Current issues

April 2021

Articles this month:

Budget 2021

The Chancellor of the Exchequer delivered his Budget 2021 speech to Parliament on 3 March 2021. The main pensions-related news was confirmation of rumours that the lifetime allowance will be frozen at its current level, but there was also foreshadowing of regulation changes to facilitate investment in illiquid assets.

Lifetime allowance

The lifetime allowance was due to increase to around £1,078,900 in April 2021, under indexation provisions introduced by the Finance Act 2016. Instead, it will be held at its current, £1,073,100, level until 2026.

Pensions Investment

There is promise within the 'Red Book' Budget document of consultation, within the next month, *'on whether certain costs within the charge cap affect pension schemes' ability to invest in a broader range of assets... to ensure pension schemes are not discouraged from such investments and are able to offer the highest possible returns for savers'*.[1] The Department for Work and Pensions (DWP) is to produce draft regulations 'to make it easier for schemes to take up such opportunities within the charge cap by smoothing certain performance fees over a multi-year period'. The DWP has previously announced its intention to develop a multi-year approach to the calculation of performance fees.[2]

Other announcements

The Coronavirus Job Retention ('Furlough') Scheme will be extended, yet again, until the end of September 2021. Furloughed employees will continue to receive 80 per cent of their wages (subject to a cap) for the time not worked.

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[1] See paragraph 2.147 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966161/Budget_2021_Web_accessible.pdf>.

[2] Paragraphs 62 – 65 of *Improving Outcomes for Members of Defined Contribution Pension Schemes* (September 2020) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918860/improving-outcomes-for-members-of-defined-contribution-pension-schemes.pdf>.

Businesses will (in addition to covering the associated pension and National Insurance contributions) be expected to contribute 10 per cent of the cost from July, rising to 20 per cent in August.

The Government will increase income tax thresholds on 6 April 2021, but they will then remain frozen until April 2026. That means that the personal allowance will rise to £12,570 and—in England, Wales and Northern Ireland—the basic-rate limit will increase to £37,700, making the threshold for higher-rate tax £50,270 (the Scottish Parliament sets the higher rate threshold for non-savings, non-dividend income for Scotland).

The rate of corporation tax on profits will increase from 19 per cent to 25 per cent on 6 April 2023. Businesses with annual profits of less than £50,000 will be protected from the increase, and the effect will be tapered for those with profits between £50k to £250k.

The decision to freeze the lifetime allowance, so soon after it began to keep pace with inflation, is further evidence of the susceptibility of pensions taxation to short-term tinkering. It seems that the Treasury has not learned from the tapered annual allowance, another ill-considered tweak, which led to a revolt by senior clinicians that left the Government floundering when the pandemic struck and it was 'All hands on deck' for the NHS. The same group of people will be amongst those most affected by the lifetime allowance freeze.

Regulator outlines policy on new DB criminal powers

The Pensions Regulator has made known the approach that it proposes to take to the investigation and prosecution of new criminal offences connected with defined benefit pension schemes.[3] Its draft policy provides examples of activities that might trigger investigation and when 'a reasonable excuse' might exist.

Background

The *Pension Schemes Act 2021* will establish two new criminal offences, one concerned with avoidance of employer debt, and the other with conduct risking accrued scheme benefits. Someone found guilty of one of the offences might be liable to a fine of unlimited extent or imprisonment for up to seven years, or both. The section containing the offences is not yet in force.

From their inception, the offences have been the source of disquiet. The issue has been (and continues to be) with the relatively unbounded grasp of the offences, as drafted; both in the spectrum of activity (or inactivity) that might be criminalized, and the persons who might be prosecuted. Although they apply only to conduct that is intentional, in the case of avoidance of employer debt, or effects that are expected or foreseeable, in the case of acts detrimental to the likelihood of members receiving their accrued benefits; and only when the accused had no reasonable excuse for their behaviour; there is a fear that even a purely hypothetical risk of having to defend oneself in court will have a damping effect on ordinary corporate transactions.

In answer to such criticisms, the Government, reluctant to redraft the offences to make them more sharply focused (and thereby render them less adaptable to unexpected circumstances), gave an undertaking that the Regulator would consult upon and publish guidance on the application of the legislation.

