



# PENSIONS ROUND-UP

## AUGUST 2016

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# INTRODUCTION

Welcome to the latest edition of DLA Piper's monthly newsletter – Pensions Round-Up – in which we provide an overview of developments in pension legislation, case law and regulatory guidance.

In this edition we look at key developments from August 2016 as well as some developments from late July including the following.

- **The Pensions Regulator:** the new code of practice, accompanying guidance and compliance and enforcement policy in relation to occupational pension schemes providing money purchase benefits; the publication of a report about the action taken by the Regulator in relation to failures to produce the chair's annual statement; and the latest quarterly bulletin in relation to automatic enrolment compliance and enforcement.
- **Pension Protection Fund:** an update on the PPF's plans for the third levy triennium; a document setting out the key principles that the PPF will apply when considering levy data correction requests from schemes; and the latest edition of the PPF's Technical News bulletin.
- **Work and Pensions Committee:** the publication of an invitation for written submissions about various aspects of defined benefit pension funds including regulation by the Regulator; the sustainability of the PPF and the balance between meeting pension obligations and ensuring the ongoing viability of sponsoring employers.
- **Consultation and Legislation:** a consultation issued by the Treasury on proposals for the introduction of a pensions advice allowance; and the coming into force of the Insurance Act 2015.
- **HMRC:** the launch of the online service to apply for lifetime allowance protection; the latest Countdown Bulletin in relation to the end of contracting-out; and statistics about flexible payments made in the second quarter of 2016.
- **Other news:** a press release issued by the Insolvency Service concerning the winding-up of a company which facilitated and operated a pension liberation scheme; and a consultation about technical amendments to regulations governing teachers' pensions.
- **On the Horizon:** a timeline of some of the key future developments in pensions to help employers and trustees plan ahead.

If you would like further information about any of the issues raised in this edition of Pensions Round-Up, please get in touch with Cathryn Everest or your usual DLA Piper pensions contact. Contact details are at the end of this newsletter.

# THE PENSIONS REGULATOR

## NEW CODE AND ACCOMPANYING GUIDANCE – MONEY PURCHASE BENEFITS

On 28 July the updated version of the Regulator's code of practice on the governance and administration of occupational trust-based schemes providing money purchase benefits came into force. The code sets out the standards of conduct and practice that the Regulator expects trustee boards to meet in complying with legislation. It is accompanied by six guidance documents (one relating to each section of the code) which provide practical information and examples.

The code applies to occupational schemes which offer money purchase benefits including DC schemes, the DC sections of schemes offering mixed benefits, DC AVCs within DB schemes and DC benefits with a DB underpin (although it should be noted that not all of the legal requirements apply to schemes where the only DC benefits are AVCs). The new documents cover the following areas.

- The trustee board including issues such as appointing a chair of trustees, succession planning, the role of the chair and the scheme secretary, and content and frequency of meetings.
  - Scheme management skills including managing risk, trustee knowledge and understanding, appointing and managing relationships with advisers and service providers, working with the employer, and conflicts of interest.
  - Administration covering issues such as working with the administrator, administration reporting, prompt processing of core financial transactions, and record-keeping.
  - Investment governance including setting investment objectives and strategies, monitoring and reviewing investment strategies and fund performance, and security and liquidity of assets.
  - Value for members, with the guidance including an illustrative approach to assessing this.
- Communicating and reporting which covers requirements including signposting Pension Wise, the provision of generic retirement risk warnings, and the chair's annual statement.

The broad areas in which changes have been made since the previous version of the code was published in November 2013 include the following.

- The new code does not set out in detail all the requirements of the law instead assuming that trustees have a good level of knowledge. The Regulator also thinks that the standards set out in the 2013 code are now well established. This reduces the level of guidance needed in the code meaning that it is now much shorter but there is more accompanying guidance.
- The new code does not include the 31 DC quality features that underpinned the 2013 code although the Regulator states that the features formed the basis for the standards.
- The documents have been updated in light of changes to legislation including: the introduction of the DC flexibilities; the charge cap and other charge controls; the statutory governance standards; the requirement to produce a chair's annual statement; and changes to disclosure requirements to introduce obligations to signpost Pension Wise to members and provide them with generic retirement risk warnings.

