The Slaughter and May Podcast

Recent pension law developments

Hello my name is Richard Goldstein, I'm a consultant and Head of Pensions Knowledge at Slaughter and May. In this first podcast I'm going to cover Pensions Regulator's guidance on reporting requirements following the end of its COVID-19 easements. I'm going to cover guidance on DV Super Funds, compliance with trustees' obligations on fiduciary management services and investment consultants, and the pensions impact of the Corporate Insolvency & Governance Act.

So starting with COVID-19, TPR has updated a number of documents to reflect the ending on 30th June 2020 of the easements on reporting breaches. From 1 July, pension scheme trustees are required to resume reporting information to TPR as part of the updating the DB schemes funding and investment advice for trustees has been rewritten. There are new sections on dealing with difficult decisions, the value of obtaining focused advice and TPR's regulatory approach to suspending and reducing contributions. Starting with reporting obligations. From 1 July, pension scheme trustees required to resume reporting information to TPR including suspended or reduced contributions. Trustees will need to submit a revised recovery plan or a report of missed contributions in line with legislation and the DB funding code. For missed contributions, trustees will also be expected to inform members in line with a code of practice on reporting late payment of contributions. Also, late valuations and recovery plans not agreed will need to be reported and any delays in CETV quotations and payments. TPR says it will continue to regulate pragmatically and sympathetically.

Other areas covered in the guidance include late payment DC schemes, TPR will continue to give DC an auto-enrolment proviso of 150 days instead of 90 days to report late payment of contributions. TPR says this extension will be reviewed at the end of September 2020. On pension transfers, trustees should continue to issue the letter template to all members requesting a CTV quote and monitor requests for concerning patterns. Trustees who identify unusual or concerning patterns should report this to the FCA.

On annual benefit statements, TPR says it is continuing to take a pragmatic approach to annual benefit statements, accepting that the impact of COVID-19 means schemes need additional time to issue them to members. On account, trustees will be asked to report any failure to prepare audited accounts, but TPR will not be looking to take enforcement action on late accounts signed off by 30 September 2020. The legislation on the Chair's statement does not allow TPR discretion to waive penalties, and this applies to late issuance or inadequate content of those statements. The statements must be included in their annual report and accounts but can be prepared and signed off separately. TPR says that it does not expect reviewing statements before autumn 2020.

The next guidance that TPR has updated is on Scheme Funding and Investment. First, in terms of suspending or reducing contributions, employers are now likely to have financial projections reflecting the likely impact of COVID-19, enabling trustees to review in more detail the business case for a new or continuing suspension or reduction. These may be appropriate but TPR says it does not expect trustees unquestioningly to extend their original suspension arrangements on a 3 month rolling basis. Trustees should consider whether it is in the best interests of members to agree a suspension or reduction, even where the request is part of a larger coordinated request across other stakeholders that may appear equitable. The guidance sets out the protections the trustees should seek including cessation of evidence or other forms of shareholder distributions until deferrals of suspended contributions are paid. The agreement of triggers for contributions to restart increase contributions agreeing legally enforceable

protections to avoid the scheme being unfairly prejudiced as compared to other spare shareholder or stakeholders.

In this next section, I want to talk about DB consolidators and TPR's interim regulatory guidance. Under pressure to keep pace with market developments, including burgeoning new capital investment models, TPR's updated its guidance on DB commercial consolidators. These super funds are set up to accept bulk transfers of assets and liabilities from other DB schemes to provide an alternative way for response and to separate itself from the scheme. The guidance which is immediate effect sets out the standards TPR expects to be met by super funds in the interim period before new legislation is in place. It also highlights issues for employers and trustees considering a transfer to a super fund. TPR has published guidance on a framework for regulating super funds. It follows a consultation last year, the guidance sets out minimum standards in the interim period. Super funds will be expected to obtain confirmation from TPR that they meet these standards before accepting any transfers into the schemes. The guidance requires trustees' directors, who run super funds, to submit information to TPR that demonstrates:

1. The super fund is financially sustainable and has adequate contingency plans to manage funding level triggers, as well as ensuring an orderly exit from the market

2. TPR will require super funds to hold sufficient assets to meet these promises to members with a high degree of certainty.