The draft policy

The Regulator's position is that:

> *The intent of the new criminal offences is not to change commercial norms or accepted standards of corporate behaviour.*
>
> *Rather it is to tackle the more serious examples of intentional or reckless conduct that puts members' savings at risk; and strengthen the deterrent and punishment for that behaviour.*[4]

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[3] Consultation on our approach to the investigation and prosecution of the new criminal offences <www.thepensionsregulator.gov.uk/en/documentlibrary/consultations/consultation-on-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences>. Draft policy: Our approach to the investigation and prosecution of the new criminal offences <www.thepensionsregulator.gov.uk/en/document-library/consultations/consultation-on-ourapproach-to-the-investigation-and-prosecution-of-the-new-criminal-offences/draft-policy-our-approach-to-the-investigation-and-prosecution-of-the-newcriminal-offences>.

[4] 2 TPR consults on new criminal sanctions policy (PN21-08) <www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2021-press-releases/tprconsults-on-new-criminal-sanctions-policy>.

The Regulator infers that Parliament's intention was to give it additional options when responding to the worst examples of the sort of conduct that is already within reach of its existing contribution-notice (CN) powers (or that would be, if the perpetrator were sufficiently connected with a scheme employer). It does not expect to extend the range of activity that it will investigate. Whether it will go down the CN or criminal-prosecution route in any particular case will depend on considerations of seriousness, efficiency and the public interest.

Detrimental effects & reasonable excuses

The draft policy compares the new offences and the existing powers, highlighting points of similarity and differences. For example, the offence concerned with conduct that puts accrued benefits at risk involves a material detriment test, as does the CN power. The Regulator does not anticipate prosecuting anyone who would have a good defence to a 'material detriment' CN (in summary, because they gave due consideration to the extent to which their actions might affect the likelihood of accrued being received, took all reasonable steps to minimize the potential detrimental effects, and concluded that any residual detriment would not be material). However, there is no statutory provision for clearance statements in connection with the offences.

The Regulator stresses that the onus is on the prosecuting authority to prove that an accused person had no reasonable excuse. However, that does not mean that it must identify and disprove every available justification; anyone who might be investigated should be prepared to explain their actions and provide contemporary evidence, such as meeting minutes and written advice, to support their case. The Regulator identifies three factors as particularly significant to whether an excuse is reasonable or not: whether the detrimental effect was incidental, the adequacy of mitigation efforts, and (in the absence of effective mitigation) whether there was a non- or less-detrimental alternative course of action that was open. The transparency and timeliness of a person's communication with the trustees and Regulator will also be relevant.

The draft policy contains examples of the types of behaviour that could fall within the scope of the new offences, and those where a reasonable excuse might exist.

Consultation & beyond

The six-week consultation period for the draft guidance ends on 22 April 2021. The Regulator asks whether its general approach and its proposed strategy for selecting cases for investigation are clear, and consistent with the underlying policy intent; and whether its examples are helpful to those seeking to understand what might constitute a reasonable excuse. The Regulator expects to publish the guidance later in the year (presumably in time for the commencement of the section that creates the new offences, which is likely to be effective from 1 October 2021). Although the Government has said that the new criminal sanctions will apply only to acts occurring after the powers come into force,[5] the Regulator indicates that prior events may still be relevant when establishing an accused person's intentions.

The draft guidance acknowledges the concerns that exist about the new offences and signals the Regulator's willingness to provide greater certainty (although it is only able to instigate prosecutions in England and Wales, and is not even the only institution able to do so in those places).

Historically, the Regulator has been slow to use the 'nuclear options' available to it. Considering the height of the bar for a successful criminal prosecution and the burden of proving that the accused had no reasonable excuse, we suspect that this might not change any time soon. However, readers will recognize some very high-profile cases—anonymized, but unambiguously depicted—amongst the Regulator's examples of behaviour that might invite prosecution. There are people who will be left in no doubt that the Regulator will be sizing them up for prison clothing if they pull similar stunts again.

Although there is no statutory route for the Regulator to provide clearance from the risk of prosecution, the existing facility in relation to contribution notices would seem capable of offering some measure of reassurance. We wonder if there might be a new enthusiasm for clearance applications, and how ready the Regulator will be to respond.

Those engaging in corporate transactions, restructuring or refinancing should seek advice, document their decisions carefully, and engage early with their trustees, to reduce regulatory risk.

[5] <https://questions-statements.parliament.uk/written-questions/detail/2020-12-17/131181>.