Trustees should assess their scheme against the standards in the code. The Regulator has published a self-assessment template which trustees can use to complete this exercise and identify areas where action is required to improve standards. The template includes information showing how the features in the 2013 version of the code relate to the standards in the new code. You can find more information about the code and guidance in our detailed *Pensions Alert* which, in particular, focuses on the changes made since the previous code was published in 2013.

# THE PENSIONS REGULATOR

## DC COMPLIANCE AND ENFORCEMENT POLICY

Following a consultation issued in March, on 28 July the Regulator published an updated version of its compliance and enforcement policy for occupational pension schemes providing money purchase benefits, together with a response to the consultation. Key points to note include the following.

- The Regulator's strategy is to educate and enable those involved in the provision of occupational DC schemes to comply with the law and meet its expected standards. However, where there is a failure to comply with the law, the Regulator will consider taking enforcement action.
- The Regulator will continue to take a targeted approach to regulating the risks within different segments of the DC landscape and will be more visible in its regulation of certain segments, for example master trusts, which are playing a key role in automatic enrolment.
- The Regulator will target its resources and activities at the risks it believes pose the greatest threat to good outcomes for members. The Regulator regards the key risk areas for occupational DC schemes as: poor standards of governance; poor investment governance and inadequate cost controls; poor administrative practices; and scams and the misappropriation of scheme assets.
- The Regulator will proactively engage with trustees, advisers and providers where appropriate. The Regulator's engagement will take various forms – it may engage directly with new schemes coming to the market or may proceed on a thematic basis where it wants to understand practices in a particular field or market segment.
- The policy sets out some examples of factors the Regulator may consider when deciding what action should be taken in relation to a breach of legislation (such as the number of members affected and the extent to which there is a systemic problem) and the principles it will be guided by when considering

the amount of a financial penalty (for example, that the penalty should be proportionate to the nature and impact of the breach).

- Where trustees have failed to comply with the obligation to produce a chair's statement, the Regulator **must** issue a financial penalty of between £500 and £2,000. The policy sets out how the amount of the penalty will generally be calculated which takes into account the number of members, previous breaches and whether there is a professional trustee in place. The policy states that where the scheme has a professional trustee the penalty will generally be £2,000.

## CHAIR'S STATEMENT

On 17 August the Regulator issued a regulatory intervention report about the action it took in relation to a professional trustee firm which failed to comply with the requirement to produce a chair's annual statement for three separate schemes. In line with the Regulator's compliance and enforcement policy reported above, it issued three fines, all for the maximum sum of £2,000, because the schemes had a professional trustee in place and there were no mitigating factors. The Regulator states that this case serves as a reminder to all trustees that they need to ensure they meet their legal duties.

## AUTOMATIC ENROLMENT

On 29 July the Regulator published its latest quarterly compliance and enforcement bulletin which covers the period 1 April to 30 June 2016. The bulletin reports that during this period the Regulator issued 3,392 Compliance Notices (taking the total to 11,099), 177 Unpaid Contributions Notices (total 582), 861 Fixed Penalty Notices (total 3,045) and 38 Escalating Penalty Notices (total 165). The bulletin also notes that none of the appeals against fines heard by the Tribunal have been successful and that in every case *"the judge rejected the employer's excuse and ruled that the law is the law, regardless of whether the employer intended to break it or not"*.

# PENSION PROTECTION FUND

## THIRD LEVY TRIENNIUM

On 28 July the PPF published an update on its plans for the third levy triennium which starts in 2018. The update highlights a number of areas in relation to the Experian insolvency risk model where work is being undertaken to consider whether changes might be appropriate. Key areas being considered include managing the impact that accounting standard changes (in particular the introduction of FRS102) may have on variables measured currently in the model. The update is not a consultation document but is intended to indicate the PPF's direction of travel.

