadly speaking, a period of up to five years), given potential employer contributions and the employer's insolvency risk.
3. That the transfer improves the likelihood of members receiving full benefits.

Next steps for employers and trustees: Where the use of DB superfunds is a realistic prospect, employers and trustees will want to progress plans with their advisers.

DEADLINE FOR COMPLIANCE REPORTS FOR TRUSTEES' INVESTMENT OVERSIGHT DUTIES

The deadline for submitting annual compliance statements to the Competition and Markets Authority (CMA) was 7 January 2022. This covers the obligations on DB and DC schemes to carry out compulsory competitive tenders for new suppliers of fiduciary management services and to set strategic objectives for investment consultants.

The obligations on pension scheme trustees in relation to investment consultancy and fiduciary management have been in place since December 2019 under an Order from the CMA. Pension scheme trustees who wish to delegate investment decisions for 20% or more of their scheme assets must run a competitive tender when first purchasing fiduciary management services. Trustees who had already appointed a fiduciary manager for 20% or more of their scheme assets without a tender prior to the Order being made must put the service out to tender within five years of the start of their agreement with that fiduciary manager. Trustees must not enter into a contract for the provision of investment consultancy services, or continue to obtain those services, unless the trustees have set strategic objectives for the provider.

Compliance reports in relation to mandatory tendering for fiduciary management are required by trustees even if a fiduciary management provider has not been used (in this case the trustee is compliant because it does not use fiduciary management).

Regulations, under which compliance would move from the CMA to TPR, are not expected until later in the first half of 2022.

Unless and until the CMA regime is superseded by DWP regulations, trustees must use the compliance statement. For more details, including a contact for queries or to report a breach (trustees must report non-compliance within 14 days of becoming aware of it), please see the CMA [webpages](#).

Next steps for trustees: Ensure deadline has been met.

PRIVATE MEMBERS' BILL ON GMP CONVERSION

A Bill to remove barriers to conversion of Guaranteed Minimum Pensions (GMPs) has Government support.

Although this is a Private Members' Bill, it has a good chance of achieving Royal Assent. The Department for Work and Pensions repeated in their 2019 conversion guidance that the Government was considering changes to the conversion legislation to clarify certain issues, and this may be a convenient way to achieve such changes.

Margaret Ferrier, an independent MP, is sponsoring a Private Members' Bill, *The Pension Schemes (Conversion of Guaranteed Minimum Pensions) Bill*, that aims to amend and clarify existing GMP conversion legislation "helping to reassure occupational pension schemes that they are able to use the methodology published in DWP guidance to level the effective differences between pension amounts paid out to men and women". At Second Reading in the House of Commons on 26 November 2021, Guy Opperman, the Secretary of State for Work and Pensions, stated that the Bill has Government support. Margaret Ferrier also noted that there is clear cross-party agreement on this issue.

The Bill aims to achieve the following:

- Clarify that the legislation applies to survivors as well as earners.
- Remove the current provisions that specify survivors' benefits and replace them with a power to set out in regulations conditions to be met for survivors' benefits.
- Provide a power to set out in regulations who must consent to the conversion - to deal with the point that the scheme's sponsoring employer may no longer exist.
- Remove the requirement to notify HMRC. There is no HMRC process for notification, but until the legislation has been amended, notification has to be made to meet the conversion conditions.

For more details on GMP conversion, please see our [Pensions Bulletin July 2021](#) on conversion guidance issued by the GMP Equalisation Working Group convened by the Pensions Administration Standards Association (PASA).

The PASA Working Group has recently supplemented its [guidance](#) on the GMP reconciliation process with a [Briefing Note](#) on GMP Reconciliation and Transitions. The note covers transition of administration services between providers where administrators have undertaken GMP reconciliation or other projects. It points out the need to ensure that the ceding administrator passes over "off system" workbooks that document the GMP reconciliation process to date, with an audit trail showing any changes made during the process. New administrators should check that all trustees' decisions have been recorded and that they have access to those documents.

Although the Bill is likely to progress through Parliament, it may take some time before the statute and underlying regulations come into force.

Next steps for trustees: Consider whether the changes impact the scheme's GMP equalisation project planning.

GOVERNMENT RESPONSE ON THE CONSULTATION ON COLLECTIVE MONEY PURCHASE SCHEMES REGULATIONS

Finalised regulations facilitating the introduction of collective money purchase (CMP) schemes.

On 15 December 2021, the Department for Work and Pensions (DWP) laid before Parliament the draft *Occupational Pension Schemes (Collective Money Purchase Schemes) Regulations 2022* and published a [response](#) to its July 2021 consultation on the Regulations. Provided they are approved by both Houses of Parliament, the Regulations will come into force on 1 August 2022.

Following the consultation the DWP has made a number of technical changes to the Regulations. Amongst other things, the response confirms that:

- The maximum authorisation fee will be £77,000.
- There will not be a "back stop" confirming when CMP schemes must be wound up.
- Transitional provisions will ensure that only schemes which come into existence after the CMP legislation comes into force can be characterised as CMP schemes.

Consequential changes to existing legislation will be made in regulations to be laid before Parliament in February 2022, also to come into force on 1 August 2022.

The Pensions Regulator expects to consult on its draft Code of Practice “in January 2022”.

Next steps for employers: This development may be of interest to some employers.