One Code to rule them all: combining Codes of Practice

The Pensions Regulator has begun consultation on draft content for a consolidated Code of Practice.[6] This initial instalment will replace ten of the fifteen existing Codes, and deals mainly with governance and administration matters in both defined benefit and defined contribution schemes, and encompassing the private and public sectors. The remaining Codes will be incorporated into the new, modular format later. The consultation period is from 17 March to 26 May 2021.

Subject matter

This first phase of consolidation involves the following Codes of Practice:

- *No. 1: Reporting Breaches of the Law*;
- *No. 4: Early Leavers—Reasonable Periods*;
- *No. 5: Reporting Late Payment of Contributions to Occupational Money Purchase Schemes*;
- *No. 6: Reporting Late Payment of Contributions to Personal Pension Schemes*;
- *No. 7: Trustee Knowledge and Understanding*;
- *No. 8: Member-nominated Trustees and Directors—Putting in Place and Implementing Arrangements*;
- *No. 9: Internal Controls*;
- *No. 11: Dispute Resolution—Reasonable Periods*;
- *No. 13: Governance and Administration of Occupational Trust-based Schemes Providing Money Purchase Benefits*; and
- *No. 14: Governance and Administration of Public Service Pension Schemes.*

The Regulator has drawn out various themes from those Codes to form 51 shorter, more-topical modules. For simplicity, its expectations and schemes' legal duties are set out in separate lists, each arranged in logical sequence. The language used has been reviewed too, so that '*must*' signifies a legal obligation, '*should*' indicates a regulatory expectation, and '*need*' is used for practical requirements. With one Code to rule them all—trust-based, personal and statutory (public-sector) schemes—the Regulator has had to find a new way of referring to the responsible parties: hence its catch-all reference to the '*governing body*'.

It being primarily a consolidation exercise, there is relatively little that is truly fresh material. Most of the expectations and requirements covered already exist, although in some cases they have been updated and, where relevant, made consistent across scheme types. The Regulator says that its expectations are set at the level appropriate for any well-run scheme, '*not… a gold standard*'.

Newer ground

There are some novel elements, however, such as the two modules dealing with responsible investment issues: one focusing on stewardship and the other on the risks and opportunities arising from climate change. The Regulator has also reinforced its guidance on cyber security, going into greater detail on its expectations.

The most extensive addition is of material intended to meet the IORP II Directive's requirements for occupational schemes to have '*effective systems of governance*'. The broad requirement has been part of UK law, for private-sector schemes, since January 2019; but trustees now have details of the Regulator's expectations on, for example, the need for schemes with 100 members or more to have written policies on key functions, including responsibility for risk management, on remuneration issues, and on the appointment of service providers. The draft Code of Practice also explains how schemes of such size can meet the requirement for '*own-risk assessment*', which (the Regulator explains) is a regular process, distinct from ordinary risk-management activities, whereby the trustees evaluate the effectiveness of their system of governance. It notes that the first own-risk assessment may require substantial extra work, notwithstanding that it should be proportionate to the characteristics of the scheme. Documented evidence of the first assessment should be available within twelve months of the commencement of the new Code of Practice. Thereafter, the process should be repeated annually, and following any material change in the scheme's risk profile.

[6] <https://www.thepensionsregulator.gov.uk/en/document-library/consultations/new-code-of-practice>.

Future phases

These Codes are missing from the first phase of consolidation:

- *No. 2: Notifiable Events*;
- *No. 3: Funding Defined Benefits*;
- *No. 10: Modification of Subsisting Rights*;
- *No. 12: Circumstances in Relation to the Material Detriment Test*; and
- *No. 15: Authorization and Supervision of Master Trusts*.

The first update to the consolidated Code is likely to involve incorporation of the revised *Code of Practice No. 3: Funding Defined Benefits*, upon which consultation is expected in the second half 2021. The Regulator is drafting it in the same style as the consolidated Code so that it can be readily slotted in. Further extensions to the combined Code will be required in due course to cover the contents of the Pensions Schemes Act 2021, which will expand the Regulator's powers, enable the establishment of collective money purchase schemes, allow prescribed qualifications to the statutory right to transfer as a means of combatting scams, and lead to the imposition of new climate-risk governance obligations.

Have your say

The consultation period for the draft Code ends on 26 May 2021. The Regulator is organizing a 'virtual workshop' at which groups of participants will have opportunities to discuss the new Code.[7]

The consolidated Code is concise and presents its information straightforwardly. The state of suspense about the practical implications of the IORP II governance requirements is over at last. In the meantime, the subject has been the focus of much attention and effort; the own-risk assessment is an opportunity to honestly appraise the extent of progress. Considerable extra work will be required for the first such assessment; and we note that the legal requirement for the ORA to recur at least triennially has been translated into a regulatory expectation that it will be undertaken annually.

