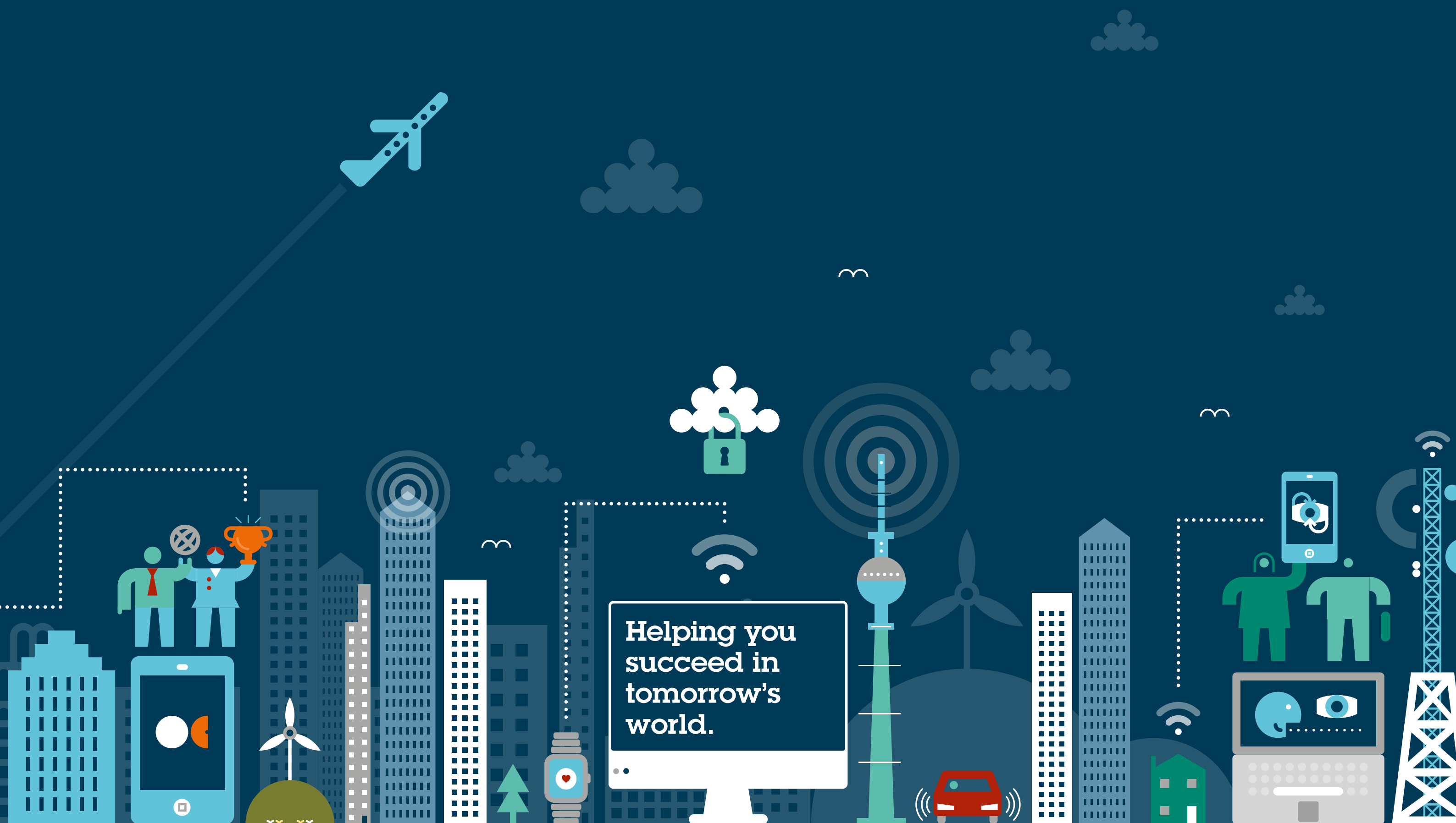
Osborne Clarke

Pensions Action Plan
Q1 2021



This action plan is a summary of changes and proposals in pensions law and regulation over the last quarter, which employers and trustees need to respond to now or in the coming year.

