

PENSIONS BULLETIN

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In this month's Pensions Bulletin, we cover:

1. A statement by the Pensions Regulator (TPR) on the latest developments for defined benefit pension schemes with liability-driven investments.
2. TPR has finalised its enforcement and prosecution policies, setting out how it applies the different strands of its powers.
3. Further details of the mandatory standards underpinning the pensions dashboards legislation have been published and TPR has indicated how it will enforce compliance with trustees' obligations.
4. The Information Commissioner's Office has published guidance on transfer risk assessments; trustees may need to complete these in order to make international transfers of data.
5. The High Court has agreed to correct pension increase provisions in a deed because they did not reflect the intentions of the employer and trustees at the time they were drafted. The case is a helpful example of the circumstances in which an application for rectification is likely to be successful.

We include our regular watch list of current and future developments.

LDI CRISIS: FURTHER DEVELOPMENTS

The Pensions Regulator (TPR) has issued further guidance for trustees of defined benefit (DB) schemes on liability-driven investment (LDI).

In October, after a number of pension schemes took emergency measures to meet cash margin calls in relation to their LDI investments, TPR issued a [statement](#) on the near-term action expected of DB scheme trustees, including reviewing operational processes and assessing their liquidity position in relation to their LDI portfolios. (We reported on this in our [Pensions Bulletin October 2022](#).) TPR has now issued further [guidance](#) to DB pension scheme trustees on maintaining LDI resilience, providing more detail about its expectations in relation to schemes' liquidity positions and operational processes.

TPR plans to issue a further update in the Annual Funding Statement in April 2023; it is also possible that there may be references to LDI in the imminent draft DB Funding Code.

TPR's guidance, which applies to both pooled and segregated arrangements, is in response to (and supports) statements by the regulators in Ireland and Luxembourg, where many LDI funds are located. The regulators, known as the National Competent Authorities (NCAs), have written to fund managers to report that Sterling LDI funds currently have an appropriate liquidity buffer and saying that they expect the levels of resilience and reduced risk profile of the funds to be maintained.

TPR's guidance emphasises that trustees are responsible for testing the liquidity buffer and if they depart from that set out by the NCAs, they should:

- Demonstrate the buffer that is in place for the scheme.
- Complete a risk assessment of how the scheme will respond to stressed market events, including how it will raise liquidity, taking into account that the ability to sell assets may be impaired.
- Detail a plan for bringing the scheme to higher levels of resilience, noting any assumptions in respect of market conditions, operational arrangements and timescales.
- Document these arrangements and review them regularly.

TPR says that if a scheme is not able or willing to hold sufficient liquidity, the trustees should consider the level of hedging, taking appropriate advice.

TPR repeats its messages on governance from the October statement, recommending that trustees review their processes. A list of suggested steps includes confirming instructions for signatures are up to date, stress testing LDI asset allocation, calculating required collateral amounts and dates, and identifying what assets would be sold. Trustees should continue their detailed conversations with LDI managers on liquidity, including on triggers for replenishment and the process for meeting collateral or margin calls.

Where trustees are using lines of credit with sponsoring employers, those arrangements should be documented (with time period, amounts and conditions) and reviewed regularly. Any facilities must only be used on a short-term basis and for liquidity purposes. Trustees should make sure any arrangement is reviewed legally "to avoid the risk of an abrupt end to the facility when it is needed".

Meanwhile, representatives from TPR and others have been giving evidence to a House of Lords' Committee on the use of LDI by pension funds. TPR acknowledged that it did not have sufficient data to enable it to regulate the systemic risks arising from LDI. From 2023, there will be more detailed asset information collected through scheme returns, as a result of changes made to the asset categories used in the stress calculation for the Pension Protection Fund levy. However, TPR will look at whether it needs to collect information systematically on leverage, liquidity and buffers in LDI. TPR also raised the broader issue of the quality of overall governance in schemes and expressed its view that, ultimately, all schemes should have a professional trustee on their trustee board and that there has to be more consolidation of smaller schemes.