PENSIONS OMBUDSMAN: SCHEME MANAGER COULD CHOOSE RECOVERY METHOD FOR OVERPAYMENTS

A recent Pensions Ombudsman (TPO) decision in Mr S is a useful reminder of the flexibility afforded by equitable recoupment to recover mistaken overpayments.

TPO rejected a complaint brought by a member of a public sector scheme about repayment of an overpayment of his retirement benefits. TPO said that it was open to the scheme manager to choose the method of recovering an overpayment, even though it had originally offered the member the option of a repayment plan, to which the Limitation Act would have applied.

Facts: S received his retirement benefits in 2010. In 2016, when S raised a query about contributions he had made, the scheme manager informed him that he had received an overpayment of over £5,000 due to initial errors in calculating his retirement pension and lump sum. S was told that the overpayment could be repaid by cheque or through an agreed monthly repayment plan. S complained to TPO. During the course of TPO’s investigation, the manager said it was relying on “equitable set-off” (against future pension payments) as the legal basis for recovering the overpayments.

Determination: TPO held that the manager could recover the overpayments by reducing S’s future pension benefits. TPO noted that set-off was not subject to a six-year limitation period under the Limitation Act 1980 and said that the manager was entitled to withdraw the repayment option, which was subject to the Limitation Act. In accordance with the decision of the High Court in *Webber v Department for Education*, the manager’s claim was taken to have been made in April 2019 (when TPO’s Office received its response to S’s complaint). Therefore, if it had used the repayment method, the manager would only have been able to recover payments dating back to April 2013. TPO found that, although equitable set-off was less financially favourable to S, the method of recovery was a decision for the manager to make.

TPO also rejected S’s change of position defence to the claim (based on his expenditure). The overpayment was too small a proportion (3%) of his overall annual pension and lump sum payments to have had a material impact on his spending decisions.

Next steps for trustees: Discuss with administrators in the context of any rectification exercise.

PENSION LEGISLATION AND REGULATION WATCH LIST

| No | Topic | Expected effective date | Further information/action |
|----|--|---|---|
| 1 | Changes to DC scheme governance and disclosure, including the annual Chair's statement and the charge cap | <p>First scheme year ending after 1 October 2021 (changes to Chair's statement); 5 October 2021 (changes to annual scheme return); first scheme year ending after 31 December 2021 (detailed value for money assessments for schemes with assets below £100m).</p> <p>April 2022: introduction of £100 de minimis pot size below which flat fees cannot be charged.</p> | <p>DC schemes only.</p> <p>DWP to confirm whether look-through mechanism for charge cap compliance will be amended or removed.</p> <p>DWP to review whether fines for non-compliance with Chair's statement requirements should be mandatory.</p> <p>DWP proposals on universal charging structure to follow "shortly".</p> <p>Consultation on removal of performance-based fees from charges cap ends 18 January 2022.</p> |
| 2 | Restrictions on transfers of a member's cash equivalent transfer value by trustees/managers of occupational or personal pension schemes unless prescribed conditions are met | Transfers where the date of the member's application for a statement of entitlement (DB schemes) or transfer request (DC schemes) occurs on or after 30 November 2021. | Final regulations issued November 2021. |
| 3 | Trustee oversight of fiduciary managers and investment consultants | Under the Investment Consultancy and Fiduciary Management Market Investigation Order 2019, compliance statements, confirming the extent to which requirements have been met, had to be provided to CMA by 7 January 2022. | Consultation response and new DWP regulations have been delayed until June 2022. |
| 4 | DB superfunds | Regulatory regime expected. | Interim regulatory regime in place from October 2020. |

| No | Topic | Expected effective date | Further information/action |
|----|---|---|---|
| 5 | New notification requirements for DB schemes in relation to corporate and financing activity | Draft Notifiable Events (Amendment) Regulations, with expected commencement date April 2022. | Consultation on draft regulations closed 27 October 2021. TPR Code of Practice 2 (Notifiable Events) will be updated. |
| 6 | Refer members to guidance before processing application to access or transfer flexible benefits | April 2022. | For DC schemes only. Consultation on draft regulations closed 3 September 2021. |
| 7 | Draft DB Funding Code of Practice | DWP regulations expected for consultation "Spring 2022". Part 2 of TPR consultation and draft Code expected "late Summer 2022". New Code expected to be operational in December 2022. | Once in force, the Code will apply to triennial valuations submitted thereafter. |
| 8 | TPR consolidated Code of Practice | By end of June 2022. | TPR consultation issued 17 March 2021 and interim response issued August 2021. |
| 9 | Register certain trusts with the Trust Registration Service | Registration by 1 September 2022. | Applies to some trusts relating to pension and life assurance benefits where no exemption applies (e.g. bare trusts set up on distribution of a lump sum). |
| 10 | Climate risk governance and reporting requirements | 1 October 2022 | 1 October 2022 for schemes with £1 billion or more in net assets, governance to be in place for the scheme year underway, and the first annual report to be published within seven months of the end of the scheme year. (1 October 2021 deadline applied for all authorised master trusts and collective DC schemes and schemes with £5 billion or more in net assets.) |
| 11 | Simpler annual benefit statements | 1 October 2022. | DC schemes used for auto-enrolment. |

| No | Topic | Expected effective date | Further information/action |
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| 12 | Changes to the scheme asset information collected through scheme returns | Scheme returns from 2023. | DB schemes. |

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