How to use the action plan

The action plan is divided into different subjects.

Changes requiring immediate action are identified in red.
Changes requiring action in the next 6 to 12 months are identified in blue.
Changes to note are identified in green.

The column on the left hand side of the table shows whether the issue applies to defined benefit schemes or sections (**DB**), defined contribution schemes or sections (**DC**) or both (**All**).

You can access the insights, papers and articles that are named in **orange** by clicking on them.

If you would like advice on any of the points raised in this action plan, please contact your usual Osborne Clarke contact, **Jonathan Hazlett** or **Jennifer Alldridge**.

Jonathan Hazlett
Partner, UK
T +44 117 917 3350
jonathan.hazlett@osborneclarke.com

Jennifer Alldridge
Senior Knowledge Lawyer, UK
T +44 117 917 4188
jennifer.alldridge@osborneclarke.com

Administration and Covid-19

All | Coronavirus Job Retention and Job Support Schemes

The Coronavirus Job Retention Scheme (CJRS) was due to end on 31 October 2020. It has now been extended into December to tie in with the announcement, by the Prime Minister, of a new national lockdown (subject to Parliament's approval, to start on 5 November and last until at least 2 December). The new Job Support Scheme (JSS), which was due to start on 1 November 2020, has been postponed until the end of the extended CJRS. We discuss the extension of the CJRS in our **Insight**.

Actions/Osborne Clarke Comment:

The new JSS will not be suitable for all employers. Employers should take advice on how the new JSS (or working arrangements outside of it) will impact their workplace pension and life assurance arrangements from early December 2020. Trustees (particularly the trustees of DB schemes and sections) should understand how a further national lockdown and the withdrawal of the CJRS are likely to affect the employer and consider the need to take further action (for example, increase communication with the employer and covenant monitoring).

All | Pension scams and cold calling

As part of its review of the impact of the introduction in 2015 of the pension freedoms, the Work and Pensions Committee is **investigating** pension scams (scale, types of scams and what more can be done to prevent them).

On a related note, following the introduction of the ban on 'cold calling' people about their pensions, the Information Commissioner's Office has **fined** CPS Advisory Ltd £130,000 for making over 100,000 unauthorised marketing calls to people about their pensions.

Actions/Osborne Clarke Comment:

Redundancies and wage reductions due to Covid-19 have created more opportunities for scammers. Trustees should review their communications and websites and agree with their administrators whether there is anything more they can do to flag the scam risk to members and remind them that they should not accept unsolicited calls about their pensions.

Automatic enrolment

DB	Call for evidence: alternative quality requirements for DB and hybrid schemes

The Department for Work and Pensions has held a **call for evidence** on the alternative quality requirements. The alternative quality requirements are the 'cost of accruals' and 'money purchase' tests for scheme quality which were introduced as alternatives to the 'test scheme standard' for employers who use a DB or hybrid pension scheme to meet their automatic enrolment duties.

The DWP asked for views on the following questions:

- are the alternative quality requirements continuing to deliver the intended simplifications and flexibility for employers and pension schemes that are unable to use the test scheme standard?
- in practice, who is carrying out the tests: the employer (self-certification) or its professional advisers?
- is there anything employers or schemes want to bring to DWP's attention about the operation of the alternative quality requirements, in particular regarding unforeseen issues when compared to the test scheme standard?

Actions/Osborne Clarke Comment:

The trustees and employers of DB or hybrid schemes which use the 'money purchase quality requirements' or 'cost of accruals' tests for scheme quality should take note of this call for evidence and look out for further developments.

Brexit

All	Action during the transition period

Negotiations between the UK and the EU continue. There are areas that seem likely to cause problems for pension schemes from 31 December 2020. These include the fact that some UK banks are **closing, or planning to close**, the UK bank accounts of customers who are based in the EEA.