Next steps for employers and trustees: Trustees with LDI strategies will want to consider TPR's statement with their advisers. Matters to consider include reviewing operational processes, and assessing the pension scheme's liquidity position and the levels of governance in place for LDI strategies. One area to consider, with the benefit of legal advice, is whether your scheme's arrangements permit, or could be amended to permit, the posting of collateral other than cash, which may limit the need to sell assets for cash in stressed scenarios.

THE PENSIONS REGULATOR'S ENFORCEMENT STRATEGY

The Pensions Regulator (TPR) has published final versions of its [Enforcement strategy](#), [Scheme management enforcement policy](#) and [Prosecution policy](#), following consultation earlier this year.

TPR's enforcement strategy consolidates different strands of related policies on how TPR assesses, investigates and applies its powers. It includes guidance on how TPR deals with overlapping powers.

The final versions of the enforcement strategies are largely unchanged from the consultation; TPR declined to make amendments to address one of the main complaints in consultation responses which was that, although TPR guidance is not binding, non-compliance with guidance remains as a factor in determining whether TPR should use its criminal powers. TPR's view, expressed in its [consultation response](#), is that because TPR would expect a court to take non-compliance with guidance into account, it is reasonable to retain it as a relevant factor. A further complaint is that the policies do not explain the circumstances in which TPR will pursue criminal or regulatory powers, or both. TPR says it will not always decide this at the start of an investigation; it will depend on the evidence gathered during the course of the investigation.

TPR confirms that the prosecution policy is focused on deliberate acts and that it usually reserves its criminal powers for more serious conduct. Except for offences where legislation intends to target conduct as a strict liability matter (employer-related investments, for example), TPR is unlikely to consider genuinely unintentional breaches as justifying the use of its criminal powers. TPR has also amended its policy to make it clear that TPR would not usually expect to take action against trustees of transferring schemes in instances of pension scams, unless there is evidence of wrongdoing by them.

Next steps for employers and trustees: The caveated nature of much of the guidance in TPR's enforcement and prosecution policies only serves to reinforce the need to take legal and potentially other advice (e.g. actuarial and covenant advice) regarding significant corporate and scheme events. Moreover, employers and trustees are still waiting for publication of the final regulations for the new Notifiable Events regime, as well as the defined benefit scheme Funding Code. Without them, employers and trustees do not have the complete picture on TPR enforcement.

PENSIONS DASHBOARDS: MORE DETAIL ON COMPLIANCE

Final versions of the majority of the mandatory standards underpinning the pensions dashboards legislation have been published but there will be further consultation on the design standards for the content and presentation of data on the dashboards. The Pensions Regulator (TPR) has published a draft of its [dashboards compliance and enforcement policy](#).

Under the Pension Schemes Act 2021 and the Pensions Dashboards Regulations 2022, trustees must provide information to qualifying pensions dashboards about members' pension benefits and the scheme. The Regulations apply to all registerable UK-based occupational pension schemes (unless the scheme has only pensioner members). The Regulations set out a staging timetable for schemes to connect to the dashboards system.

In summary, the requirements on trustees are to cooperate with the Money and Pensions Service (MaPS, the operator of the system), connect to the digital platform in accordance with the staging timetable, complete a "matching" process to identify whether information held in a "find request" matches with an individual's pension and provide ("return") data to individuals via the dashboard system. For more details, please see our [Pensions Bulletin February 2022](#).

Pensions dashboards standards set out requirements on the technical and operational detail that pension providers and schemes, and potential dashboard providers, will need to follow. Compliance is mandatory. For trustees, these standards relate to the content and presentation of the data, technical requirements for connecting to MaPS, and reporting to MaPS and regulators in relation to monitoring compliance and performance. MaPS' Pensions Dashboards

Programme (PDP) has published new versions of the [Pensions dashboards standards](#), following feedback from a consultation earlier this year. Four sets of standards have been finalised:

- **Data:** data formatting requirements pension providers must follow when returning pensions data.
- **Reporting:** data that pension providers and dashboard providers must supply to regulatory bodies, PDP and the Department for Work and Pensions.
- **Technical:** how data and dashboard providers will interface with the central technical architecture and/or each other.
- **Code of connection:** security, service and operational standards.

