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CHANCE

UK PENSIONS UPDATE: DECEMBER 2022

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RETAINED EU LAW (REVOCATION AND REFORM) BILL

NB: On 21 November 2022, the Regulatory Policy Committee published its formal opinion on the Government's regulatory impact assessment for the Bill and rated it not fit for purpose. Given this decision and the general criticism that it has received, the future of the bill is in doubt.

The Retained EU Law (Revocation and Reform) Bill (the "**Bill**") introduced into Parliament in late September will: (i) sunset a large part of retained EU law ("**REUL**") at the end of 2023; (ii) give the Government new powers to restate, revoke and replace outstanding REUL; and (iii) change the UK law status of any remaining REUL. The impact assessment for the Bill notes that this will enable departments to "*more easily amend, repeal and replace more than 2,400 pieces of REUL*". However the Bill has been widely criticised and its Impact Assessment has been "red-rated" by the Regulatory Policy Committee as not fit for purpose, because (among other things) it has not attempted to assess the impacts of sunsetting REUL.

Key pensions related points to note in relation to the Bill as currently drafted:

- broadly, the Bill provides that all EU derived subordinated legislation which implements (or operates for a purpose related to) EU law would automatically be revoked or "sunset" from the end of 2023 unless specifically preserved by the Government. This could include a range of pensions regulations – e.g. in relation to funding, investments and equality - but currently there is no definitive list of which regulations might be sunset, and which might be preserved. There is an ability for the Government to delay the sunset date to June 2026;
- the Bill would also revoke all retained EU rights, powers, liabilities, restrictions, remedies and procedures which were retained in section 4 of the European Union (Withdrawal) Act 2018 from the end of 2023. This would impact, for example, rights under the EU Equal Treatment Directive which were the basis of the decision of the Supreme Court in *Walker v Innospec* (essentially setting aside the restriction in UK law in relation to same sex survivors' benefits); please see our July 2017 special briefing for further detail on this decision. There is no power to delay this revocation, though the Government will also have powers to make regulations reproducing the effect of such rights etc.; and
- the Bill broadly provides that courts will have greater freedom to depart from retained EU case law when interpreting retained EU law.

There are very real concerns about the potential for legal uncertainty given the broad scope of the sunset provisions (e.g. concerns it could, perhaps inadvertently, impact pre-existing pensions regulations which also happen to give effect to EU provisions). It is also clear that there is a huge amount of work for the relevant Government departments to sift through the regulations to determine which provisions should be preserved. The Government has created a Retained EU Law Dashboard which contains a list of the impacted law identified by the Government (though it was noted during

the Bill's second sitting debate that this dashboard was "an authoritative but not comprehensive list of laws to be affected"), and this is at least a useful starting point for monitoring the Government's review of relevant retained EU Law.

As things stand, the Bill has not been well-received and it is hoped that any changes to pensions law/regulation will only be made following consultation with the industry.

LIABILITY DRIVEN INVESTMENTS: WHAT NEXT?

In a hearing with the House of Lords Industry and Regulators Committee on 15 November 2022, the Pensions Regulator ("**tPR**") confirmed that it is working with the Financial Conduct Authority ("**FCA**") to address the recent issues concerning liability-driven investment ("**LDI**"). Amongst other things, tPR noted during the hearing that it did not have as much data on the use of LDI strategies as perhaps it needed in order to assess systemic risk (and that it is currently considering whether further improvements in data reporting and the gathering of DB scheme asset information are needed), while the FCA flagged the fact that investment consultants are not currently regulated and its belief that they should be.

On 30 November 2022, tPR issued a statement to trustees and their advisers on LDI funds and schemes operating segregated LDI arrangements about the level of collateral which the regulators expect them to keep in order to provide a stronger buffer against future sharp bond yield movements. This notes that segregated, pooled and single client LDI funds should maintain a yield buffer of 300 – 400 basis points (in line with a statement issued jointly by the Central Bank of Ireland ("**CBI**") and the Commission de Surveillance du Secteur Financier ("**CSSF**") in relation to pooled funds), sets out steps to be taken where trustees depart from that liquidity buffer, and sets out practical steps trustees should take to ensure quick reactions to future market stresses. tPR also proposes in its statement that, as an alternative to investment liquidity, schemes may prefer to establish lines of credit with their sponsoring employer to ensure liquidity during future market stresses (provided this is done in accordance with legal requirements and having taken appropriate legal advice). The FCA also issued a statement confirming that it expects asset managers to take any necessary or appropriate actions following the above communications from tPR, the CBI and the CSSF.