Actions/Osborne Clarke Comment:

Trustees should continue to consider and plan for the impact of Brexit on the employer covenant and the scheme's administration, investment and funding position. As a part of this, they need to consider how they will ensure the continued payment of pensions to members who live in the EU.

Data Protection

All | Schemes must review data transfers outside of the UK and EEA

The Court of Justice of the European Union (CJEU) has **ruled** that the EU-US Privacy Shield is invalid because it does not contain sufficient limitations on the access to, and use of, personal data transferred from the European Union to the United States of America by US public authorities, especially the intelligence services. It has also said that, where the Standard Contractual Clauses are relied upon in connection with the transfer of data outside of the UK and EEA, the onus is on businesses and national data protection authorities to scrutinise transfers, and the parties' ability to comply with the Standard Contractual Clauses, on a case-by-case basis. We published this **Insight** on the CJEU's decision on the day it was handed down.

Actions/Osborne Clarke Comment:

Trustees need to consider whether they themselves 'transfer' personal data to the US in reliance upon the EU-US Privacy Shield and or anywhere outside of the UK and EEA in reliance upon the Standard Contractual Clauses. Trustees also need to ask their service providers whether they make such transfers and, if so, how and by when they will ensure compliance with the GDPR following the CJEU's ruling. Trustees should consider taking legal advice because 'transfer' for these purposes is widely defined.

DC

DC | All change from October 2021? Illiquid assets and scheme consolidation

In our **Q2 2019 Pensions Action Plan**, we reported that the government had consulted on proposals to facilitate investment by DC pension schemes in less liquid assets such as smaller and medium-sized unlisted firms, housing, green energy projects and other infrastructure. The original proposals were aimed at prompting larger schemes to consider investment in illiquid assets and smaller schemes to consider transferring into a larger scheme.

The government has now **published** its response to this consultation, combined with a new consultation on a series of changes to become law with effect from October 2021. The changes affect all DC schemes and sections but have a particular impact on the trustees of DC schemes with assets of less than £100 million. The trustees of these schemes will be required to complete and report the outcome of an annual 'value for members' assessment and, if the scheme is not offering value, decide whether to continue to operate (and improve value) or consolidate with a larger scheme such as a DC master trust. We discuss the proposed October 2021 changes in our **Insight**.

Actions/Osborne Clarke Comment:

The trustees of all DC schemes and sections need to understand how the intended changes will affect their scheme.

Trustees with assets of less than £100 million need to start to think about the new 'value for members' assessment, take advice and, if they have concerns, agree the action they can take before October 2021.

DC — New requirement to take guidance, or opt out, before accessing or transferring DC or cash balance benefits

In a previous edition of the pensions action plan, we reported that the Financial Guidance and Claims Act 2018 gave the Secretary of State the power to make regulations to require trustees to refer members to pensions guidance and ensure that members and beneficiaries either receive pensions guidance, or expressly opt out of receiving guidance, before putting DC or cash balance benefits into payment or paying a transfer. The Act also contains a second provision under which the FCA will need to introduce similar rules for personal pension schemes.

Following 'stronger nudge' trials with three pension providers, Guy Opperman has **confirmed** that the Department for Work and Pensions intends to bring both provisions into force and to introduce "*new information requirements from the age fifty*". The DWP has also published a **policy paper**, in which it confirms that "*trustees and managers will be required to take proactive steps to facilitate (Pensions Wise) appointments for their members and to present taking guidance as a natural part of the process of accessing pension savings*" and that it expects that "*The Pensions Regulator will provide guidance for trustees and managers to support them to implement this change*".

Actions/Osborne Clarke Comment:

The government intends to consult on draft regulations to come into force "*at the earliest opportunity*", but no clear timeline is given. The trustees and employers of DC and cash balance schemes and sections should take note of this announcement and look out for further developments.

