



CMS Specialist Counsel:

Pensions Regulator Investigations

CMS Specialist Counsel:

Experts ready to go

Pensions regulatory and criminal investigations are pressurised, disruptive and come with high risk.

Navigating through an investigation is about more than understanding the law. It is about managing an intensive and document-heavy process, often in a short space of time, whilst planning strategically to achieve the best overall outcome. The CMS Pensions Team has the experience and depth of resource to assist quickly and effectively.

The Pensions Regulator (“TPR”) has extensive powers to investigate anyone involved in matters affecting a pension scheme – both businesses and individuals. TPR has been opening investigations more frequently as part of its “clearer, quicker, tougher” approach, and we expect this trend to continue, with pressure on TPR to demonstrate that it is using the powers granted to it by the Pension Schemes Act 2021.

Most commonly we see TPR launching investigations where there has been:

- difficulty agreeing a valuation for a pension scheme,
- (perceived) governance issues with the running of the scheme, or
- corporate activity impacting the pension scheme in a negative way.

TPR’s investigative powers are broad ranging, and the process is different from supervision, or from other kinds of disputes. Investigations can include TPR demanding huge swathes of documents, requiring your attendance at interviews, and searching your premises. You may need to respond to detailed warning notices with witness and expert evidence, potentially culminating in a hearing before TPR’s Determinations Panel.

Non-compliance with an investigation may be a criminal offence or result in a civil penalty starting from £50,000, even if the investigation does not result in TPR using any of its other powers. Compliance with the process is vital.



How we can help

The early steps in an investigation process can be pivotal: they can nip the investigation in the bud or set the stage for a much more invasive and lengthy process ahead.

You therefore need pensions specialists you can trust for their expertise and commercial acumen and who can get stuck in immediately, meet tight deadlines and help manage the entire process from start to finish.

Specialist Counsel

Even if we are not your regular legal advisers, our specialist team can help you respond to a regulatory investigation. We can work alongside your existing advisers, bringing:



Capacity at hand to handle even the largest investigations, and respond at speed

We have strength in depth from a pensions team of more than 75 specialists, so we can service even the most demanding and document-heavy investigative processes. This is coupled with having one of the largest disputes practices in the City giving us the capacity, as well as the expertise, to deal with the biggest and most complex cases. Whilst TPR will often impose short deadlines - despite the scale and complexity of its demands - we can deploy a team at speed and are able to scale up as necessary to handle the demands of your investigation.



Outstanding pensions and regulatory expertise

Our team has extensive experience advising on the full range of TPR's various powers, including moral hazard powers (financial support directions, contribution notices), governance failings, and regarding employer-related investments. When it comes to investigatory processes, we understand how disruptive these can be, and that you need an adviser you can be confident in.



A collaborative approach

We will work constructively and collaboratively with your existing team. You do not need to completely change your legal advisers, who can continue to provide day-to-day advice on ongoing matters. We also understand that for some clients, working alongside TPR will be a key part of their strategy to achieve the best result for their stakeholders.



A new perspective

Where appropriate, we can bring a fresh approach and independent thinking having not been involved with the matters which have led to the investigation being launched.



