

# CLIENT BULLETIN: “LANDMARK” PENSIONS BILL COMPLETES PARLIAMENTARY PROCESS

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## A. OVERVIEW

Described by Pensions Minister Guy Opperman as a “*hugely important*” piece of legislation that will “*impact the lives of millions of people across the country and will make our pensions safer, better and greener*”, the Pension Schemes Bill (the “Bill”) has completed all Parliamentary stages and awaits Royal Assent. The detail of many of the changes will be set out in regulations and guidance: we summarise below what we see as the next steps and timing in relation to the various topics covered, and propose to cover specific areas in more detail in future Bulletins.

**When fully in force** (and different parts will be brought into force at different times), the Bill will effect major changes to pensions legislation in 7 areas:

- enabling a new type of occupational pension scheme, a “collective money purchase benefits scheme” (CMP scheme) (more commonly known as a “CDC” or collective DC scheme) under which contributions are pooled and invested with a view to delivering an aspired benefit level. The Government believes such schemes have the potential to offer a more predictable, and higher, retirement income for members,
- strengthening the Pension Regulator’s (TPR) powers in relation to DB schemes in a number of respects, including introducing punitive criminal and civil sanctions and a new “early warning” system, extending the contribution notice (CN) regime, and adding new “notifiable events”,
- introducing new civil penalties (of up to £1 million) for providing false or misleading information to TPR or to DB pension trustees and for not complying with an information request from TPR, and giving TPR wider powers to investigate, in relation to interviews and inspection of premises,
- supporting the new DB funding framework that TPR plans to introduce some time next year,
- providing the legislative framework for the development of pensions dashboards,
- requiring schemes to manage the effects of climate change as a financial risk, and to report on how they have done so, and
- introducing restrictions on individual transfers-out, in a further attempt to clamp down on scams.

## B. CMP SCHEMES

**Part I** of the Bill sets out the framework for how CMP schemes will work. Much of the detail is in the Government’s March 2019 response to consultation and will be set out in regulations made under new powers in the Bill. In legislative terms, CMP benefits are a sub-set of money purchase benefits and subject to the regulatory regime that applies to such benefits, adapted to deal with the specific features of CMP schemes.

**Next steps:** We expect the regulations to be published for consultation later this year and will report on them, and CMP schemes more generally, then.

## C. TPR POWERS AND PENALTIES

### Criminal Offences

**Part 3** of the Bill creates 2 new criminal offences, both of which can apply to any “person” (including individuals, and regardless of whether the person has any connection to, or association with, the scheme or its employer):

- avoidance of employer debt to a DB pension scheme, and
- conduct risking accrued scheme benefits.

In both cases, no offence is committed where the person had a “reasonable excuse” for their actions.

Anyone found guilty of these offences faces up to 7 years imprisonment and/or unlimited fines.

A further new criminal offence relates to a failure to pay a CN. The CN will, in future, specify the date on which it is to be paid; failure to pay by that date “without reasonable excuse” will be punishable by an unlimited fine (not imprisonment).

### New Civil Penalties

The new civil penalties of up to £1 million potentially apply to a broader pool of people than the criminal offences. Any person who:

- was party to an act or failure to act with a main purpose of avoiding an employer debt or which risks accrued scheme benefits (where it was not reasonable for the person to act that way), or
- failed to pay a CN,

may be liable.

The penalties also apply to:

- knowingly or recklessly providing false information (to the trustees or TPR), or
- failure to comply with the notifiable events framework.

**Comment:** These criminal offences and civil penalties are very broad and appear to catch actions routinely taken by DB scheme sponsors and trustees to prevent Section 75 debts arising (for example flexible apportionment arrangements). They can apply to individuals as well as companies and regardless of whether the person being targeted has any connection, to or association with, the pension scheme or its employer.

**Next steps:** In contrast to the CN regime (see below), there will be no formal advance clearance mechanism for confirmation that the new criminal offences and civil penalties will not apply to a specific transaction. But the Government has said that TPR will publish guidance on how it envisages exercising its new powers in relation to them, that TPR will consult publicly on this, and that the Government will make sure the guidance is in place by the time the provisions are commenced. It is not yet clear when this will be: as no regulations are required, it may be before autumn 2021.