All — Simpler annual benefit statements

The government has published its **response** to last year's consultation on simpler annual benefit statements for DC schemes used for automatic enrolment. Among other things, the response confirms that:

- The government will "*consult later this year on a mandatory approach to simpler statement templates … taking the two-page statement template originally developed during the course of the 2017 Review and included in our consultation document as the starting point in considering the length, content and design… and … work with industry on the detailed design of the template.*" It will consult on draft regulations and guidance.
- After those regulations have been implemented, the government will consult on how "*a similar approach for all remaining schemes*" (including DB and public service) could be delivered.
- It will also "*consult later*" on the idea of having a mandatory "statement season" in which all DC schemes send out their annual benefit statements.

Actions/Osborne Clarke Comment:

Trustees of DC schemes and sections used for automatic enrolment should take note of the consultation response and look out for the consultation on draft regulations and guidance. Trustees of other schemes should take note of the government's intention to consult on a similar approach to benefit statements.

DC | Small pots working group

To complement the work being done to establish pensions dashboards (which will give members a one-stop-shop for information about their pension arrangements), the government has **announced** the formation of a cross-industry working group tasked with reporting and making recommendations in relation to the difficult area of 'small pots'. Small pots result from members changing jobs but not consolidating their pensions savings. The group is expected to report later this year.

Actions/Osborne Clarke Comment:

This is not the first time this issue has come under the spotlight and many will remember proposals for a 'pot follows member' solution. Trustees should take note of this announcement and continue to follow developments.

Discrimination

All | New guidance: equalising benefits for the unequal effect of GMPs

In previous editions of the Pensions Action Plan, we reported on the **High Court's decision** in *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank PLC and others* that schemes must equalise benefits to address the unequal effect of Guaranteed Minimum Pensions (GMP). We have also reported developments since the judgment was handed down.

There has been one development in the last quarter: The pensions industry working group has published **guidance** for trustees who are *"in the early planning stages of GMP equalisation where they are considering how they will approach their communications"* with members. The guidance includes:

– principles that schemes can follow when planning member communications;

– a "question & answer" document that schemes can adapt and use to answer questions from members; and

– a checklist of documents and member communications which schemes are likely to need to review in connection with their GMP equalisation project.

Actions/Osborne Clarke Comment:

Trustees should discuss with their advisers this new guidance and the steps they should take now to progress their GMP equalisation project.

All | Consultation: indexation of GMPs

HM Treasury is **consulting** on three options for ensuring that public service pension scheme members reaching their state pension age on or after 6 April 2016 continue to have their pension payments fully indexed and equalised. The consultation is also relevant to private sector schemes whose rules provide for pensions in payment to increase on the same basis as public service pensions.

The problem area is the Guaranteed Minimum Pension (GMP) earned by members whose employments were contracted out of the additional state pension between April 1978 and April 1997. Until 5 April 2016, the government paid members the difference between a fully indexed additional state pension and the GMP they received from their scheme (which only included indexation on GMP earned after April 1988).

When the new single state pension was introduced on 6 April 2016, the government stopped funding this indexation top up in most contexts. A different approach was taken for public service schemes where it was agreed that, for anyone reaching state pension age between 6 April 2016 and 5 December 2018 (later extended to 5 April 2021), the scheme would provide full indexation of the GMP. This temporary fix also applied to private sector schemes whose rules provide for pensions in payment to increase on the same basis as public service pensions.

With 2021 fast approaching, the government is seeking views on three options for members who reach state pension age after 5 April 2021.

Actions/Osborne Clarke Comment:

Private sector schemes whose rules provide for pensions in payment to increase on the same basis as public service pensions should take legal advice. Most of the schemes affected by this approach to GMP indexation will already be aware of it and will want to discuss what the consultation (which is open until 30 December 2020) means for them. There may be schemes who are not aware of this issue and who need to look at the position from 2016 onwards.