The 15 November 2022 hearing was one of several meetings so far held following a recent call for evidence by the House of Commons Work and Pensions Committee in relation to its inquiry into the governance of DB schemes with LDI. The inquiry will examine the impact on schemes of the recent volatility in gilt yields and intervention by the Bank of England. It will also consider the role of tPR in regulating the use of LDI and whether schemes have adequate governance arrangements in place. It is worth noting however that some evidence heard during the inquiry has been misleading as to the effect of LDI approaches and their legality. Many schemes will still be of the view that LDI remains an appropriate and useful approach and trustees ought to be aware of the duties owed to them and of their rights under LDI contracts.

TPR PUBLISHES CONSOLIDATED ENFORCEMENT POLICY AND UPDATED PROSECUTION POLICY

On 25 October 2022, tPR published its updated enforcement and prosecution policies together with the response to its May 2022 consultation. Broadly, the updated enforcement policy consolidates tPR's enforcement policies in relation to DB, DC and public service pension schemes (as well as some aspects of master trust enforcement) and sets out the various outcomes which tPR may pursue and how it might achieve these. The updated prosecution policy (which has been brought up to date to reflect tPR's new criminal offence powers following the Pension Schemes Act 2021 (the "**PSA 21**")) now provides more information about how tPR uses its criminal powers, including tests that tPR prosecutors must meet when making a decision about whether to prosecute. tPR also published a new enforcement strategy which sets out the overarching aims of its enforcement work (excluding automatic enrolment) and provides insight into the framework tPR applies when selecting cases for enforcement action.

tPR has signposted that, notwithstanding the recently refreshed documents, it will "revisit [its] strategy and policies if these outcomes or other circumstances require any changes in [its] approach".

DWP CONSULTATION ON DB FUNDING REGULATIONS

The July consultation on the new defined benefit ("**DB**") regulations[1] published by the Department for Work and Pensions (the "**DWP**") closed on 17 October 2022. The draft regulations require DB pension schemes to have a 'funding and investment strategy' and to submit to tPR a 'statement of strategy' signed by a chair of the trustees (DB schemes without a chair will have to appoint one).

[1] The Occupational Pension Schemes (Funding and Investment Strategy and Amendment) Regulations 2023

Some of the draft regulations give discretion to tPR to determine certain matters, and we are of the view that these delegations go beyond the scope of the Pension Minister's power to so delegate and are matters that ought rightly to be addressed by the regulations themselves (these matters include, for example, the setting of the level of "significant maturity", matters to be considered in assessing employer covenant, and the form of statement of strategy). As currently drafted, the regulations provide that recovery plans should follow the principle that deficits must be paid off as soon as the employer can reasonably afford which is a change (and arguably at odds with tPR's statutory objective to minimise the adverse impact of the funding legislation on an employer's sustainable growth).

Key points to note include:

Funding and investment strategy requirements (Regulations 4 – 13)

- schemes will be required to have a secondary "low dependency" target alongside their primary focus to achieve full funding on an ongoing basis, meaning that by the time they are "significantly mature" (currently proposed to be the point at which a scheme's duration of liabilities is 12 years) they must be at least in a state of low dependency on their sponsoring employer;
- the principles trustees will need to follow to achieve this necessarily relate to the level of investment and funding risk (which are primarily dependent on the strength of the employer covenant), as well as liquidity. The matters trustees must take into account, the principles they must follow and the level of detail to be provided are all set out in the regulations;
- schemes must determine their funding and investment strategy within 15 months of the effective date of the first scheme valuation to be completed after the regulations come into force.

NB: Under the existing funding regulations, trustees must generally obtain employer agreement to funding documents, though where trustees have a unilateral contribution power under the scheme rules this requirement is diluted to an obligation to consult with the employer. The same approach is expected to be taken here.