RPI error understates inflation

The Office for National Statistics (ONS) has announced an error in the compilation of the Retail Prices Index (RPI) that led it to underestimate the annual rate of inflation for six of the months of 2020.[8]

The percentage change in the RPI over the twelve months to March, May, July, August, September, and October of 2020 was in each case 0.1 percentage point too low. Whilst the Index numbers and annual rates announced in future will be based on corrected information, there will be no retrospective amendments (the policy for the RPI is that, once published, the figures are never revised).

The months in which the error manifested included September 2020, which many pension schemes use as the reference month for the following year’s increases to pensions in payment. The annual rate of inflation announced for September 2020 was 1.1 per cent, but would have been 1.2 per cent had it been correctly calculated. To put it in perspective, a member with a pre-increase pension of £20,000 p.a. stands to receive £20 less over the course of the post-increase year than he or she would have done if the error had not occurred.

As the published statistics will not be revised, it seems likely to us that, in most cases, trustees will not have to revisit increases already granted; however, legal advice should be sought if there is any doubt about the implications of the announcement and the interpretation of scheme increase rules. The corrections to the Index figures published after its discovery of the problem should mean that any increases missed this year can be picked up in next year’s increase exercise.

[7] Readers can register interest at: <www.eventbrite.co.uk/e/new-code-of-practice-virtual-workshop-expression-of-interest-tickets-145528759437>.
[8] <www.ons.gov.uk/news/statementsandletters/errorintheretailpricesindex>.

NMPA increase consultation

Her Majesty's Treasury (HMT) has confirmed its intention to increase the normal minimum pension age (NMPA) from 55 to 57 years on 6 April 2028.[9] The NMPA is the earliest age within the pensions tax legislation at which members in good health can access their benefits.

The details of the implementation of the policy have been issued for consultation, and include transitional protection for those with rights (as at 11 February 2021) to draw benefits before attaining the age of 57. The new protection will come with fewer conditions than the existing protected pension ages for those able to retire before age 55 (those protected pension ages will remain in place). The protection will apply to all of a member's benefits under the relevant scheme and will not be restricted to those built up before 2028 and to allow individuals to access their pension flexibly it will be possible to take scheme benefits while still working and individuals will not be required to take all their scheme benefits on the same date. The NMPA increase will not apply to members of the armed forces, police and fire service pension schemes.

The consultation periods ends on 22 April 2021. The Government plans to issue draft legislation in 'summer 2021' and to legislate for the increase in the subsequent Finance Bill.

It is welcome news that the protected pension age provisions connected to the NMPA increase will have few strings attached. Although the exact provisions will not be published until later this year, employers should start thinking about how the change will be communicated to scheme members.

General levy increases tilted toward DB & own-trust DC

The Department for Work and Pensions (DWP) has announced the outcome of its December 2020 consultation exercise on the general levy.[10] It is proceeding with its preferred option, which is to increase the levy rates, but dole out the pain differently amongst four scheme types (defined benefit, 'own-trust' defined contribution. master-trust DC, and personal pension) in proportion to the share of regulatory resources that each consumes. Regulations have set the levies for 2021/22, 2022/23, and 2023/24.[11]

Levy history

The general levy recoups some of the DWP's funding of the Pensions Regulator, Pensions Ombudsman and the Money and Pensions Service. It is calculated by reference to membership numbers, and there are different charging structures for occupational and personal pension schemes.

The levy rates have not increased since 2008/9. In fact, they were *reduced* in 2012/13, and a new, lower rate for schemes with more than 500,000 members was introduced in 2017/18. In October 2019, however, the DWP announced that, owing to a growing deficit in levy revenues versus expenditure, substantial increases to the levy rates would be required.[12]

Currently, the levy rate for occupational schemes ranges from £2.88 to £0.65 per member, with larger schemes paying less per capita. Those rates are subject to minimum charges for schemes failing within each of the membership-size bands, stretching from £29 for the smallest schemes to £430,000 for those with memberships in the 0.5m+ category.