Investment

All | Implementation statements

The trustees of DC and DB schemes must now include in their annual report an implementation statement in relation to their statement of investment principles. They must also publish this statement online. The things the implementation statement must cover and the date by which it must be published online depend on whether the scheme is DC or hybrid, or DB. DB schemes have less to report upon and a little more time to publish, but all schemes must publish online by 1 October 2021. To help trustees to comply with these requirements, the Pensions and Lifetime Savings Association has published **guidance and templates**. The PLSA's implementation statement guidance covers:

– what trustees must do and by when (distinguishing between DB schemes and DC or hybrid schemes);

– general principles and specific considerations to help trustees to prepare good statements;

– specific guidance on voting behaviour disclosures (including for cases where there are pooled funds or platform providers); and

– 'top tips' for investment and responsible investment communications.

There are also vote reporting templates for asset managers and guidance for trustees and managers on how to use those templates.

Actions/Osborne Clarke Comment:

Trustees need to understand when they must prepare their first implementation statement, what they must include in it and by what date they must publish it online. They should consider taking legal advice on this and on compliance.

All | Consultation: improving climate risk governance and reporting

The government has **consulted** on proposals that include:

– requiring the trustees of schemes with £5 billion or more in assets, together with authorised master trusts and collective money purchase schemes, to have "*effective governance, strategy, risk management, and accompanying metrics and targets for the assessment and management of climate risks and opportunities*" from October 2021;

– requiring those trustees to report on these in line with the Task Force on Climate-related Financial Disclosures' (TCFD) recommendations (and publish that report) by the end of 2022 at the latest;

– extending the same requirements to schemes of £1 billion or more in assets in 2023;

– reviewing the position in 2024 and consulting again before extending these requirements to all other schemes; and

– consulting "*soon*" on mandatory "Paris alignment reporting" (requiring trustees to report the implied temperature rise or warming potential of a portfolio to help them to assess and manage climate related risk).

The consultation document confirms that the government will consult on supporting regulations in due course. It will also publish new statutory guidance to sit alongside the non-statutory guidance we discussed in our **Q3 2020 Pensions Action Plan**. We discuss the proposals in more detail in our **Insight**.

Separately, the Financial Conduct Authority has **confirmed** that it intends to introduce TCFD obligations for asset managers and personal schemes from 2022. The requirements might apply to the "*largest or most interconnected firms*" first, but asset manager disclosures would help trustees and members.

Actions/Osborne Clarke Comment:

The trustees of schemes with £5 billion or more in assets and of authorised master trusts should discuss the proposed changes with their advisers. The trustees of all other schemes should take note of the proposals and discuss with their legal and investment advisers what action to take in response to these changes and the non-statutory guidance on making TCFD disclosures.

Trustees might also be interested in:

– **the Pensions Regulator's recent comments** on the importance of climate-aware investment;

– a **recent report** by the Pensions and Lifetime Savings Association on the challenges facing trustees in this area and solutions to them;

– the Impact Investing Institute's **five guiding principles for trustees** on impact investing; and

– the Pensions and Lifetime Savings Association's **"made simple" guide to climate indexes** (how they work and how they can help with risk good stewardship).

Pension Schemes Bill

All | Pensions dashboard not expected until 2022-23

The Pensions Dashboard Programme (PDP) has published an **update on progress** and a **timeline for the development** of pensions dashboards. The first version of the data standards (the data schemes will need to make available) is due in December 2020. Voluntary on-boarding and testing is scheduled for 2022 and the staged (compulsory) on-boarding of schemes is expected to begin in 2023. As a result, the first dashboard is unlikely to be available for use by pension savers before 2023.

The PDP has also **launched** a Usability Working Group to help make sure the needs of pensions dashboard users are taken into account in design.

Actions/Osborne Clarke Comment:

Trustees should take note of this timeline and look out for the data standards.

All | Pension Schemes Bill

In previous editions of the Pensions Action Plan, we have reported on new draft legislation for pensions, the Pension Schemes Bill. The Bill **includes** provisions relating to, for example, scheme funding, moral hazard, new criminal offences, new civil penalties, pensions dashboards and statutory transfer rights. The Bill is currently being considered by a Public Bill Committee, which is expected to report to the House of Commons by 5 November 2020.

