

The Pensions Brief

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Issues affecting all schemes

Corporate Insolvency and Governance Bill 2019-21

The Corporate Insolvency and Governance [Bill](#) 2019-21 had its first reading in the House of Commons on 20 May 2020. Its aim is to provide flexibility and breathing space to businesses so they can continue trading during the period of economic uncertainty arising from the COVID-19 pandemic. It will introduce measures including:

- A new process allowing companies and LLPs that may be heading for insolvency to obtain a moratorium lasting 20 business days to give them time to restructure or seek new investment. The directors will have to make a statement that the company is, or is likely to become, unable to pay its debts and a licensed insolvency practitioner must make a statement that it is likely that a moratorium would result in the company being rescued as a going concern. The initial period of 20 business days can be extended without creditor consent for a further period of 20 business days. Further periods will be available only with creditor consent or by the court.
- A new restructuring procedure will be available, allowing solvent and insolvent companies to propose a restructuring plan, which would be voted on by creditors and would also need court approval.
- Provisions will be made that temporarily suspend parts of insolvency law, including the provisions imposing liability for wrongful trading.

- There will be temporary easements on certain company filing obligations and requirements relating to AGMs and other meetings.

The new measures will help employers suffering temporary financial difficulties. This is likely to be welcomed by pension scheme trustees to the extent that it means the employer can continue to support their pension scheme. But the protection from creditors offered by the moratorium provisions may be less welcome in that trustees would not, during the moratorium period, be able to enforce payment of, for example, a s75 debt.

Action

Trustees of schemes where the employer is in difficulties will want to familiarise themselves with the new measures and take advice on the implications for their scheme.

The Pensions Regulator blog “COVID-19: Transfer your attention”

On 26 May, the Pensions Regulator published a [blog](#) drawing together the points made about transfers that appear in [guidance](#) already published on the Regulator’s website.

The Regulator has acknowledged that trustees may currently be having difficulties in meeting the statutory deadlines for issuing statements of entitlement or getting transfer payments made. In response, the Regulator has said that it will not take enforcement action where trustees of defined benefit schemes have not been able to meet the relevant statutory deadline because of problems resulting from COVID-19. This easement is only in effect until the end of June 2020 and the Regulator says that trustees should take advice before making a decision to delay.

The Regulator repeats its concern about members being persuaded to transfer out of their employer’s pension scheme by scammers. It has published a warning [letter](#), signed by the Regulator, the Money and Pensions Service and Financial Conduct Authority, for trustees to send to members when sending a transfer value quotation. The letter also directs members to the [ScamSmart](#) website.

For defined contribution schemes, the Regulator says that the regulatory easement in relation to statutory deadlines for transfers does not apply. Under the pension legislation, defined contribution transfers are a core financial transaction which should be given priority, along with the other core processes, during the coronavirus crisis.

Action

Trustees should take advice if they wish to delay transfers and ensure their scheme administrator is aware of the Regulator’s recommendations on responding to transfer requests.

Further Treasury Direction – furloughed employees acting as trustees

HM Treasury has issued a [Further Treasury Direction](#) which clarifies the position of employees furloughed under the Government’s Coronavirus Job Retention Scheme (CJRS) who continue to act as trustees of their employer’s pension scheme. The CJRS requires an employee who is on furlough to have ceased all work for their employer. This Further Treasury Direction provides that, where the employee is undertaking work for the “sole purpose of fulfilling their duties as a trustee”, that work will be disregarded in determining whether the employee has ceased all work for the employer.

This exemption does not apply to independent trustees or where the business activities of the employee’s employer include the provision of trustee services.

Action

For noting.



Issues affecting DB schemes

The Pensions Regulator blog: DB funding code consultation

In a [blog](#) dated 18 April, the Regulator responded to calls to rethink or abandon the first part of its consultation on a new DB funding code of practice, which was published on 3 March 2020 (see our March 2020 [legal update](#)). The Regulator had received representations saying that the consultation document was written in different, more benign, economic conditions and it is now out of place.