A formal consultation on the rules generally, for the three years from 2018/19, including any proposed changes to the insolvency risk model, will follow in late 2016 or early 2017.

The PPF also states that it plans to publish a consultation on the final levy rules for 2018/19 in the autumn of 2017 and finalised rules by December 2017.

In terms of the levy rules for 2017/18 (the last year of the current triennium), the PPF plans to follow the usual timetable of consulting this autumn and publishing final rules before Christmas. The PPF reports that, given its focus on the third triennium and the desire to maintain stability of methodology, any changes to the rules for 2017/18 are likely to be very limited.

## LEVY DATA CORRECTION PRINCIPLES

The PPF published "*Levy Data Correction Principles*" in August which is directed at requests for corrections by schemes and advisers and sets out the key principles that the PPF will apply when considering a data correction request. The PPF states that whilst its aim is that levies are based on accurate information, this does not mean that all data corrections will be allowed. It seeks to strike a balance between the general desirability of invoices being based on correct information, efficiently achieving this aim and the need to ensure that the responsibility for providing correct information remains with schemes.

The PPF states that its policy and approach may be informed by the timing of a correction request, noting that: (i) the consideration of correction requests post-invoicing is more resource-intensive for it than at the pre-invoicing stage; and (ii) conversely, where the data error has been identified as part of the PPF's data cleaning activities, a correction is more likely to be made, especially where the correction is required to enable the levy calculation to take place. When considering an individual case, the PPF's general policy is informed by the timing of the request but it lists considerations that are also likely to be relevant, such as, where the responsibility for the error sits, the likely impact on the levy, and the extent to which the scheme has taken or planned steps to ensure that the same or a similar mistake will not happen again. These factors are only an indication of the PPF's approach – the relevant factors and the balance between them will vary from case to case.

## TECHNICAL NEWS

On 8 August the PPF published issue 8 of its Technical News bulletin. This includes an article about ill health retirement in which the PPF states that it is often asked whether a member who has applied for and been granted standard early retirement can be treated as having retired on the grounds of ill health where they would have met the conditions for ill health retirement but, because of the way scheme benefits are calculated, were advised that there was no advantage in applying for it. The PPF states that generally it cannot treat such members as having retired on grounds of ill health and therefore states that, if advising members that there is no advantage in them applying specifically for ill health retirement, trustees should bear in mind that if the scheme was to transfer into the PPF, members' compensation may be affected.

# WORK AND PENSIONS COMMITTEE

## DEFINED BENEFIT PENSION FUNDS

In July (in a report about its inquiry into BHS) the Work and Pensions Committee set out its plans for its inquiry in relation to DB pension funds. The Committee's comments included that: *"The future of occupational pension schemes is perhaps the greatest challenge facing longstanding British businesses"*; and *"It is imperative that the regulatory framework does not allow sponsor companies to evade [their] responsibilities and, in doing so, pass the burden onto other schemes that pay the PPF levy. There may be a case for stronger and more proactive regulation. It is equally important, however, that a balance is found to enable otherwise viable companies to continue to operate. ... Investigating how to secure a fair and sustainable settlement will be at the centre of the Work and Pensions Committee's ongoing inquiry"*.