Actions/Osborne Clarke Comment:

It seems likely that the Bill will become law either later this year or very early next. Employers who are considering (and trustees who become aware of) any change which could affect a DB scheme should discuss with their legal advisers the potential for the new moral hazard provisions to apply to changes that are made now, before the Bill becomes law. In addition, all trustees and employers should read about the consultation on "improving climate risk governance and reporting" in the **Investment** section of this Pensions Action Plan.

Pensions tax

All | Minimum pension age to rise from 55 to 57 in 2028

In an answer to a written parliamentary question, the economic secretary has **confirmed** that the government still intends to legislate to increase the normal minimum pension age from 55 to 57 from 2028. This will mean that, in most cases, pension schemes will be making unauthorised payments if they allow members to take their benefits before age 57.

Actions/Osborne Clarke Comment:

The members and employees who will be affected by this change need to start to take account of it in their financial and retirement planning. Trustees and employers should consider when and how to communicate it, preferably starting as soon as is possible.

Restructuring and insolvency

All | Corporate Insolvency and Governance Act 2020

In our **Q4 2020 Pensions Action Plan**, we reported that the Corporate Insolvency and Governance Act 2020 had come into force on 26 June 2020. The Act and related regulations introduced:

- a new 20 business day (extendible) moratorium to give companies breathing space from creditors while they seek a rescue;
- a new restructuring procedure for companies facing financial difficulties, including "cross-class cram down" provisions allowing dissenting creditors to be bound;
- temporary restrictions (1 March to 30 September 2020) on the use of statutory demands and winding-up petitions;
- greater protection for the supply of goods and services to a company which is in an insolvency process, to help support company rescue;
- a temporary relaxation of wrongful trading liability for directors (1 March to 30 September 2020), but not including financial services companies;
- an extension of government oversight of pre-pack administrations to connected persons until June 2021 (with an option to extend again); and
- temporary easements of the rules relating to Annual General Meetings and of Companies House filing requirements.

The government has now **confirmed** that most of the measures that were temporary will apply until the end of December 2020 (or, in some cases, 30 March 2021). The temporary relaxation of wrongful trading liability for directors has not been extended and came to an end on 30 September 2020. The detail is set out in **regulations** made on 23 September 2020, but modified in relation to moratoriums by **a second set of regulations**. Regulations relevant to the creditor rights of the Pension Protection Fund have also been **remade** to correct a procedural error.

Actions/Osborne Clarke Comment:

The changes made by the Act could have a significant impact on pension schemes. Trustees and employers should read our **Insight**, take note of the extensions discussed above and take legal advice if any of the changes could soon be relevant to them.

DB | Change in the law for pre-pack administrations

The government **is going to** change the law to require mandatory independent scrutiny of pre-pack administration sales where connected parties (for example, existing directors or shareholders) are involved in the purchase.

Actions/Osborne Clarke Comment:

Any party considering or involved in a pre-pack administration where connected parties are involved in the purchase should discuss this development with their legal advisers.

Superfunds

DB | Further guidance on transfer to a DB superfund

In our **Q4 2020 Pensions Action Plan**, we reported that the Pensions Regulator had issued new guidance for those setting up and running DB superfunds. The Pensions Regulator has now published **new guidance** for trustees and employers who are considering transfer to a DB superfund. The guidance confirms that the regulator expects employers to apply for clearance before a transfer to a DB superfund (with the trustees having a critical role) and is accompanied by a **DB superfunds list**, to which the regulator will add the names of superfunds in respect of which it will consider a clearance application. It also confirms three "gateway principles" which must be met before transfer can be considered and sets out special considerations for schemes which are considering transfer to a superfund on exiting a Pension Protection Fund assessment period.

Actions/Osborne Clarke Comment:

Transfer to a DB superfund will not be appropriate in every case but superfunds will add to the number of de-risking options that are available to DB pension schemes. Employers and trustees who are considering de-risking, whether by transfer to a DB superfund or otherwise, will need to take legal and other advice.