The Regulator says it believes that it is still appropriate to seek views on the subject matter of the first part of the consultation. This is the proposed new regulatory approach, the principles underpinning the new framework, and how those principles could be applied in practice. The Regulator points out that the COVID-19 crisis has shown the importance of a flexible funding regime which enables trustees and employers to withstand significant economic fluctuations.

However, recognising that many stakeholders, advisers, trustees and employers are busy dealing with the immediate impacts of COVID-19, the Regulator has extended the deadline for responses to the consultation. The consultation was due to end on 2 June 2020 and has now been extended to 2 September 2020. The Regulator says it will continue to review the situation and consider whether a further extension is required.

Action

Any trustees wishing to make a response to the first part of the consultation now have an extended deadline.

Issues affecting DC schemes

Update to Pensions Regulator COVID-19 guidance

The Regulator issued an update on 21 May to its “DC scheme management and investment: COVID-19 [guidance](#) for trustees”.

This update relates to the situation where:

- members have chosen investment funds (in particular, property funds) that have now been temporarily closed until the market normalises; and
- trustees have decided to redirect contributions into alternative funds until the closed funds re-open.

Redirecting contributions could result in the alternative funds becoming “default arrangements” and therefore subject to legal requirements such as the charge cap (if the scheme is used for automatic enrolment) and the requirement to have a statement of investment principles for that default arrangement.

The Regulator says that it believes that the only circumstances where a default arrangement would not be created are if either:

- members were made aware before they selected the original fund that contributions could be diverted to another fund in certain situations; or
- the trustees contacted the members before diverting contributions and obtained their consent

However, the Regulator says that it will continue to take a pragmatic approach to decide whether it would be appropriate to take action in individual circumstances.

Action

Trustees who have diverted members’ contributions away from closed funds and into alternative funds should take advice as to whether a default arrangement has been created.

PLSA template for annual Chair's statement

Defined contribution pension schemes must include a Chair's governance statement in their annual report that includes detailed information about various matters set out in legislation. For example, it must explain the scheme's investment strategy and its governance, the processing of core financial transactions, the disclosure of member-borne transaction costs and charges, the assessment of value for members; and how the trustees have met trustee knowledge and understanding requirements.

The Pensions Regulator has made it clear in its "DC scheme management and investment: COVID-19 [guidance](#) for trustees" that it has no discretion in using its enforcement powers in relation to failure to prepare a Chair's statement. Penalties for failing in the duty to produce a Chair's statement in line with the legislation are mandatory and the Regulator will continue to impose such penalties in the usual way.

Many trustees have found the preparation of the Chair's statement a challenging task and some have fallen foul of the very detailed requirements of the legislation, resulting in penalties being imposed.

The Pensions and Lifetime Savings Association (PLSA) has now published a [template](#) to help pension scheme trustees in the production of their Chair's Statement.

Whilst the PLSA template has the support of the Regulator, it has made it clear that the template does not provide a complete solution. David Fairs, the Regulator's Executive Director of Regulatory Policy, Analysis and Advice has said: "The template doesn't remove the need for trustees to carry out the fundamental analysis forming the foundation for a chair's statement or consider how the statement requirements apply in the case of their scheme, but it should help in collating the information needed and help to present this clearly to savers."

Action

Trustees may wish to use the PLSA template as a starting point for drafting their Chair's statement.

Mayer Brown news

Upcoming events

- **Trustee Foundation Course**
15 September 2020
8 December 2020
- **Trustee Building Blocks Classes**
16 June 2020 – trustee discretions and decision-making
17 November 2020 – DB funding and investment

Due to the COVID-19 restrictions, our events will be hosted via telephone/video conference until further notice. We will provide further details nearer the time of each event.

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Please speak to your usual contact in the Pensions Group if you have any questions on any of the issues in this Brief.