Statement of strategy requirements (Regulations 14 – 19)

The statement of strategy (the "**Statement**") is split into two parts: Part 1 sets out the detail which trustees must provide in relation to the scheme's funding and investment strategy and Part 2 sets out detail regarding supplementary matters prescribed by legislation, including, for example:

- whether, in the opinion of the trustees (or managers) the Strategy is being implemented successfully (and if not how they can remedy that);
- the main risks of implementing the Strategy and how they can be mitigated;
- certain other matters as are prescribed currently including as to the scheme's maturity, investment risk, funding level, covenant assessment etc.

The Statement must be submitted to tPR alongside the scheme's actuarial valuation and the contents of Part 2 of the statement of strategy must be reviewed and (if necessary) revised as soon as reasonably practicable after any review of the scheme's funding and investment strategy, whether or not the strategy is actually itself revised.

PENSION DASHBOARDS: WHERE ARE WE NOW?

After being laid before Parliament on 17 October 2022, the Pension Dashboard Regulations 2022 were made on 21st November and came into force on **12th December 2022** (though schemes will only have to connect to dashboards from **31 August 2023** at the earliest, depending on their size).

Pension dashboards will be online platforms through which certain pension scheme members will be able to access information about all of their pensions (both private pensions and their State Pension) in a single place. The DWP launched a consultation on draft regulations in relation to the pension dashboard regime in January 2022, responding to feedback on this consultation in June, and various consultations, guidance and legislation have also been published in relation to this upcoming regime. Broadly, the pensions dashboards regime will place various requirements on trustees in terms of preparing for records and held data to be provided in a digitised format and responding quickly to information requests.

Requirements under the Pension Dashboard Regulations 2022	**Who is subject to the requirements under the regulations?** ➢ Broadly, the regulations require HMRC-registered occupational pension schemes to connect with the Money and Pensions Service ("**MaPS**") dashboard architecture (which is publicly-owned), and to facilitate the provision of pensions information to the MaPS dashboard service or a third-party "qualifying pensions dashboard service" (**"QPDS"**) – these responsibilities will fall on the trustees of such schemes. ➢ While many schemes may choose to outsource some of their pension dashboard duties to a third-party administrator or pension scheme provider (such as an existing pension scheme provider), trustees will remain responsible for compliance with their statutory duties regardless of any outsourcing and should ensure that third-party providers comply with these requirements on their behalf as far as possible. ➢ The regulations also impose certain requirements on providers of QPDS (other than MaPS). **What is required?** ➢ The regulations set out a 'staging timetable' for when particular schemes (dependent on size) would need to connect to MaPS dashboard architecture; within these groups different types of scheme have different "staging" or "connection" deadlines – these deadlines are also set out in tPR's initial guidance. ➢ Where an individual makes a request on the dashboard service by providing their personal data (e.g. their name or address), trustees must take certain steps to match the data with their own and provide certain data to the individual (e.g. value data on pensions, member costs and charges etc). ➢ If an individual's provided data does not match data held by the scheme, trustees must delete this personal data (and none of the above information need be provided). **Other key points to note** ➢ Even after all schemes required to connect have connected to the pensions dashboards, the dashboards will only be available for the general public to use from a "dashboards available point" – this will be a date specified by the Pensions Minister at least six months in advance (which is intended to give schemes sufficient time to prepare for dashboards going live). ➢ Pensioner members are out of scope – a 'pensioner' includes a person who has taken a pension, pension commencement lump sum, a money purchase annuity or put their benefits into drawdown (though **NB**: Members who have taken uncrystallised funds pension commencement lump sum remain in scope). ➢ Schemes that have fully or partially entered PPF assessment might benefit from exemptions and extensions to the requirement to connect with limitations on the data that needs to be provided to a requesting member. ➢ Schemes / sections in wind-up will still be required to connect according to their connection deadline but connected schemes or sections need only provide value data and other data if the trustee considers it appropriate to do so.
Pension Dashboard Programme – Dashboard Standards published	The Pensions Dashboards Programme (the "**PDP**") published revised draft dashboards standards for connecting to the dashboards ecosystem which will come into force following ministerial approval. This followed feedback from its July 2022 consultation and was published together with a consultation response. The draft standards cover data standard, reporting standards, technical standards and connection standards, while a separate consultation on design standards was published on 1 December 2022 and will close on 16 February 2023.
The Pensions Regulator publishes	tPR published its initial guidance on pensions dashboards in June; key items were that:

<table>
<tr><td>initial guidance on pensions dashboards</td><td>
➢ schemes will have a "connection window" of 1 month before their connection deadline to connect to dashboards (this will be a connection window of 3 months for the largest Master Trust schemes, which currently have a 31 August 2023 staging date deadline); and

➢ while small and micro schemes (those with 99 members or less as at the 'reference date') are not currently within scope of mandatory staging, they will be able to apply for voluntary connection and DWP's initial consultation suggested mandatory connection for small / micro schemes may occur from 2026.
</td></tr>
<tr><td>Early/voluntary connection guidance published by the PDP</td><td>
In November 2022, the PDP published specific guidance around early connection for schemes with existing connection deadlines and voluntary connection for schemes not currently required to connect to dashboards. In both cases, these schemes can apply to the PDP in order to connect.

➢ Schemes wishing to voluntarily connect will be able to propose their desired connection deadline and their connection window will open one month prior to that deadline.

➢ Schemes wishing to connect early will be able to extend their connection window by opening it at least one month prior to the start of their existing connection window, though the connection window will still close at the existing connection deadline. For example, if a scheme's existing connection deadline is 1 October 2023, its existing connection window would open on 1 September 2023, but it might apply for this window to open two months earlier on 1 July 2023 (which would not change the existing connection deadline of 1 October 2023).

➢ The application deadline for all schemes is a minimum of two months prior to the start of their existing / proposed connection window. For example, where a scheme voluntarily wants to connect on 1 October 2023, its voluntary application deadline will be 1 July 2023 at the latest, which is two months prior to the start of its connection window on 1 September 2023.

➢ The PDP will consult with tPR before making any decisions on an application and aims to notify applicants of decisions with 4 weeks of applications being submitted. At this stage, application form details are not yet available but the guidance notes that they will be available "soon".
</td></tr>
<tr><td>Deferred connection guidance published by the DWP</td><td>
On 12 December 2022, the DWP published guidance on deferred connection applications.

➢ A deferred connection application can only be made if the scheme trustee can provide evidence that before the pension dashboard regulations came into force, they had in good faith (i.e. not in order to avoid their existing connection deadline):

o embarked on a programme to transfer the data held by the scheme to a new administrator; and/or

o they had entered into a contract containing an obligation to retender the scheme's administration, with the timetable for this being a reasonable one which conflicted with the scheme's connection deadline.

➢ The trustee will also need to provide evidence showing that complying with the connection deadline in light of the above would be disproportionately burdensome (e.g. the cost of compliance with the dashboards regime would be disproportionately higher than it might be if there was no administrative change being undertaken) or would put the personal data of members at risk.

➢ The guidance notes that changing administrator alone is not a sufficient reason for deferral and that evidence should be provided to show that reasonable alternative options for securing compliance have been considered and found to be unviable.
</td></tr>
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	➢ Permission to defer can only be granted once, and applications must be made at least two months before the scheme's connection deadline and within 12 months of the regulations coming into force, i.e. by 11 December 2023 at the latest.
Pension Dashboards (Prohibition of Indemnification) Bill	A private member's bill was introduced in the House of Commons in July seeking to prohibit trustees of pension schemes from being indemnified in respect of penalties imposed under the pension dashboard regulations. The bill has been through the Committee stage and is currently in the Report stage.

JUDICIAL REVIEW OF RPI/CPIH ALIGNMENT DECISION FAILS

On 1 September 2022, the High Court handed down its decision in respect of the judicial review case brought by the trustees of the BT, Ford and Marks and Spencer pension schemes against the UKSA and the Chancellor.[2] The judicial review challenged the UKSA's decision to align the methodology of the RPI with the methodology of the CPIH, which would lead to an approximated 1% reduction in the RPI.