On **design standards** - the requirements for presentation of the pensions data on dashboards and design of the dashboards - a further consultation is being carried out, running until 16 February 2023. All the standards will come into force once they have been approved by the Secretary of State for Work and Pensions.

Respondents to the consultation emphasised the need for disclaimer wording in the presentation of data values to make clear that values shown are indicative, to limit liability of schemes and to direct users to their schemes before making decisions. However, having raised in the consultation the possibility of the ability to add text to cover scheme-specific warnings, the PDP has now confirmed in its [consultation response](#) on the data standards that it will not be including a free text function, because of the administrative difficulties and burden of overseeing a non-standard element. The warning field in the display of estimated retirement income and accrued pension data will be limited to a constrained set of the most common major factors that affect the value, such as an unresolved transaction or the existence of a pension sharing order.

On split scheme administration scenarios (a defined benefit scheme with a separate AVC provider, for example), PDP confirms that there are two options:

- One scheme sends all the related data to dashboards. This will require the other administrators to send their data to the “main” scheme.
- All part-scheme administrators decide to respond to dashboards independently for each pension search. The regulated entity will then need to decide to:
 - create a pension link and communicate it to all other part-scheme administrators; or
 - choose not to link “*and trust that the members understand the values they are presented with*” if the benefits are not shown together on a dashboard.

Meanwhile, TPR has published a [consultation](#), closing on 24 February 2023, on its **dashboard compliance and enforcement policy**. It will focus initially on connection issues, such as the scheme not connecting by its statutory deadline, or connecting only part of their membership/entitlements to the system, and then on matching, where it says it will be interested in:

- schemes failing to find a pension for a saver when they should
- returning data to the wrong saver
- failing to provide data in line with the legal requirements, in particular where the value provided is not sufficiently recent.

TPR goes on to explain that compliance with the dashboards legislation falls within the scope of the governance sections of its new consolidated Code of Practice. The Code is still in draft form but we expect it to be finalised within the next few weeks. (As with other TPR Codes of Practice, there is to be no specific penalty for failing to follow the single Code, or to meet the expectations set out in it. However, TPR may rely on it in proceedings as evidence that a legal requirement has not been met. In those situations, a court must take the Code into account.) In relation to dashboards, TPR expects schemes to operate adequate internal controls for reviewing and improving the quality of data and for selecting, appointing and managing service providers. Trustees should also have risk management processes, including

for monitoring the resolution of issues between the scheme and third parties and for identifying breaches of the law (and, if necessary, reporting them to TPR).

On record keeping, TPR expects schemes to maintain clear audit trails of compliance and of steps taken to resolve any issues (such as with third parties), as well as records of their matching policy and the steps taken to improve their data.

TPR will use the regular data received from the dashboards system to identify breaches. It would investigate if, for example, the data revealed that a scheme did not return the number of matches TPR might expect from a scheme of that size. Other scenarios illustrating how TPR's approach might work in practice include:

- Missing the connection deadline: in the first instance, TPR would issue a compliance notice. If the trustees failed to comply, TPR would issue a penalty notice and would also consider opening a governance case on the basis of lack of effective internal controls or of knowledge and understanding.
- Failure to match savers to their pensions: TPR might issue a compliance notice for the scheme to review its matching policy. If the failure was due to an employer not providing information to the scheme, TPR might issue a third party compliance notice to the employer.
- Failure to return value data appropriately. TPR might not take further action if the scheme had contacted the member and the trustees were working to improve the provision of data in future. On the other hand, if there was a pattern of complaints and missing value information, TPR might open a governance case.

As in other areas of its regulation, in deciding what action to take TPR will take into account the impact on members, whether a breach is due to circumstances outside the scheme's control, and the scheme's compliance record, including its consideration of guidance and co-operation with TPR.