Main results of consultation

For the levy year commencing on 1 April 2021, the levy rates for DB and own-trust (as distinct from master-trust) DC occupational schemes will run from £3.17 to £0.72 per member, with minimum invoices from £32 to £475,000. Thereafter, the rates diverge, so that by 2023/24 a DB scheme will pay between £6.34 and £1.43 a head, with minimum charges extending from £64 to £945,000 per scheme; whilst an own-trust DC scheme can expect to pay from £4.32 to £0.98 per capita, subject to a minimum of £44 to £645,000 per scheme.

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[9] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960034/NMPA_consultation_2021.02.10.pdf>.

[10] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966795/government-response-the-occupational-and-personal-pension-schemes-general-levy-review-2020.pdf>.

[11] The *Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2021* (SI 2021 No. 214).

[12] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844687/occupational-and-personal-pension-schemes-general-levy-review-2019.pdf>.

The rates payable by master-trust DC schemes are a little lower in 2021/22, and rise much less steeply thereafter, so that by 2023/24 they will be £3.14 to £0.71 per member, with the minimum amount of the levy ranging from £32 to £470,000 per scheme. The levies on personal pension scheme are substantially lower, across the board and in every year.

Cost control & future developments

The DWP's report announces that, for 2021/22, the operating budgets for the Pensions Regulator and Pensions Ombudsman will remain at their 2020/21 levels; and the element of the MaPS's 2021/22 funding that is paid for via the levy has been reduced by a quarter. The decision is intended to demonstrate the Government's commitment to effective cost control, and recognizes that current circumstances are making it harder for schemes to operate.

The Government will consider creating additional levy categories, for example for DB superfunds, as things develop. It will also consider comments that consultation respondents raised about sectionalized schemes and those with atypical features, and about possible alternative sources of funding for the Pensions Ombudsman (e.g. charging users).

The Government is pondering the implications for the fraud compensation levy (which is separate from the general levy) of the November 2020 *Pension Protection Fund v Dalriada Trustees* judgment.[13]

Strengthening the Regulator's contribution-notice & info-gathering powers

The Department for Work and Pensions (DWP) has published two draft statutory instruments providing details of a proposed new test for contribution notices and the extension of the Pensions Regulator's information-gathering powers.[14]

The regulations are being made under powers in the *Pension Schemes Act 2021*. It will establish two additional routes by which the Regulator can issue contribution notices, including the '*employer resources test*', which is aimed at cases where activity has materially reduced the sponsor's resources relative to its estimated 'section 75' debt. The Act will also extend the Regulator's information-gathering powers so that it can require subjects to attend interviews in broader circumstances and has more grounds for inspecting premises—and can apply appropriate penalties for non-compliance.

Contribution notices

In broad terms, contribution notices can make scheme employers or their associates liable for all or part of their scheme's section 75 debt, which is the difference between its assets and the cost of buying out members' benefits with an insurance company. Currently, the Regulator can issue a contribution notice if an act or a failure to act meets the '*material detriment test*', or if a main purpose was to prevent the section 75 debt from falling due or being recovered, to compromise it, or to reduce its amount.

The DWP explains the need for the new tests by noting that whilst the '*material detriment*' and '*main purpose*' tests are scheme focused, most of the cases that have arisen so far have been about activity that affects the employer, with an indirect effect on the scheme. It says that it is '*evidentially challenging*' for the Regulator to extrapolate from an employer-related act to a scheme impact, and that it is difficult for it to forecast the medium- and long-term performance of the business in question.

The Act makes provision for new tests specifically and directly concerned with effects on sponsoring employers. The one that is the subject of the draft regulations (and this article) is the already described employer resources test. For completeness, the other is the '*employer insolvency test*', which is concerned with whether an act has materially reduced the amount of the section 75 deficit that could have been recovered in a hypothetical employer insolvency.

The draft *Pensions Regulator (Contribution Notices) (Amendment) Regulations 2021* specify how an employer's resources would be evaluated for the purposes of the employer resources test.[15] The DWP considered four options:

- net assets, drawn from company accounts;
- covenant value, based on the net present value of future cash flows, or a multiple of earnings before interest, taxes, depreciation, and amortization (EBITDA);

[13] [2020] EWHC 2960 (Ch). See *Current Issues* March 2021 for a summary.
[14] *Strengthening the Pensions Regulator's Powers: Contribution Notice and Information Gathering Powers Regulations 2021* <www.gov.uk/government/consultations/strengthening-the-pensions-regulators-powers-contribution-notice-and-information-gathering-powers-regulations-2021>.
[15] <www.gov.uk/government/consultations/strengthening-the-pensions-regulators-powers-contribution-notice-and-information-gathering-powers-regulations-2021/draft-regulations-the-pensions-regulator-contribution-notices-amendment-regulations-2021>.