The Pensions Regulator

All | 15 year corporate strategy

The Pensions Regulator has **published** a **discussion paper** in which it sets out its provisional corporate strategy for the next 15 years. This identifies different cohorts of pension savers and challenges, and suggests strategic priorities. The strategic priorities are: security, value for money, scrutiny of decision-making, market innovation, and bold and effective regulation. The strategy recognises the huge growth in DC and confirms that the regulator will *"over the 15-year horizon of this strategy, shift (its) primary focus to the security and value that these schemes provide savers"*. It also confirms that the regulator anticipates the consolidation of DB and DC schemes will continue. The feedback period runs until 16 December 2020 and the final strategy will be published in the new year.

Actions/Osborne Clarke Comment:

Trustees and employers should take note of this development.

All | New powers to access communications data

In our **Q4 2020 Pensions Action Plan**, we reported that draft regulations had been laid before Parliament which would add new authorities, including the Pensions Regulator, to the list of public authorities that can access *"communications data"* for the purpose of *"where it is wholly or partly events data, preventing or detecting serious crime, and in any other case, for the purpose of preventing or detecting crime or of preventing disorder"*. Those regulations have now been **made** and have come into force. The Pensions Regulator is reported to have said that it will use the new powers to help in the fight against pensions scammers, but the draft regulations do not restrict it to this particular crime prevention purpose.

Actions/Osborne Clarke Comment:

Trustees and employers should take note of this development.

The Pension Protection Fund

DB PPF consults on levy rules for 2021/22

The Pension Protection Fund (PPF) is **consulting** on its levy rules for 2021/22 (how it will calculate the levy for invoices issued in 2021).

In this consultation and partly because of the uncertainty introduced by the Covid-19 pandemic, the PPF has not proposed setting levy rules for the next three years as it usually would. Instead, it is looking to introduce rules which will only apply for 2021/22 and which the PPF hopes *"will provide material assistance to the schemes and employers with the most significant levies."*

As such, the levy estimate for 2021/22 is proposed to be set at £520 million (£100 million lower than 2020/21). The PPF also proposes changes to reduce the levy for smaller schemes (by half for schemes with sub £20 million assets, with tapering for schemes with up to £50 million assets) and to reduce the risk-based levy cap on unstressed liabilities from 0.5% to 0.25%). If adopted, it expects 90% of schemes to see a risk-based levy reduction relative to their 2020/21 invoice. The PPF is also asking for views on, amongst other things, whether it should extend its Covid-19 payment easement to levy invoices issued in 2021.
The consultation will remain open until 24 November 2020 and the PPF expects to publish its final rules for 2021/22 at the end of January 2021 (this is later than previous years, when final levy rules were published in mid-December). Electronic contingent asset certificates are still, however, expected to be submitted by the end of 31 March 2021.

Actions/Osborne Clarke Comment:

Trustees and employers should discuss this consultation, and the impact the proposed changes are likely to have on them, with the advisor who usually supports them in connection with their PPF levy.

DB Updated actuarial factors

The PPF has updated the actuarial factors for **converting compensation into a cash lump sum**, or taking PPF compensation **earlier** or **later** than the applicable normal pension age. It has also updated its **step-down factors**. The new factors will apply to retirements on or after 1 October 2020.

Actions/Osborne Clarke Comment:

The trustees of schemes in a PPF assessment period should discuss the new factors with their legal and actuarial advisers.
If the trustees already apply PPF actuarial factors, they will need to apply the new factors from 1 October 2020. If they are considering whether to apply the PPF's actuarial factors on or after 1 October 2020, they will need to refer to the new factors as part of their decision making process.

DB PPF and DWP to appeal High Court ruling

In our **Q4 2020 Pensions Action Plan**, we reported that the High Court had ruled that the method the PPF is using to implement the Court of Justice of the EU's ruling in the case of *Grenville Hampshire v The Board of the Pension Protection Fund* (that is, to make sure that each member has PPF compensation of at least 50% of the value of their original scheme benefits) is permissible (*Hughes and others v The Board of the Pension Protection Fund*).