### Contribution Notices

The Bill introduces 2 new grounds for issuing a CN, both relating to the weakness of an employer:

- an “employer insolvency” test, and
- an “employer resources” test.

Defences are available in relation to both tests and both are subject to the existing “reasonableness” test whereby TPR must be of the opinion that it was reasonable to impose a CN.

There is also a change to the timing of the calculation of the “shortfall sum” (the amount of the employer debt) to bring the calculation date closer to the date of issue of the CN and to give TPR power to change that date.

**Comment:** The addition of the 2 new tests to the CN regime (arguably subsets of the existing “material detriment” test) will in principle widen TPR’s powers when dealing with corporate transactions in circumstances where DB pension schemes are not given due consideration. The CN defences will have to be carefully considered when assessing the risk of the use by TPR of its moral hazard powers in future: as was the case when the “moral hazard” regime was introduced in 2005, until market practice develops, parties are likely to err on the side of caution. In some circumstances, parties may wish to seek formal TPR clearance (and we understand that TPR is planning to update its Clearance guidance to reflect the changes) but in many cases that will not be a realistic option: risk analysis will be key.

**Next steps:** Regulations are required in relation to the “employer resources” test: we expect these to be published for consultation this spring. In a written response to a Parliamentary question on 11 January, 2021, the Pensions Minister said the aim was for the new powers to be available to TPR “by autumn 2021”.

## Retrospectivity

One of the key issues is the extent to which the new punitive criminal and civil offences and enhanced TPR CN powers will apply to behaviour pre-dating introduction of the legislation.

In the Parliamentary written answer referred to above, the Minister confirmed that none of TPR’s new powers will be retrospective i.e. apply to acts or failures to act taking place before the new powers come into force. But (in the context of Financial Support Directions rather than CNs) TPR has previously looked at behaviours pre-dating the coming into force of specific legislation when assessing whether it is **reasonable** to issue the FSD.

For more information on the new offences and TPR powers see our October 2019 [client publication](#).

## Changes to TPR’s investigative powers and new civil penalties

TPR will have a new power to issue a financial penalty of up to £1 million to anyone providing information either to it, or to DB pension scheme trustees, that is false or misleading in a “material particular”: providing false or misleading information to TPR is currently (and will remain) a criminal offence, punishable with unlimited fines, or imprisonment not exceeding 2 years. There are also new powers to require those subject to TPR’s information gathering powers to attend an interview, and in relation to inspection of premises.

**Next steps:** We expect that TPR will set out how it intends to exercise its new sanctions/powers in new versions of its DB and DC Compliance and Enforcement Strategies, and in its criminal prosecution policy, once the legislation is in force.

## New advance notice requirement and changes to notifiable events

There is a new duty on the employer and/or a connected or associated person (with power to extend this to other persons) to give notice to TPR of events relating to the employer. The notice, to be given to the trustees at the same time, must be accompanied by a statement dealing with any adverse effect on the scheme and any proposed mitigation, and detailing communications with the trustees and members. The detail (including in relation to the timing of notifications) will be in regulations.

**Comment:** We expect this notice (described in the DWP’s 2018 White Paper as a “declaration of intent”) to be required to be given much earlier than under the current notifiable events framework (where the requirement is to notify “as soon as reasonably practicable” after the event). The policy intent as described in that White Paper is to motivate employers to engage with trustees at an early stage in transactions.

Based on the 2018 White Paper, we expect changes to the events that must be notified to TPR under the notifiable events framework. These can be made by secondary legislation under existing powers. The DWP has suggested that regulations will introduce 2 new employer-related events:

- the sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of scheme liabilities, and

- the granting of security on a debt to give it priority over the debt to the scheme.

In addition, we expect the “wrongful trading” notifiable event to be removed, and there are likely to be changes to the timing of the requirement to notify.

**Next steps:** All of these changes are expected to be in regulations that will be put out for consultation: TPR has indicated that consultation will be this spring, with the aim of having the regulations in place by “autumn 2021”.

## D. PENSIONS DASHBOARDS

The Bill provides the framework for the development of pensions dashboards, from which individuals will be able to access information about all their pension benefits in one place.