- a holistic assessment of covenant strength; and
- profitability.

It proposes to use profitability, essentially as the least worst of the four options. It accepts that the test will not be simple to apply, and that the element of subjectivity may create complications and uncertainties; but says that it has found no alternative that is simpler or less subjective.

The draft Regulations say that the resources of the employer are its normalized profits before tax. The starting point will generally be the profits as stated in the employer's accounts for the period ended before the contested act, adjusted to exclude non-recurring or exceptional items. The Regulator would need to make the profitability determination both with and without the effects of the act, and then decide whether the difference is material relative to the notional section 75 deficit. There is a brief description of the proposed process in the consultation document.

Information-gathering

The 2021 Act also contains provisions giving the Regulator broader powers to compel attendance at interviews, expanding the purposes for which its inspectors can enter premises, and introducing new fixed and escalating penalties for non-compliance. The draft *Pensions Regulator (Information Gathering Powers and Miscellaneous Amendments) Regulations 2021* would set out the minimum information to be included in an interview notice, and modify the statutory inspection power so that it works appropriately for multi-employer schemes.[16] The new fixed penalty would be £400, the same as applies currently to failures to comply with auto-enrolment-related information requests. If non-compliance persists thereafter, the new escalating penalty would be £200 per day, for individuals (as per auto-enrolment); whilst for companies it would be £500 on the first day, rising incrementally until it reaches £10,000 for the twentieth and each subsequent day for which the transgression continues.

Consultation particulars

Responses to the draft Regulations and the DWP's questions should be submitted by 29 April 2021. The Government intends to announce the outcome of the exercise within twelve weeks thereafter. It expects that the legislation will come into force in October 2021.

Social factors in ESG policies

The Department for Work and Pensions (DWP) has issued a call for evidence about consideration of social risks and opportunities by occupational pension schemes.[17] It is seeking views on the effectiveness of trustees' policies and practices in relation to the 'S' in 'ESG': financially material social factors.

The Government notes that action on environmental, social and governance (ESG) policies has tended to focus on climate change, and although that may be the most urgent risk to society and the economy, the law requires trustees to take account of financially material environmental, social and governance considerations. Current legislation requires trustees to prepare a statement of investment principles (SIP) which includes trustees' policies in relation to financially material considerations (including ESG factors) and requires them to have a policy on non-financial issues.

A recent survey of the SIPs of 40 large occupational pension schemes found that although most acknowledged that ESG considerations may have a material impact on investment risk and return, they did not differentiate between 'E', 'S' and 'G' factors. The call for evidence looks at what social factors are and how they are linked to risk management. It also considers ways in which trustees can take account of social factors when investing and in their stewardship role. The investment opportunities of social factors are covered in the final chapter.

The Government is seeking views on whether occupational pension schemes trustee policies and practices on social factors are '*sufficiently robust*' and what action the Government could take to ensure that trustees are meeting their legal obligations in this area.

The period for responses lasts from 24 March to 16 June 2021. Any change to policy would be subject to a public consultation.

[16] <www.gov.uk/government/consultations/strengthening-the-pensions-regulators-powers-contribution-notice-and-information-gathering-powers-regulations-2021/draft-regulations-the-pensions-regulator-information-gathering-powers-and-miscellaneous-amendment-regulations-2021>.
[17] <https://www.gov.uk/government/consultations/consideration-of-social-risks-and-opportunities-by-occupational-pension-schemes>.

Allowing for performance fees within the DC charge cap

The Department for Work and Pensions (DWP) proposes to allow for smoothing of performance fees when testing for compliance with the defined contribution (DC) charge cap, as a means of facilitating investment in less-liquid assets.[18] It has also asked whether the current policy of 'look-through' to underlying investments might stymie investment in assets such as venture capital and growth equity.

The cap

The charge cap applies to the default investment arrangements of money purchase schemes that are used to satisfy employers' automatic enrolment duties. The annual limit in relation to a single-charge structure, under which charges are calculated solely by reference to the value of a member's rights, is currently 0.75 per cent of the default funds.[19] There are equivalent constraints for default arrangements that have a combination-charge structure. At the moment, trustees must test for compliance using either the retrospective method, which looks back at the charges actually incurred by the member during the charges year, or the prospective method, which can be used when they are able to predict charges with confidence.