In addition to an enforcement policy, TPR will provide guidance on trustees' dashboards duties. It published [initial guidance](#) earlier this year (see our [Pensions Bulletin July 2022](#)). The emphasis in the guidance was on the need for trustees to monitor the set-up work being done on their behalf by third parties - responsibility for connection on time in accordance with allocated staging dates and for ongoing compliance rests with the trustees. We are expecting TPR to finalise its guidance once all the mandatory standards are in place.

Next steps for trustees and employers: The standards will be an important part of trustees' preparation for their scheme's staging date. Trustees will need to plan ahead in 2023 to ensure the requirements are met. After master trusts, the first staging deadlines will be for defined contribution auto-enrolment schemes - those with 10,000 or more members have a deadline of 30 September 2023. The deadline for defined benefit schemes of that size is 30 November 2023.

GUIDANCE ON INTERNATIONAL TRANSFERS OF DATA

The Information Commissioner's Office (ICO) has published [guidance on international transfers of data](#).

Under the UK GDPR, a "restricted transfer" of personal data (in other words, to a country outside the UK or where the UK GDPR does not apply) cannot be made unless:

- it is to a country covered by UK adequacy regulations; or
- one of a limited number of exceptions covers the transfer; or
- there are transfer mechanisms with "appropriate safeguards" (protections for data subjects that are sufficiently similar to UK protections), such as the International Data Transfer Agreement (IDTA). (Earlier this year, the ICO published a new IDTA to replace the old EU Standard Contractual Clauses, which were widely used pre-Brexit.) In addition, a transfer risk assessment (TRA) is required.

The ICO's new guidance includes:

- updated [guidance on international transfers](#)
- a [new guidance section on TRAs](#), including a new TRA tool.

The guidance breaks down the TRA process down into six questions with tick-box tables to complete at each stage. Organisations do not need to use the ICO TRA format; they can use other methods as long as they keep a record of their assessment. The ICO has also confirmed that, as an alternative, organisations can comply with the approach of the European Data Protection Board (EDPB) to transfer assessments. In practice, the EDPB approach may remain the default for organisations operating across the UK and Europe, unless the European authorities also recognise the validity of the UK TRA for EU GDPR transfers.

The new TRA guidance seeks to answer some of the difficult questions about who is responsible for carrying out TRAs. It confirms that, subject to exceptions, if the processor is making the restricted transfer, the processor (rather than the controller) must complete the TRA.

Next steps for employers and trustees: Although international data transfers are generally viewed as the administrators' responsibility, trustees as data controllers remain liable for UK GDPR compliance. Trustees should therefore check with their administrators that steps are in place to meet these complex new requirements.

HIGH COURT GRANTS RECTIFICATION OF PENSION INCREASE PROVISIONS

The High Court allowed rectification of a scheme rule that had erroneously introduced underpins to pension increases. It was helpful that the error was noted within a few months of execution of the document.

In *Viavi Solutions v Viavi Solutions Pension Trustee*, the High Court granted an application for summary judgment in a claim to rectify the provisions of a pensions deed which did not reflect the intentions of the employer and trustees at the time of the deed.

Rule 61.4 of the 1999 Trust Deed and Rules (TDR) provided for increases in annual pension:

“(a) for that part of the pension which is attributable to Pensionable Service before 6th April 1997 3% per annum compound; and (b) for that part of the pension which is attributable to Pensionable Service after 5th April 1997 3% per annum compound (or, if greater, the annual rate of increase in the Index as determined at 1st September of the previous year up to a maximum of 5%).”

At a very early stage, the fact that the 3% underpins were introduced in error was noticed. An amending page purporting to correct part (a) of the rule was signed by the trustees in November 2000, but it was of no legal effect. In December 2001, a Deed of Rectification was executed by the employer and the trustees, but that purported to rectify only part (b).