On 8 August the Work and Pensions Committee issued an invitation for written submissions in relation to its inquiry on DB pension funds. The issues in relation to which submissions are sought include the following:

- DB pensions regulation by the Pensions Regulator including issues such as: (i) the adequacy of regulatory powers, including anti-avoidance provisions; (ii) whether a greater emphasis on supervision and pro-active regulation would be appropriate; (iii) whether specific additional measures for private companies or companies with complex and multi-national group structures are required; (iv) the pre-clearance system including whether it is adequate for particular transactions including the disposal of companies with DB schemes; (v) powers relating to scheme recovery plans; and (vi) the impact of the Regulator's regulatory approach on commercial decision-making and the operation of employers.
- The sustainability of the Pension Protection Fund (PPF) and the fairness of the PPF levy system and its impact on businesses and scheme members.
- The role and powers of pension scheme trustees.
- Relationships between the Regulator, the PPF, trustees and sponsoring employers.
- The balance between meeting pension obligations and ensuring the ongoing viability of sponsoring employers including: (i) the Regulator's objective to minimise any adverse impact on sustainable growth; (ii) whether the current framework is generating inter-generationally fair outcomes; and (iii) whether the current wider environment, including very low interest rates, warrants an exceptional approach.

Unless they want to make written submissions to the Committee, there is no need for trustees or sponsoring employers to take any action at this stage. The closing date for submissions is 23 September 2016. It will be interesting to see whether, as a result of this inquiry, the Committee makes any recommendations in relation to the powers of the Regulator, the PPF levy, or legislation governing DB pension schemes and the benefits they provide, and how the government responds to any such recommendations.

# CONSULTATION AND LEGISLATION

## PENSIONS ADVICE ALLOWANCE

At Budget 2016 the government announced that it would consult on introducing a pensions advice allowance to allow people to take up to £500 from their DC pension pot tax-free to redeem against the cost of financial advice. On 30 August the Treasury issued a consultation setting out its preferred design for the allowance and raising questions on a number of outstanding policy points. It is expected that the provisions in relation to the allowance will come into force from April 2017. Other key points to note from the consultation proposals and questions include the following.

- A new authorised payment will be created so that adviser charges taken from pension funds could be used to fund holistic retirement advice.
- The authorised payment would be tax free for members and they would still be entitled to the same tax-free lump sum as currently applies when they take their pension benefits.
- The funds withdrawn would need to be paid direct from the scheme to the financial adviser. The allowance could be redeemed against all fully regulated advice services including automated advice models, but not against guidance only services.
- The allowance would be available before the age of 55 but the government seeks views on the exact age from which it should be available.
- The government is considering permitting savers to use the allowance more than once. However, the consultation notes possible issues with this including the risk of creating more opportunities for pension fraud. The government therefore seeks views on limiting the total number of uses, for example, to a maximum of three per person.
- It would not be mandatory to offer the allowance but the consultation seeks input on how to encourage the majority of DC schemes to offer it. Specific issues raised in relation to occupational schemes include whether trustees may be reluctant to offer the allowance, for

example, because of the need to consider the statutory restrictions on charges and because scheme rules may or may not contain discretion to make deductions from members' pots to cover charges.

## INSURANCE ACT 2015

The Insurance Act 2015, which aims to update insurance contract law in line with best practice in the modern UK insurance market, came into force on 12 August 2016.

Provisions of the Act which apply to commercial contracts include the following: (i) in relation to disclosure, the Act introduces a "duty of fair presentation" which requires the insured to make a "fair presentation of the risk" before a contract is entered into or renewed; (ii) "basis of the contract" clauses (where all pre-contractual representations are converted into warranties) are prohibited and it is not possible to contract out of this provision; and (iii) breach of warranty will result in the insurance cover being suspended until the breach is remedied. (Under the previous law a breach entitled the insurer to avoid all claims under the policy from the date of breach.)

You can read more about the Act in [this article](#) prepared by our Litigation and Regulatory Group.

**If trustees are entering into, renewing or amending an insurance contract (for example, indemnity insurance, a buy-in contract, a buy-out contract or longevity swap) we suggest that they consider seeking legal advice about the implications of the Act.**

## LIFETIME ALLOWANCE PROTECTION

HMRC has introduced its online service for pension scheme members to apply for fixed protection 2016 (FPI6), individual protection 2016 (IPI6) and individual protection 2014 (IPI4). This replaces the interim paper process for FPI6 and IPI6 and the online form for IPI4. Further detail (provided in HMRC's pension schemes newsletter number 80) includes the following.