Outcome of past consultation

In September 2020, the DWP sought comments on various planned changes aimed at promoting greater diversification of DC investment portfolios and encouraging consolidation of under-performing schemes.[20] It has now announced its conclusions about one part of that consultation exercise.

It confirms that it will proceed with plans to revise the definition of '*charges*' so that it does not include costs solely attributable to holding physical assets (covering things like the costs of management, maintenance, valuation, insurance, ground rents, rates and taxes on assets such as land, buildings, vehicles, and commodities). Where the charge cap associated with a single-charge structure has to be pro-rated because a member has joined or left part-way through the charges year, the trustees will be able to exclude any performance fees that are assessed and deducted each time the member's investment value is calculated.

New proposals

The DWP is now also consulting on an additional proposal (for which there was a trailer in the September 2020 consultation) to supplement the two existing methods of charge-cap testing (summarized above). It would allow trustees, when calculating the performance-fee contribution to their scheme's charging structure, to use a five-year moving average of the performance fees rather than those accrued during the charges year. The consultation document provides a series of examples illustrating how it will work in practice.

The DWP has also called for evidence on whether the 'look-through' requirement contained in statutory guidance is a hindrance to investment in alternative asset classes, specifically mentioning venture capital and growth equity. It is a reference to the expectation that trustees 'look-through' any fund-of-funds or pooled investment vehicles to consider not just the costs of investing in the pooled vehicle itself but the costs paid by the pooled vehicle manager in connection with the underlying investments.

Timetable

Comments on the proposals, and responses to the 'look through' questions, should be submitted by 16 April 2021. The results of this consultation exercise and the Government's conclusions about the remaining aspects of the September 2020 consultation paper are set to be announced in June 2021, coinciding with finalized regulations and statutory guidance. The changes are likely to come into force on 1 October 2021.

[18] *Incorporating performance fees within the charge cap* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/969097/incorporating-performance-fees-within-the-charge-cap.pdf>

[19] The DWP announced in January 2021, following a review, that the 0.75 per cent cap remains appropriate. It also concluded that transactions costs should not be brought within the cap at the current time, and that it should establish a £100 *de minimis* pot size below which flat fees cannot be applied within a combination-charge structure.

[20] *Improving outcomes for members of defined contribution pension schemes* <www.gov.uk/government/consultations/improving-outcomes-for-members-of-defined-contribution-pension-schemes>. See *Current Issues* October 2020 for a summary.

SI round up

Various statutory Orders have been laid before Parliament, affecting benefits from April 2021.

Section 148 Order

The earnings used in the calculation of the State additional pension are revalued in line with average earnings. This revaluation (known as 'section 148' revaluation in reference to the legislation under which the Government specifies the required increases) also applies to the earnings factored into the calculation of guaranteed minimum pensions (GMPs) provided by occupational pension schemes to members who were contracted out of the State scheme from 1978 to 1997. Section 148 revaluation applies whilst the member is in contracted-out service, and in the period between the end of such service and GMP payment age, unless another form of revaluation is used. The section 148 Order that will come into force on 6 April 2021 is based on an increase in average earnings of 2.6 per cent.[21]

GMP Increases

Whilst in payment, GMPs accrued for the tax years 1988/89 onwards are increased annually by Order, in accordance with increases in the general level of prices to a maximum of three per cent per annum. The price inflation measure currently used by the Government is the Consumer Prices Index (CPI). The Order that will come into force on 6 April 2021 specifies an increase of 0.5 per cent.[22]

Public Sector pensions

The Order that increases 'official pensions' (broadly, those in the public sector) provides that pensions in payment before 12 April 2021 will increase by 0.5 per cent.[23]

A separate Order fixes the revaluation of early leavers' benefits under the career average (CARE) schemes in the public sector. Revaluation for the period from 1 April 2020 to 31 March 2021 will (depending on the public-sector scheme) be by reference to an increase in prices of 0.5 per cent or an increase in earnings of 2.4 per cent.[24]

HMRC newsletters March 2021

Pension Schemes Newsletter 128

Her Majesty's Revenue and Customs (HMRC) has published *Pension Schemes Newsletter 128*.[25] It includes:

- notice that some temporary changes to scheme administration processes during the pandemic have been extended until 30 June;
- the release (on 16 March 2021) of new practitioner registration and authorization features of HMRC's online Managing Pension Schemes service (see below for more information);
- some information related to relief at source, including notes about the Welsh and Scottish rates of income tax for 2021/22; and
- mention of various things announced elsewhere (the Budget freeze to the lifetime allowance, the consultation on increasing the normal minimum pension age to 57 in 2028, confirmation of the fix for the '*McCloud*' issue in the public-service schemes).