The Court agreed with the employer's application for rectification. Various aspects of the evidence were significant:

- Prior to the execution of the TDR there had been no previous 3% underpin for past service (increases were historically discretionary).
- The drafting solicitors were instructed only to update the rules and to check the scheme booklet to ensure it matched the scheme rules. Importantly, there was no record of an instruction to increase the benefits to members.
- Only two out of the six trustees provided evidence and only one director of the principal employer provided a statement. However, it was clear that considerable efforts were made to contact and obtain evidence from all relevant parties. In any event, given that the events took place so long ago, the Court thought it was hardly surprising that those who had provided witness statements had very little first-hand memory of the events. The director was able to say with some conviction that the instructions were merely to bring the rules up to date and there was no indication that further changes were required. As at the date of execution of the deed, there was no evidence to suggest that there was an intention to extend benefits to members by adding the underpins.
- The evidence which post-dated the execution of the TDR was of great importance. Within a month or so of the TDR being executed, the error was pointed out and efforts were then made to correct what was seen as an error. After the TDR was executed, the scheme was administered and funded on the basis that it was not subject to the underpins.

Next steps for employers and trustees: Trustees and employers should note this further example of a case where the High Court has been willing to rectify a mistake in an amending deed on summary judgment.

PENSION LEGISLATION AND REGULATION WATCH LIST

No	Topic	Effective date or expected effective date	Further information/action
1	DC scheme governance and disclosure, including the annual Chair's Statement and the charge cap	First scheme year ending after 31 December 2021 - detailed "value for members" assessments for schemes with assets below £100m. For charging years ending after 6 April 2022: £100 de minimis pot size below which flat fees cannot be charged.	DC schemes only. Consultation on draft regulations on inclusion of explanation of illiquid investment policies in default SIPs and draft regulations and statutory guidance on disclosure of asset allocation data in Chair's Statement (from 1 October 2023); consultation on removal of performance-based fees from the charge cap for default arrangements used for DC auto-enrolment schemes (from 6 April 2023).
2	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).
3	Trustee oversight of fiduciary managers and investment consultants	1 October 2022. Requirement for trustees to make annual compliance reports to the CMA ceased 1 October 2022.	All DB and DC schemes (with minor exceptions). Occupational Pension Schemes (Governance and Registration) (Amendment) Regulations 2022 largely replicate existing regime under the Competition and Markets Authority Order 2019. TPR guidance issued August 2022.

No	Topic	Effective date or expected effective date	Further information/action
4	Climate risk governance and reporting requirements	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. Trustees of schemes in scope have to adopt a portfolio alignment metric for measuring climate risk from 1 October 2022.
5	Stewardship and voting reporting in Implementation Statements: statutory guidance	Statutory guidance applies to Implementation Statements for scheme years ending on or after 1 October 2022.	All schemes required to prepare Implementation Statements. Guidance on Statements of Investment Principles is non-statutory.
6	Simpler annual benefit statements	1 October 2022.	DC schemes used for auto-enrolment.
7	New notification requirements for DB schemes in relation to corporate and financing activity and change to the notification process	Response to consultation on draft Notifiable Events (Amendment) Regulations was expected Summer 2022.	TPR will consult on update to Code of Practice 2 (Notifiable Events) and accompanying guidance once DWP have published their finalised regulations and consultation response.
8	Draft DB Funding Code of Practice	Part 2 of TPR consultation and draft Code expected in 2022 after DWP regulations finalised. Code to be operational from October 2023.	DWP regulations issued for consultation July 2022. Once in force, the Code will apply to triennial valuations submitted thereafter.
9	TPR Single Code of Practice	Revised Code to be issued December 2022/January 2023.	All schemes.
10	Changes to the scheme asset information collected through scheme returns	Scheme returns from 2023.	DB schemes.

No	Topic	Effective date or expected effective date	Further information/action
11	Pensions dashboards	Compulsory connection deadlines from August 2023.	All registerable UK-based schemes with active and/or deferred members. Pensions Dashboards Regulations in force from 12 December 2022.

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