As with CMP schemes, much of the detail is to be set out in regulations. We can glean what these are likely to contain from the DWP’s consultation exercise on pension dashboards that took place last year.

The key question for pension scheme trustees will be in relation to the “pension-related information” (widely defined, with the detail to be prescribed in regulations) about member’s benefits and the scheme that they are required to provide to pensions dashboards. A particular concern is how this sits with trustees’ data protection obligations.

**Next steps:** The Pensions Dashboard Programme, responsible for delivery of pensions dashboards, has recently published its Data Standards Guide to allow pension providers, including occupational schemes, early sight of the data elements, to enable them to assess their availability and quality and consider how their benefit types map to the data elements. Pension providers are urged to start getting data ready for dashboards, which are due to be available from 2023.

## E. DB SCHEME FUNDING

The Bill gives statutory effect to TPR’s new approach to supervision of DB scheme funding, focusing on the adoption by schemes of a long term funding target. The legislation will be supplemented by regulations, alongside a new TPR funding code of practice and guidance. The first consultation on the new funding code was published in March 2020; the second is expected in the second half of this year.

The Bill requires trustees of DB schemes to set out a “funding and investment strategy” (with which the employer must agree) for ensuring that pension benefits can be provided over the long term. Regulations (expected to be published for consultation “*in the first half of 2021*”) will provide further details about the matters that trustees will need to take into account in formulating the strategy (for example, the scheme’s maturity, whether it is open or closed, and the employer’s financial strength) and are likely to require the trustees, in specifying the funding level, to adopt prescribed actuarial methods or assumptions. The trustees must also prepare a written statement of the new funding and investment strategy, signed by the Chair of Trustees, setting out the strategy and supplementary matters.

An opposition amendment to the Bill requiring a different regulatory approach to the funding of open schemes was defeated, with the Government stating that this will be dealt with in regulations.

**Next steps:** Given the delay in publication of the second stage of the funding code consultation, we do not expect to see the new regime in place until early next year. Bear in mind that it will then only apply to triennial valuations that take place after that.

## F. CLIMATE CHANGE RISK

Provision was introduced at Committee Stage in the House of Lords to introduce regulation-making powers to:

- impose requirements on trustees to secure there is effective governance of the effects of climate change on pension schemes, and to publish information about this, and
- confer functions on TPR to ensure compliance with these requirements.

In August 2020, the DWP launched a consultation on proposals to require trustees (initially of larger occupational schemes, authorised master trust schemes and authorised collective money purchase schemes) to address climate change risks and opportunities through effective governance and risk management measures in line with TCFD

recommendations. See our [client publication](#) on the consultation. The Government published its response on 27<sup>th</sup> January, alongside draft regulations.

Broadly, the new requirements will apply to schemes with assets of £5 billion or more from 1 October 2021.

**Next steps:** The consultation on the draft regulations ends on 10 March 2021: it seems likely that the new requirements will take effect on 1 October.

## G. RESTRICTIONS ON TRANSFERS OUT

A regulation-making power allows the Government to place new conditions on a member’s statutory right to transfer their pension benefits to another scheme. We expect the power to be used to add a new restriction on transfers to occupational pension schemes so that such transfers can be made only where a genuine employment relationship between the member and the receiving scheme employer can be established.

If this new condition is not met, the member will lose the right to take a cash equivalent and the trustees will have no duty to transfer.

**Comment:** This additional condition for acquiring a statutory transfer right is welcome: the current requirements mean that trustees can be required to effect transfers (because the member has a statutory right) even where they have suspicions about the *bona fides* of the receiving scheme.

**Next steps:** We expect draft regulations to be published for consultation later this year.

## G. EXPECTED TIMINGS: SUMMARY

2021	
January	Consultation on TPR guidance on new criminal offences and civil penalties
January/February	Consultation on climate change regulations
“Spring”	Consultation on CN regulations, notifiable events regulations, CETV regulations, CMP regulations and changes to TPR “material detriment” Code of Practice and clearance guidance
“First half of 2021”	Consultation on scheme funding regulations
“Second half of 2021”	Part 2 of TPR funding code consultation
1 October	Climate change provisions in force. New TPR CN powers in force?

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