Managing Pension Schemes

The March edition of HMRC's *Managing Pension Schemes service* newsletter has also been published.[26] It has more details on the new practitioner registration and authorization features mentioned in *Pensions Schemes Newsletter 128*, as well as articles on:

- accessing a locked Accounting for Tax return;
- migration of schemes to the MPS service from Pension Schemes Online;

[21] *Social Security Revaluation of Earnings Factors Order 2021* (SI 2021 No. 267).
[22] *Guaranteed Minimum Pensions Increase Order 2021* (SI 2021 No. 163).
[23] *Pensions Increase (Review) Order 2021* (SI 2021 No. 275).
[24] *Public Service Pensions Revaluation Order 2021* (2021 No. 276).
[25] <www.gov.uk/government/publications/pension-schemes-newsletter-128-march-2021/pension-schemes-newsletter-128-march-2021>.
[26] <www.gov.uk/government/publications/managing-pension-schemes-service-newsletter-march-2021/managing-pension-schemes-service-newsletter-march-2021>.

- updating addresses;
- how MPS users can help improve the service;
- plans to begin deleting inactive user credentials; and
- pension scheme accounting.

Countdown Bulletin 54

In its first update since May 2020 about the abolition of contracting-out, HMRC reports that there were '*no significant* [additional] *delays*' to its plan to complete the issuing of final reconciliation data by the end of July 2020.[27] However, it notes that it was unable to issue data cuts to some schemes with nil output or for which it was unable to trace the scheme administrator. The email address for the Customer Relationship Team is CRM.schemereconciliationservice@hmrc.gov.uk, Requests should be submitted by 31 July 2021.

[27] <www.gov.uk/government/publications/countdown-bulletin-54-march-2021/countdown-bulletin-54-march-2021>.

And Finally…

The basket of goods and services used to calculate the UK's consumer price indices has been updated.[28] In a clear COVID-era sign o' the times, the additions include hand-hygiene gel, men's loungewear bottoms and smartwatches.

The first item is unsurprising and needs little explanation, although it suggests that the proliferation early in the first lockdown of online guides to manufacturing hand-sanitizer at home had little lasting impact, and perhaps that people found better uses for the contents of their drinks cabinets. Presumably the popularity of smartwatches has something to do with people recognizing after weeks at home that they had left permanent impressions in their sofas, and needed something—other than an empty 'hygiene gel' glass—to encourage them to get up and move once in a while. *AF* reaped similar health dividends by buying his offspring a trampoline for the garden: we find that the blood is generally washed away by the next rainfall, and expect that it'll be a couple of years before the need for bionic knee replacements becomes really pressing.

We do have some questions about the new 'men's loungewear bottoms' item. Clearly, they've been of more practical utility, lately, than three-piece suits. However, we failed to spot an obviously analogous trend in women's leisure clothing, and we're unsure if it's because the ladies have taken a shine to our jogging pants, if their wardrobes were already kitted out with something a little more comfortable to slip into, or if they're just less inclined to let their sartorial standards drop. We're also wondering at the absence of evidence of new-found demand for men's loungewear *tops*, and are wondering whether lots of fellas are still donning shirts and silk ties every weekday morning as insurance against unexpected Zoom or Teams calls.

Equally poignant are some of the things that have been cast out, unceremoniously, from the basket of goods: 'staff restaurant sandwiches', for example. Having said that, we expect that their passing will grow steadily less affecting over time, as more and more people's minds are boggled by the very concept of a staff restaurant. Or just restaurants more generally.

Also dropped from the basket?—gold chains. Whether that's because there's little point going full-on Mr T when there ain't none of us gettin' on no planes, sucka, or because people have taken to melting them down into ingots for ease of storage in their zombie-apocalypse shelters, is somewhat unclear…

[28] <www.ons.gov.uk/economy/inflationandpriceindices/articles/ukconsumerpriceinflationbasketofgoodsandservices/2021#changes-to-the-baskets-in-2021>.