

# TRUSTEE KNOWLEDGE UPDATE

August-October 2023

<b>LEGISLATION.....</b>	<b>3</b>
Pensions (Extension of Automatic Enrolment) Act 2023.....	3
<b>CONSULTATIONS AND DRAFT LEGISLATION.....</b>	<b>3</b>
Draft equal treatment regulations .....	3
Draft Pension Protection Fund Compensation Regulations .....	3
Review of the General Levy.....	3
Considering Social Factors in Pension Scheme Investments .....	3
<b>THE PENSIONS REGULATOR.....</b>	<b>4</b>
DC investment regulation changes.....	4
Climate scenario analysis.....	4
Regulated Apportionment Arrangement Guidance .....	5
First climate change reporting fine issued.....	5
Pensions dashboards checklist .....	5
<b>CASES .....</b>	<b>5</b>
McGaughey v USSL - <i>Court of Appeal rejects ‘multiple derivative claims’ brought against trustee directors</i> .....	5
BRASS Trustees Ltd v Hayley Goldstone and the Board of the Pension Protection Fund - <i>High Court considers trustee decision to issue winding-up petitions against employers</i> .....	6
<b>THE PENSIONS OMBUDSMAN .....</b>	<b>6</b>
CAS-92093 Mr S (Water Companies Pension Scheme) - <i>Trustee entitled to return surplus to employer on scheme wind-up</i> .....	6
PO-28532 Mr W (Western Power Distribution Pension Fund) - <i>trustees entitled to refer member to MoneyHelper on “overseas investment” amber flag</i> .....	7

## LEGISLATION

### [Pensions \(Extension of Automatic Enrolment\) Act 2023](#)

(18 September 2023)

This Act provides regulation-making powers for the Secretary of State to decrease the minimum age for automatic enrolment and reduce or remove the qualifying earnings threshold.

## CONSULTATIONS AND DRAFT LEGISLATION

### [Draft equal treatment regulations](#)

(19 September 2023)

These draft regulations codify the current legal position by amending the Equality Act 2010 to allow a notional (rather than actual) opposite sex comparator to be used where sex discrimination arose as a result of the effects of the GMP legislation. This is the effective hard-coding of the *Allonby* CJEU case. An equivalent amendment is made to section 171 of the Pensions Act 2004 in relation to PPF compensation payments.

The regulations also codify the 2017 Supreme Court judgment in *Walker v Innospec*, removing the pre-December 2005 service cut-off for same sex partners' benefits in Schedule 9 of EqA 2010.

These Regulations are made using the restatement powers in the Retained EU Law (Revocation and Reform) Act 2023 and are set to come into force immediately before the end of 2023, after approval by both Houses of Parliament.

### [Draft Pension Protection Fund Compensation Regulations](#)

(19 September 2023)

These regulations amend Schedule 7, Pensions Act 2004 to ensure that PPF compensation meets the 50 per cent ongoing minimum set out in the *Hampshire* CJEU judgment. The PPF has published [draft](#)

[guidance](#) on the detail. The regulations also formally remove the PPF compensation cap struck down in the *Hughes* case.

These regulations are made using the restatement powers in the Retained EU Law (Revocation and Reform) Act 2023 and are set to come into force immediately before the end of 2023, after approval by both Houses of Parliament.

### [Review of the General Levy](#)

(2 October 2023)

This Government consultation sets out options for mitigating the ongoing deficit in levy funding over the next three tax years. It seeks views on the three options previously agreed by ministers.

- Option 1 – freeze at this year's rates until 2026-27 and retain the four categories of rate payer. This would see the levy deficit continue to grow, requiring greater rises at a later date.
- Option 2 – retain the current levy structure and increase rates by 6.5 per cent per year. This option will bring the cumulative deficit back into a compliant level by 2031.
- Option 3 – increase rates by 4 per cent per year across all schemes and add a £10,000 premium to schemes which, as of April 2026, have memberships under 10,000. This allows for a lower initial increase across all schemes, while still paying off the deficit, and 'supporting the consolidation' of smaller schemes.

The consultation closes on **13 November 2023**.

### [Considering Social Factors in Pension Scheme Investments](#)

(19 October 2023)

The DWP-appointed Taskforce on Social Factors (TSF) has published a draft guide on considering social factors in pension scheme investments. Social factors are described as including a wide range of topics from payment terms for suppliers, links to armed conflict, health

impacts on consumers and communities (mental and physical) and inequality. It has three main sections:

- Social factors and pension funds: exploring why material social factors are important from an investment perspective, and how taking these into consideration aligns with pension trustees' fiduciary duties.
- Social factor data: discussing data trustees can use to manage social factors in investment, along with a materiality assessment framework to help prioritise areas for action.
- Addressing social factors in pension portfolios: setting out a framework for addressing social factors in pension schemes.

The TSF is requesting written feedback on the draft guidance by **1 December 2023**.