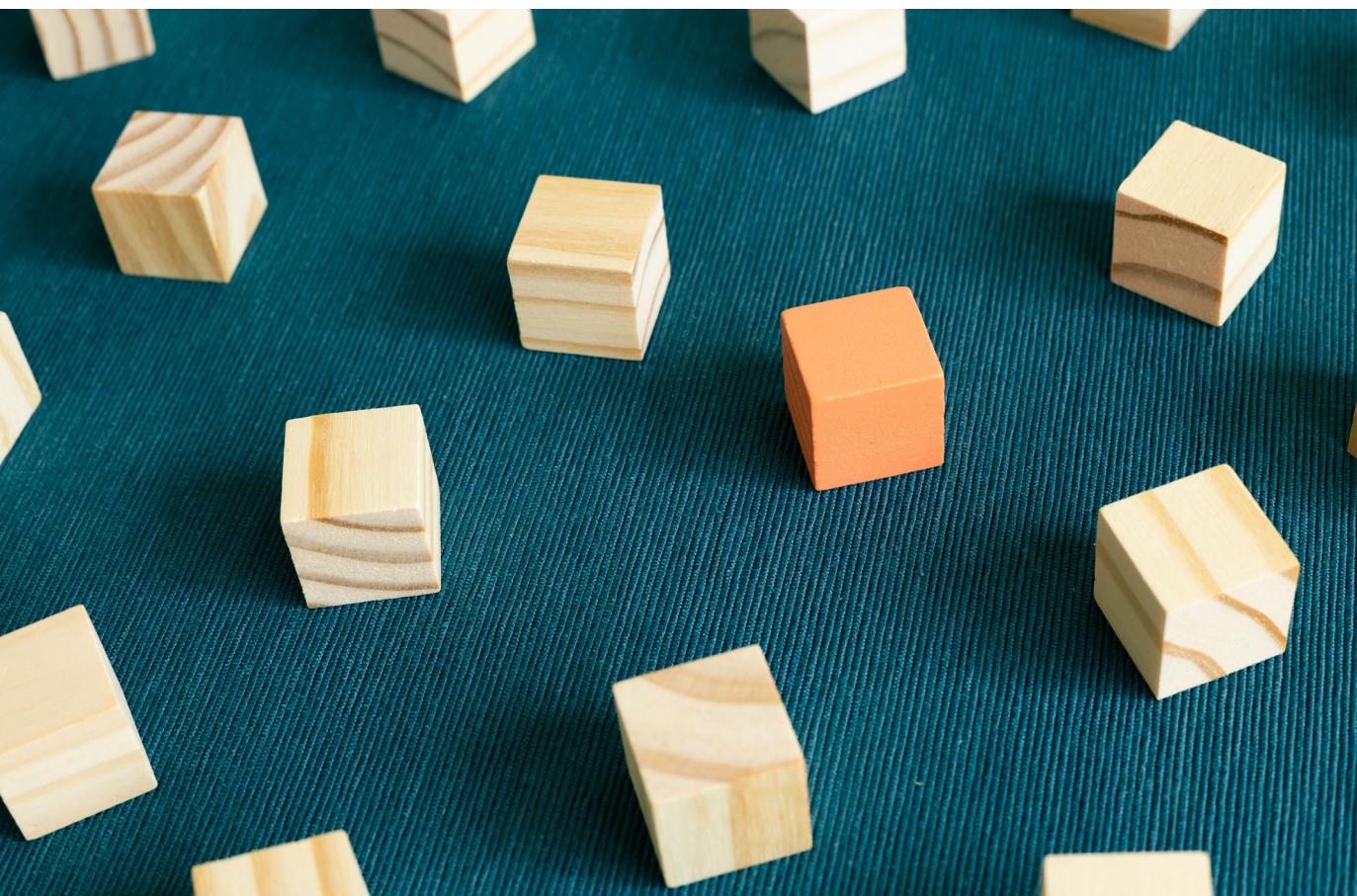
Your "one stop shop" for legal advice on a case

As a full service law firm, we have experts in white collar crime and regulatory investigations. While criminal investigations may be new and rare in pensions, our specialists are familiar with these types of investigations.



Project management and technological solutions

Our experience of managing large investigations including huge numbers of documents, multiple witnesses and experts means we can help you manage the process efficiently, reducing your management time and avoiding pitfalls. Our experience is combined with technological solutions such as our CMS-developed matter management tool (Lupl) to maximise efficiencies wherever possible.



Our Investigations experience

CMS Pensions team members have extensive experience working on TPR investigations, on top of day-to-day experience managing a TPR relationship. Our team members have advised employers, trustees and others in relation to the following types of cases:

- TPR “moral hazard” cases, including financial support directions and contribution notices, such as:
 - Employer selling the business and distributing assets elsewhere in the group
 - Pre-pack insolvency
 - Substituting employer with offshore entity
 - Collapse of an international corporate group
- TPR’s “section 231” powers to intervene in a scheme valuation
- Conflicts of interest
- Concerns over trustee concessions in agreeing a valuation
- Employer-related investments
- Trustee conduct and governance
- Failure to comply with basic legal requirements, such as to collect contributions
- Failure to comply with other Trustee duties

Case studies



Managing the response to an investigation on governance failings, no action was taken and we established an improved long term relationship with TPR.