However, the High Court suggested that the trustees of schemes in a PPF assessment period should pay benefits in line with the Hampshire decision (the 50% requirement) and the Bauer decision (in addition to the 50% requirement, payments must prevent the member from falling below Eurostat's at-risk-of-poverty threshold for the UK) instead of the PPF compensation rules set out in legislation. It also ruled that the PPF compensation cap (£41,461.07 for 2020/21) is unlawful.

The PPF has **confirmed** that it intends to appeal the parts of the decision relating to its methodology and that the Department for Work and Pensions intends to appeal the decision on the PPF compensation cap.

Actions/Osborne Clarke Comment:

We discuss the High Court's decision in *Hughes and others v The Board of the Pension Protection Fund* in our **Insight**. The trustees of schemes in a PPF assessment period, or of schemes which are preparing for a PPF+ buy out, should discuss the decision with their legal advisers.

DB | Responsible investment, including climate change

The PPF has **published** its first responsible investment report and its **annual report and accounts** for 2019/20. The responsible investment report is particularly interesting because it shows how the PPF is approaching responsible investment, while the annual report and accounts contains the PPF's first TCFD disclosure.

Actions/Osborne Clarke Comment:

Trustees might be interested to take a look at these reports. The report and accounts also provides an update on PPF activities and notes that the PPF now has assets under management of over £36bn.

Trustees

All | Voluntary code of practice for professional corporate sole trustees

The Association of Professional Pension Trustees has released a new **voluntary code of practice** for professional corporate sole trustees (PCST). The code has been prepared after consultation with TPR and will apply from 1 January 2021. It is "*not intended to apply to Master Trusts or "captive" corporate trustees established for the sole purpose of running one or more pension schemes associated with a single employer or group of employers*".

Actions/Osborne Clarke Comment:

Employers who are in the process of appointing a PCST should seek assurance that the trustee will comply with the code. Employers who have already appointed a PCST should ask them whether and by when they intend to comply.

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Key contacts

Jonathan Hazlett
Partner, UK
T +44 117 917 3350
jonathan.hazlett@osborneclarke.com

Jennifer Alldridge
Senior Knowledge Lawyer, UK
T +44 117 917 4188
jennifer.alldridge@osborneclarke.com

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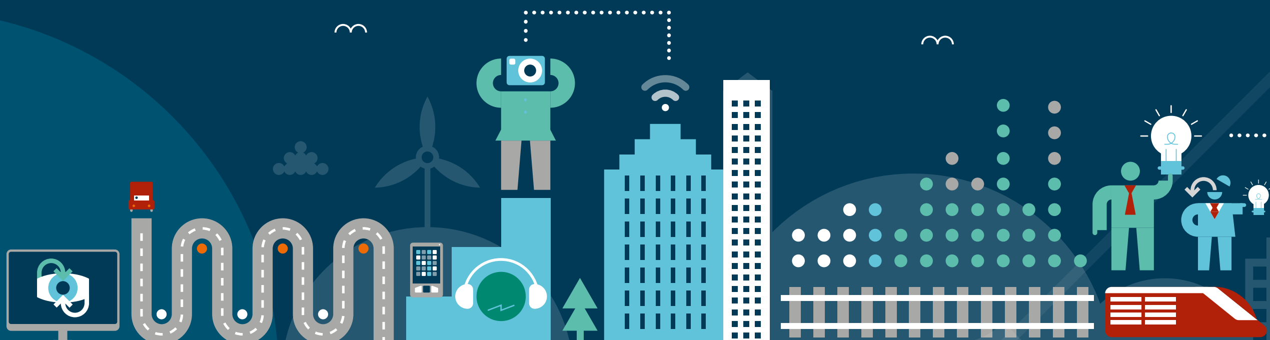

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