## THE PENSIONS REGULATOR

### [DC investment regulation changes](#)

(24 August 2023)

TPR has updated its [DC Code](#), [investment guidance](#) and [communicating and reporting guidance](#) to reflect the requirements, coming into effect on 1 October 2023, for trustees to state their policy on investing in illiquid assets in their default arrangement statement of investment principles (by 1 October 2024 at the latest) and to disclose asset class breakdowns for default arrangements in the chair's statement. The updates also reflect the changes allowing specified performance-based fees to be excluded from the charge cap with effect from 6 April 2023, and new requirements to disclose performance-based fees in the chair's statement.

#### Comment:

The new requirements on illiquid asset policies and asset allocation reporting affect almost all DC and hybrid schemes. TPR states that it will be "closely monitoring the impact of these changes".

### [Climate scenario analysis](#)

(29 August 2023)

In this blog, TPR considers what needs to be done to address the shortcomings in the available models and approaches to climate risk scenario analysis, as identified in some recent research reports. It suggests that trustees do not need to be climate experts, but should:

- have an appropriate level of knowledge and understanding of climate issues;
- undertake regular training and ask for additional training if they do not feel comfortable making decisions based on the information provided;
- regularly review the climate-related capabilities of service providers and consider the need for additional advisers or specialist input;
- be able to understand the narratives underlying their climate scenarios, the limitations of those scenarios and the assumptions made in their construction;
- broadly rationalise the outputs from those scenarios for their scheme; and
- consider with advisers the use of stress testing and tail risk analysis to complement their climate scenario input to investment strategy decision making.

Where trustees have already completed their scenario analysis but not finalised their TCFD report, TPR considers that it would be useful for members if trustees provided additional commentary in their report on the analysis they carried out and how they expect it to develop. TPR also expects trustees and their advisers to be mindful of industry developments and good practice.

### [Regulated Apportionment Arrangement Guidance](#)

(19 September 2023)

TPR has published guidance on Regulated Apportionment Arrangements (RAAs), replacing its 2010 RAA statement. The guidance sets out the principles TPR expects to be met in respect of any RAA application and makes clear that it would expect the same principles to be followed in respect of agreements other than RAAs which produce a similar outcome (including the compromise of section 75 debts). An RAA, which requires TPR approval, allows an employer facing inevitable insolvency to detach itself from its DB pension scheme so it may continue trading.

TPR considers that employers should rule out all other options before applying for an RAA. TPR will consider an RAA proposal when there is evidence of consideration of the principles set out in the guidance. The main principles include:

- the cash consideration proposed is significantly greater than the recovery expected on insolvency;
- a better outcome for the scheme could not be achieved by other means (including through the use of TPR powers);
- it would not be reasonable for the wider group to support the scheme or the employer;
- the scheme is receiving equitable treatment in comparison to other creditors; and
- the scheme receives an appropriate portion of the equity in the departing employer.

### [First climate change reporting fine issued](#)

(28 September 2023)

TPR has published a regulatory intervention report confirming that it has issued the first fine against trustees for failing to publish a climate change report within the prescribed timescale. The trustees of the

ExxonMobil Pension Plan were issued with a mandatory penalty and fined £5,000 for failing to meet new the requirements. The trustees had produced the report by the deadline but it was not published on a publicly available website until 10 days later due to a faulty URL.

TPR also confirms that it will name schemes which receive a penalty for failing to publish their climate change report in its quarterly [compliance and enforcement bulletin](#).

### [Pensions dashboards checklist](#)

(18 October 2023)

This blog reminds trustees about TPR's [checklist](#) which is designed to help schemes prepare for connection to pensions dashboards. It includes data tasks and other actions including establishing dashboards as a regular agenda item at trustee board meetings and discussing dashboards with the administrator and relevant advisers.

## CASES

### [McGaughey v USSL - Court of Appeal rejects 'multiple derivative claims' brought against trustee directors](#)

(21 July 2023)

This was an appeal from a decision of the High Court. Two scheme members had sought permission to bring a number of 'multiple derivative claims', i.e. claims made on behalf of the scheme's trustee company (USSL) against its current and former directors. To succeed in going to a full trial of the issues, the claimants had to persuade the Court that the scheme had suffered loss which reflected the claimants' own loss and that the loss followed a deliberate or dishonest breach of duty, or the directors having improperly benefitted themselves at USSL's expense.

The members had alleged that the trustee directors had breached their duties in relation to failures in respect of the scheme's 2020 actuarial valuation; introducing rule changes reducing future service

benefits which amounted to indirect discrimination; allowing a dramatic increase in USSL's operating costs; and failing to create a plan for disinvestment from fossil fuels. However, the High Court held that most of the claims could not succeed as multiple derivative actions, as USSL had suffered no loss, and dismissed the claimants' application for permission to continue any of them.

The Court of Appeal dismissed the claimants' appeal on all grounds. The claimants needed to demonstrate loss and had not done so. Multiple derivative claims were an exceptional remedy for use when a wrong would otherwise go unremedied: they were not a way of avoiding procedural hurdles where other legal remedies were available - in this case, direct claims against USSL rather than its directors. The Court went on to signal its agreement with the High Court's dismissal of each of the four claims alleged in the earlier proceedings.