The court found that the claimants' arguments failed on every ground, finding principally that: (i) the UKSA had the power to amend the RPI in the way in which it planned to do so, (ii) the UKSA was only obligated to consider statistical matters as part of its March 2020 consultation, which it did, and (iii) the UKSA was not under a duty to consult the public in respect of its alignment decision, nor was the Chancellor under a duty to consult the public in respect of his decision not to issue compensation to holders of affected gilts. In respect of a private claim on whether a "cessation clause" for gilts issued after 2005 would be triggered by the implementation of the alignment decision, the court also ruled in favour of the defendants and found that it would not.

The judgment has not been appealed and it is expected that the UKSA will implement its alignment decision in February 2030, as planned. As noted in previous updates, aligning the RPI with the CPIH may negatively affect some pension schemes, particularly DB schemes (e.g. if the value of assets relative to liabilities falls where RPI index-linked gilts or other assets are being used to hedge CPI liabilities) and their members (e.g. where pension increases are linked to RPI).

FCA CONSULTS ON BROADENING PENSION SCHEME ACCESS TO ILLIQUID ASSETS

On 10 October 2022, the FCA closed its consultation seeking responses to proposals to allow for the promotion of long-term asset funds ("**LTAFs**"), a new category of authorised open-ended fund to a broader range of retail investors and pension schemes. Broadly, the FCA has proposed to amend the unit-linked products rules to extend the distribution of the LTAFs and other illiquid assets by:

- permitting the broadening of the distribution of LTAFs via self-select options in qualifying schemes, subject to similar protections to those that currently apply to default arrangements (which prevent individuals from investing to a greater extent than the level of investment by the default option of the scheme);
- extending the distribution of LTAFs where investors in a long-term, unit-linked product have appropriate professional support on fund selection; and
- giving equivalent status to that currently afforded to LTAFs via the permitted links rules to other illiquid assets where the unit-linked product is part of the default arrangement of a qualifying scheme.

The FCA is aiming to publish a final policy statement and Handbook rules in early 2023.

FURTHER DWP CONSULTATION ON 'DISCLOSE AND EXPLAIN' PROPOSALS AND PERFORMANCE-BASED FEES

On 6 October 2022, the DWP published a consultation paper comprising: (i) the Government's response to the 'Disclose and explain' proposals consultation from its March combined consultation paper (please see our UK Pensions Update: June 2022 for commentary on that paper), and (ii) further to that March consultation, a new consultation on draft regulations and draft statutory guidance relating to both the 'Disclose and Explain' proposals and the exemption of performance-based fees from the DC charge cap.

2 BT Pension Scheme Trustees Limited and Ors v the UK Statistics Authority and the Chancellor of the Exchequer [2022] EWHC 2265 (Admin)

The October consultation closed on 10 November 2022 and the draft regulations consulted on[3] are currently proposed to come into force on **6th April 2023** (though, as noted below, the 'Disclose and explain' proposals themselves are currently proposed to begin to come into force from **1 October 2023**). The draft regulations would amend the 2005 Investment Regulations, the 1996 Scheme Administration Regulations and the 2013 Disclosure of Information Regulations.

(**NB**: The draft statutory guidance published as part of the October consultation only covers performance-based fees and the asset allocation part of the 'Disclose and explain' proposals. The DWP has noted that guidance in respect of the illiquid asset policy disclosures to be made within a scheme's statements of investment principles ("**SIP**") will follow.)