A trustee client received an information request from TPR. The Trustee was told an investigation was being opened with a view to TPR potentially using its power to appoint an independent trustee. The Trustee was given two weeks to provide many years' worth of documentation.

We started by successfully negotiating a reasonable extension to the deadline to provide the requested information. In the end, the full set of data provided covered over 3,000 documents, and CMS assisted with the practical and technical aspects of setting up an online sharing portal in the format specified by TPR.

Having subsequently reviewed the information shared, TPR set out in more detail their eight allegations against the Trustee, by reference to the documents it had seen. The Trustee was given two weeks to respond. We then reviewed the 3,000 documents and prepared the detailed response of over 35 pages, which rebutted the points of criticism line by line, and contextualised the issues TPR raised. We also worked with the Trustee to suggest to TPR specific alternative actions in response to the allegations, meeting with the case team and establishing a more positive and open ongoing dialogue with TPR's team to show the steps taken by the Trustee.

TPR decided not to take formal regulatory action. A temporary monthly monitoring process was agreed, enabling the Trustee to provide updates of actions taken in response to TPR's concerns. TPR continued active engagement with the Trustee for around a year until the investigation was formally closed. Underlying issues outside the Trustee's control remain, and the Trustee continues to be in dialogue with TPR on these issues, but the relationship is open and positive.



Immediate support provided, delivered at speed

TPR launched an investigation into trustee governance, out of the blue with no prior indication of concerns. The initial request was for trustee records relating to an intense period of discussions with the employer, and gave a short deadline to respond. It would be a criminal offence to fail to comply without reasonable excuse in the time given. We were able to draft in several team members to support the usual client team, in order to ensure adequate resourcing.

We identified that many of the documents were clearly unrelated to the issue raised and TPR did not appear to appreciate the volume of what had been requested and what it would have to review. We liaised with TPR to manage the request and set out a realistic timescale. The reduced scope made matters more manageable and cost efficient for our client. We ensured that TPR reissued its formal notice so that our client would clearly be in compliance.

Our Pensions Investigations Specialists



Johanna Clarke
Partner
T +44 20 7367 2606
E johanna.clarke@cms-cmno.com



Laura Clarke
Partner
T +44 20 7367 3447
E laura.clarke@cms-cmno.com



Simon Evans
Senior Associate
T +44 20 7367 3522
E simon.evans@cms-cmno.com



Hadassah Shulman
Senior Associate
T +44 20 7367 3197
E hadassah.shulman@cms-cmno.com

An Investigation is launched: Day One Checklist

The approach taken on Day One of an investigation can make a big difference to how matters progress and can help set you out on the best possible footing in difficult circumstances.

Here are some top tips for Day One of an investigation:

- Check your crisis response protocols – ensure the right people are notified, including your advisers
- Suspend regular document destruction processes
- Identify what TPR is asking for and who may hold the relevant documents
- Make sure anyone who may have relevant material knows to keep it safe without edits or deletions
- Keep information about the investigation limited to those who need to know – you can rely on legal professional privilege to only a limited extent and there are legal restrictions on what information from TPR you can circulate more widely
- Check if any insurance notifications are required
- Check any deadlines, whether they are reasonable and whether to consider requesting an extension. TPR is obliged to consider all reasonable and justifiable requests for extensions but it's important to act fast
- It is a criminal offence to mislead TPR so be mindful of this in your communications with them

We expect dawn raids to be rare but if TPR's Day One strategy is to undertake one – call in a legal expert as soon as possible. You will not want to be obstructive but there are limits to TPR's powers and you will need advice.



This guide and many other useful resources are now available on our new app, Pensions Law Appraised, which provides real-time guidance on the latest pensions law developments while helping pension scheme trustees to comply with their statutory knowledge duties. To start using it, scan the QR code or click [here](#) to download it.

CMS Law-Now™

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It was prepared in co-operation with local attorneys.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices; details can be found under "legal information" in the footer of cms.law.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Cúcuta, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, París, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.

cms.law