This will include a requirement for liabilities to be calculated using specific assumptions and for additional assets to be held in a capital buffer available to the trustees of the scheme and specified events. The super fund will have to be funded on a prudent basis. The super fund will also need to be run by fit and proper people, capable of being supervised by the trustees and has effective governance arrangements in place. The super fund must have sufficient and administrative systems and processes to ensure that it is run efficiently. Employers making transfers to super funds must supply for clearance. Transferring to a super fund removes the employer covenant and therefore is potentially a Type A Event. TPR expects to see evidence of receiving trustees due diligence. TPR will not issue any clearance statements for any entry to a super fund before they have assessed the super fund against their criteria, and super funds will need to provide prospective senior employers and trustees with full details of their offering. The guidance confirms that there will be these gateway tests, as proposed in the consultation. A super fund should not accept a transfer from a seeding scheme that has the ability to buy-out or is in the course to do so within the foreseeable future, for example in the next 5 years. TPR will be updating its equivalent guidance for trustees and for employers on a transfer to a super fund. The current versions make it clear that TPR will need to be convinced that the trustees consider a transfer to be in the best interests of beneficiaries compared with maintaining the link with the employer on an insurance buy-out. Independent covenant advice will be essential. TPR will also assess whether any deterrent to the scheme has been adequately mitigated.

I wanted to cover deadlines of fiduciary management and investment consultancy compliance statements. The obligations on trustees to carry out compulsory competitive tenders for new suppliers of fiduciary management services and also to set objectives for investment consultants have been in place since December 2019. They were introduced by the CMA under an Order. On 2 June 2020, the CMA has published an update on the process and timing for compliance statements, arising from its investigations into investment consultants. The requirements originally set out in an Order made on 10 June 2019 and which had effect from 10 December 2019. The Order contains the requirements for pension scheme trustees to:

1. Carry out a competitive tendering exercise for appointment of fiduciary managers for new appointments after 10 December 2019, and

2. Set strategic objectives for providers of investment consultancy services.

This has to be in place also by 10 December 2019. Under the CMA Order, compliance statements by the various parties, including the trustees, must be made to the CMA confirming the extent to which those requirements have been met and these have to be made by the following deadlines: 8 July 2020 for fiduciary management proviso in relation to performance information provision, and 7 January 2021 for other requirements, including trustees in relation to compulsory competitive tenders, an objective setting for investment consultants.

If any parties, including trustees, are aware of any failure on their part to comply, they must report this to the CMA within 14 days of becoming aware of failure to comply and provide a brief description of the steps taken to address the failure. DWP regulations that would replace the Order published for consultation back in July 2019, provide for the TPR to carry out this monitoring compliance on enforcement. Instead of a compliance statement being sent to the CMA, trustees would be required to use the existing scheme return process to report compliance. However, there remains no news on when these delayed regulations will be finalised and unless and until, the CMA regime is superseded by DWP regulations, trustees must use this process to report compliance.

In the final item, I wanted to cover the Corporate Insolvency & Governance Act. The Corporate Insolvency & Governance Act received royal assent on 26 June 2020. The Act introduced measures to provide greater flexibility for companies to explore rescue options and temporarily to protect companies from creditor action, including a new statutory moratorium and a new restructuring plan process. There are two main pensions related areas of concern that have been well publicised, the first being super priority stated for unsecured banking and finance debt during a moratorium and the fact that neither the moratorium nor the restructuring plan count as qualifying insolvency events for the purposes of the employer debt legislation or the PPF entry requirements. So that no debt is triggered and neither the trustees nor the PPF have a seat at the table. However, as a consequence of concerns raised by the pensions industry, the Government did amend the bill before it was enacted to ensure the following:

1. It would not be possible for banks to accelerate payments of their debts during a moratorium in such a way that the total amount of unsecured debt has super priority ranking ahead of the pension scheme;

2. During a moratorium, the PPF will be given rights to information and the right to challenge the actions of the directors and/or the monitor of the moratorium;

3. On a restructuring plan, both the PPF and TPR will be entitled to receive copies of all the information sent to creditors, and

4. Finally, on both procedures, it will be possible to provide creditor rights to the PPF subject to the appropriate constraints.

That ends this podcast for this month – I hope you enjoyed it. If you have any comments or questions you would like to raise with me, please feel free to email me at richard.goldstein@slaughterandmay.com. Many thanks.