Disclose and explain proposals – Illiquid asset policy disclosure requirements in the scheme SIP	➢ The illiquid asset policy disclosure requirements have been amended so that they now comprise: • a statement on whether or not investments held by the default arrangement include illiquid assets; • where such investments do include illiquid assets: ○ a description of the age profile of the members in respect of whom those investments are held ○ an explanation of whether investments are held directly in illiquid assets or via a collective investment scheme ○ an explanation of the types of illiquid assets in which investments are held; and ○ an explanation of why the trustees have chosen to invest in illiquid assets (including an assessment of the advantage to members of doing so) when compared to investments in other asset classes; • where such investments do not include illiquid assets, an explanation of why the trustees have chosen not to invest in illiquid assets; and • an explanation of whether the trustees have future plans to invest or to increase their investment in illiquid assets. ➢ **The DWP now proposes to define illiquid assets on a granular level** as: "assets which cannot easily or quickly be sold or exchanged for cash and, where assets are invested in a collective investment scheme, includes any such assets held by the collective investments scheme", **so that trustees will be required to look through multi-asset investments to their underlying investments to determine their illiquidity.** ➢ The DWP intends for the new policy requirements to apply on **the first occasion on which a scheme's default SIP is updated after 1 October 2023**, **and** regardless of when that date may fall, **the policy <u>must</u> be included in all default SIPs from 1 October 2024.**
Disclose and explain proposals – Chair's Statement asset allocation disclosure requirements	➢ All relevant schemes (as defined in the 1996 Scheme Administration Regulations) must disclose their default arrangement asset allocation in their Chair's Statement (the threshold limiting this obligation to schemes managing over £100m in assets has been removed). ➢ While the DWP proposes that only the highest level of granularity is required for asset allocation disclosures, it has included detail on suggested sub-asset classes which could optionally form part of these allocation disclosures in its draft statutory guidance. ➢ Trustees are required to "look through" funds when determining asset allocation.

[3] The Occupational Pension Schemes (Administration, Investment, Charges and Governance) (Amendment) Regulations 2023

	➢ The draft guidance confirms that where a scheme is sectionalised, asset allocation must be broken down for each section, and that where a scheme has more than one default arrangement, trustees should disclose the asset allocation for each default arrangement.
Performance-based fee exemption to DC charge cap proposal	➢ The amendments would add performance-based fees to a list of charges which are out of scope of the charge cap, though the exemption would not apply to any components of a performance fee structure which are not directly linked to investment performance (e.g. fixed rate management fees or other costs), which would remain subject to the charge cap. ➢ The performance-based fee must be agreed upon between the trustees and fund manager prior to investing. ➢ Trustees will be required to agree with the fund manager methods to mitigate the risk that the fee amount is increased as a result of short-term fluctuations in the performance or the investment valuation. ➢ Trustees will be required to disclose in the scheme's Chair's Statement any performance-based fee charges which members incur and to publish this section on a free to access website (in the same manner in which various other costs and charges incurred by members must currently be publicly disclosed). ➢ The value for members assessment already required in respect of other costs and charges will be extended to performance-based fees. ➢ Existing provisions allowing schemes to smooth or pro-rate the effects of performance fees for charge cap purposes will be repealed as a result of these changes to how performance-based fees are treated.

DWP CONSULTATION RESPONSE SUMMARY

Government responds to consultation on ERI regulation amendments for Master Trusts

As detailed further in our UK Pensions Update: June 2022, the Government recently launched a consultation proposing amendments to the employer-related investment regulations so that restrictions on ERI will broadly only apply to investment in the master trust funder, strategist or to persons associated or connected with them where the master trust has 500 or more participating employers. In its response to the consultation published in July, the Government noted that stakeholders were broadly in favour of the proposed amendments, with no major changes being made to the drafting of the regulations which came into force on **1 October 2022.** [4]

Government responds to consultation relating to policy proposals on Paris alignment reporting

The Government published its response to its consultation on policy proposals on Paris alignment reporting, including publishing finalised draft regulations and finalised guidance in relation to the Stewardship and Implementation Statement – no major changes were made to drafts previously circulated, as previously covered in our UK Pensions Update: January 2022. The amending regulations came into force on **1 October 2022**.

Government responds to 2019 consultation on regulations bringing CMA regime within the Pension Regulator's remit

Back in 2019, the DWP consulted on draft regulations designed to bring aspects of the CMA Order[5], which imposed duties on trustees, into pensions legislation. The draft regulations would also serve to bring the monitoring of and compliance with those trustee duties within the remit of the Pensions Regulator. The draft regulations were initially expected to come into force on 6 April 2020 but were subsequently delayed (as noted in our UK Pensions Update: March 2021).

[4] The Occupational Pension Schemes (Investment)(Employer-related investments by Master Trusts)(Amendment) Regulations 2022

[5] The CMA's Investment Consultancy and Fiduciary Management Market Investigation Order 2019.