**Comment:**

The claimants sought to use a novel mechanism to challenge trustee decisions with which they disagreed, but the appeal confirms that the scope of 'multiple derivative actions' in relation to pension schemes may be limited: they do not provide a back door to allow beneficiaries a lower bar for challenging decisions of trustee companies.

**[BRASS Trustees Ltd v Hayley Goldstone and the Board of the Pension Protection Fund - High Court considers trustee decision to issue winding-up petitions against employers](#)**  
**(28 July 2023)**

The Trustee sought the Court's approval for its decision to issue winding-up petitions on the Scheme's sponsoring employers (the "Decision"), who owe around the Scheme around £40m, including £8.5m of outstanding contributions (against a deficit of around £28.3m). Due to the confidential and sensitive nature of the case, the representative beneficiary was a pensions lawyer rather than a member or beneficiary of the Scheme.

The Court concluded that the evidence showed overwhelming support for the Decision, including the fact that the employers had repeatedly failed to provide the Trustee with information or contributions and had breached a negative pledge obligation.

The judge noted that in an application to "bless" a trustee decision, the Court's role is limited to confirming that the proposed exercise of trustee powers is lawful and within the power, does not infringe trustee duties, and ignores irrelevant, improper or irrational factors. The case also looked at the considerations for proper trustee decision-making, with the relevant points for the Trustee to consider in this situation including financial factors and trustee duties.

## THE PENSIONS OMBUDSMAN

**CAS-92093 [Mr S](#) (Water Companies Pension Scheme) - Trustee entitled to return surplus to employer on scheme wind-up**  
**(29 August 2023)**

The member complained about the trustee's decision to return the £12m surplus in the Bristol Water section to the employer on section wind-up.

The scheme rules provided the Trustee with a discretion to use any surplus on wind-up to augment benefits; but to the extent it chose not to do so, surplus assets were to be returned to the employer. The member claimed that the Trustee had breached its duties because its decision not to augment and to pay to the employer was not in the best interests of section members. The Trustee argued that refunding the surplus was appropriate as the employer had borne the downside risk for operation of the section and paid a significantly greater proportion of overall contributions. It said the employer should not be penalised for having been willing to fund its low risk investment strategy.

The Ombudsman explained that his role extended only to investigating whether the Trustee had followed the correct process in

making its decision. He went on to find that the Trustee had followed the requirements of the scheme rules, correctly interpreted those rules, taken appropriate factors into account and not come to an unreasonable decision. The complaint would therefore be rejected.

In particular, in relation to the member's "best interests" argument, the Ombudsman noted that the employer was also a potential beneficiary. He also pointed out that the courts had moved away from a 'simplistic' formulation of the best interests duty to the test in the Merchant Navy case, based on the "proper purposes" principle. He found that a trustee would be acting in accordance with the purposes of the trust where surplus assets were available on wind-up and, having secured benefits in full, it decided to pay the assets to the employer in accordance with scheme rules.

**Comment:**

As scheme funding positions improve and more schemes move to buy out, this is a significant ruling. It confirms the principle that in cases where benefits are fully secured, trustees can properly choose to repay surplus to the employer where scheme rules allow and appropriate considerations are taken into account during the trustee decision-making process.

**PO-28532 [Mr W](#) (Western Power Distribution Pension Fund) - trustees entitled to refer member to MoneyHelper on "overseas investment" amber flag (23 October 2023)**

This was the first Ombudsman determination on the Conditions for Transfers Regulations. Under these, a member whose transfer raises

an 'amber flag' must attend a MoneyHelper safeguarding appointment before acquiring a statutory right to transfer.

The member complained of loss due to the delays which arose from the trustee referring him to MoneyHelper, following his request to transfer to a personal pension. The referral was made on the basis of the amber flag which arises under the Regulations where the receiving scheme includes "overseas investments", as the member would be invested in a (UK-based) global fund.

The Ombudsman rejected the complaint. He explained that the pensions industry approach to the Regulations was fragmented, with different views on the level of risk to be tolerated when applying them. For example, he noted that TPR and DWP had issued a statement saying that trustees may allow a discretionary transfer even where no statutory right is established - in circumstances where they conclude there is "low risk of a scam". He also accepted that the broad wording of the Regulations did not necessarily align with the policy intent.

The Ombudsman held that the decision on whether the receiving scheme included overseas investments was one for transferring scheme trustees to make. The trustee had taken legal advice and a literal interpretation of the Regulations was "not unreasonable". Its actions had not therefore caused unreasonable delay.

**Comment:**

The decision will be welcomed by those trustees who have chosen to refer all overseas investment cases to MoneyHelper, but it does not follow that the Ombudsman would consider other approaches unreasonable. We consider that the Ombudsman's likely focus will be on trustees having followed proper process including appropriate due diligence, following relevant guidance and taking advice as required.