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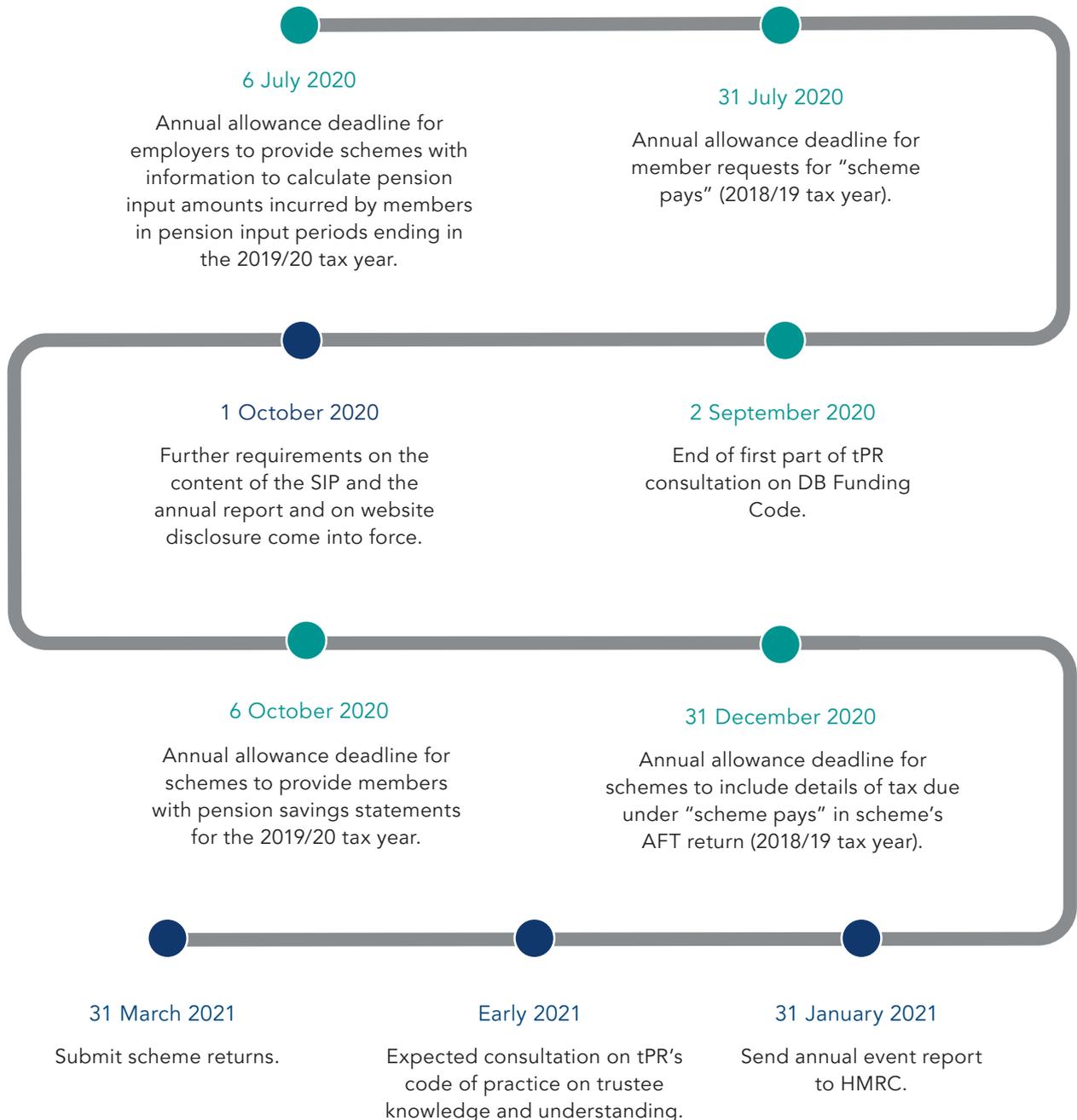
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Dates to note over the next 12 months



Key:

- Important dates to note
- For information

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