The Government published its response to the consultation in June 2022 and the finalised draft regulations came into force on **1 October 2022**. Broadly, the regulations replicate the provisions of the CMA Order which imposed duties on pension trustees, with changes made since the original consultation serving to bring the regulations more closely in line with the provisions of the CMA Order.

ROUND UP

Updated guidance on pension scam transfer regulations	In the summer, tPR and the DWP published a joint statement addressing general industry concerns about delays impacting members' transfer requests as a result of the new transfer regulations (see our UK Pensions Update: January 2022). To tie in with the joint statement, tPR updated its guidance on the pension scam transfer regulations (originally published in November 2021), aiming to specifically "*address concerns about applying the regulations where overseas investments or small-scale incentives feature in the transfer*". Key changes made are that: ➢ the guidance now emphasises that though the presence of certain risk factors may require trustees to refuse statutory transfers, discretionary transfers may still be made (if scheme rules allow); ➢ the guidance suggests that trustees may consider discretionary transfers where they consider that a transfer is in the member's interests and does not pose a risk or poses a low risk to the member, even where red or amber flag risk indicators are present, such as: – where a red flag incentives risk indicator is present (the updated guidance notes that some activities which may be considered incentives under the regulations may be "*considered normal industry practices*"); or – where an amber flag overseas investments indicator is present. ➢ the incentive examples originally included have been removed and instead readers are directed towards an outline of what an incentive is (and is not) within the regulations. tPR has also flagged that the outline included within the regulations is non-exhaustive and that trustees must keep up to date with current and evolving scam tactics as well as considering industry good practice; and ➢ tPR notes that it still expects trustees to carry out enough due diligence on a discretionary transfer for them to be confident that they've fulfilled their fiduciary duties to the member.
Further judgment on forfeiture and pension arrears payments	In August, the High Court handed down judgment[6] in respect of a claim concerning the construction of a scheme rule which the sponsoring employer contended provided for the forfeiture of members' benefits after 6 years (such that arrears of underpayments should not be payable by the trustees beyond this temporal limitation). Following Axminster[7], Leech J confirmed that the rule in contention validly provided for the forfeiture of members' benefits in the specified circumstances. The judgment also confirmed that the appropriate rate of interest on pension arrears should be 1% above base rate, and that the Pensions Ombudsman was not a "competent court" for the purposes of recovery of overpayments via recoupment.
HMRC confirms tax status of interest payments on pension arrears	In its June pension scheme newsletter, HMRC confirmed that interest payments will qualify as scheme administration member payments where interest is provided on an arm's length commercial basis, so that these will be authorised payments. Specifically, where interest is provided at 1% above base rate in relation to pensions arrears paid in connection with equalising for unequal GMPs (in line with the *Lloyds* judgments), or at an interest rate specified in the scheme rules, HMRC has clarified (supplementing commentary in its February 2020 pension

6 CMG Pension Trustees Limited v CGI IT UK Limited [2022] EWHC 2130 (Ch)

7 Punter Southall Governance Services Limited v Jonathan Hazlett [2021] EWHC 1652 (Ch)

	scheme newsletter) that such an interest payment will be treated as a scheme administration member payment. HMRC has also confirmed that such interest payments will be taxable as interest under s. 369 of the Income Tax (Trading and Other Income) Act 2005.
tPR provides update on single code of practice progress	tPR has confirmed that its single code of practice "*is in its final stages*" and that it hopes it will be laid before Parliament "*towards the end of this year or the beginning of January*".
FCA confirms consumer duty applicable to occupational pension schemes	The FCA has published final rules and guidance for a new Consumer Duty which broadly requires firms to deliver good outcomes for retail consumers across a spectrum of financial services. While the FCA had previously confirmed that the Consumer Duty would not apply to pension schemes regulated by tPR, in its response to the December consultation, the regulatory body subsequently confirmed that beneficiaries of FCA-authorised occupational pension schemes will in fact constitute retail customers under the new rules (with the definition of "retail customer" in the rules being revised to reflect this). This is because while the trustee is legally the "customer" of an occupational pension scheme, in practice members are likely to regard the pension the way they would an individual pension and so schemes are likely to have a role in ensuring good outcomes for members. The implications of this confirmation are unclear, including the extent to which the Consumer Duty is applicable to DB schemes.

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