- HMRC has published more guidance to help members who want to apply for protection including guidance on valuing their pensions for IPI4 and IPI6.
- From 6 April until 31 July 2016 an interim paper process was used to apply for FPI6 and IPI6 whereby members would receive a temporary reference number. Any applications made after 31 July using the interim paper process will be returned and the member directed to the online service. (HMRC will process interim applications on hand at 31 July and if the application is successful will issue these members with a permanent protection notification number.)
- When using the online service members will not receive paper certificates with details of their protection but instead will be able to view the details online and print them as necessary.
- When an individual applies for a permanent protection notification number under the new online service, details of their FPI6 or IPI6 and any previous protections will show in their personal tax account. HMRC states that it would be grateful if administrators would promote the benefits of applying online and obtaining the permanent number.

The newsletter also reports that HMRC is continuing to develop the lifetime allowance look up service for administrators to use to check the protection status of their members. This will be available later in the year. In the meantime administrators should continue to check protection status with members before making payments.

## COUNTDOWN BULLETIN

On 5 August HMRC published its latest Countdown Bulletin in relation to the end of contracting-out which notes that HMRC's Customer Relationship Manager Team has issued a readiness template to all administrators who have signed up for the Scheme Reconciliation Service (SRS) asking when they expect to submit queries and what the query types and volumes will be. In light of feedback received, HMRC explains that: the information can be provided from an administrator level if it is not available at scheme level (the information can be refined at a later date); and part of the template still needs to be completed and returned even if the scheme has completed its reconciliation.

The bulletin also states that from 5 August HMRC is no longer accepting any more requests to register for the SRS. Following publication of the bulletin HMRC will also no longer respond where administrators send it certain information and requests including: (i) terminations and transfers showing post-5 April 2016 end dates (HMRC does not need post 2016 notifications other than for the Contribution Equivalent Premium); (ii) contribution/ earnings and calculation requests (these should be submitted via the GMP Checker); and (iii) membership queries from schemes using SRS (these should be submitted via SRS e-rooms).

## FLEXIBLE PAYMENT STATISTICS

On 28 July HMRC published an updated version of its statistics about flexible payments which shows that in the second quarter of 2016, 256,000 payments were made to 159,000 individuals and the total value of payments was £1,770 million. These figures are higher than those for previous quarters and HMRC states that it expects that this is partly due to the fact that reporting was optional for 2015/16 but has been compulsory since April 2016.



# OTHER NEWS

## THE PENSIONS OMBUDSMAN

On 31 August it was announced that the Pensions Ombudsman Service has changed its name to The Pensions Ombudsman (or TPO when abbreviated). TPO states that this new name is similar in style to its main partner organisations, The Pensions Regulator and The Pensions Advisory Service, and will provide clarity for the public when they look for advice, guidance and resolution of pension complaints. TPO's work and remit – covering complaints about pension administration and about the actions and decisions of the PPF – will remain the same.

## PENSION LIBERATION

On 3 August the Insolvency Service published a press release reporting that Thames Trustees Ltd, a Preston-based company, which facilitated and operated a pension liberation scheme, has been wound up in the High Court following an investigation by the Insolvency Service.

The press release includes that: (i) the company acted as trustee of the Westminster Pension Scheme which was established in December 2012; (ii) clients were induced to move their existing pension funds into this scheme on the basis that they would receive in return a cash payment in the form of a 'loan' from an associated company or from commission on investments made by the company on behalf of the scheme; (iii) in fact, there was never any intention that the loans would be repaid and the scheme instead operated as a pension liberation vehicle providing clients with earlier access to pension funds than is permitted by the Finance Act 2004; and (iv) the High Court found that the company had operated with a lack of transparency and a lack of commercial probity, for example, commission payments were deducted from the funds transferred in by clients without their prior knowledge, and the investigation found no meaningful evidence to suggest that there was any value whatsoever in the investments undertaken by or on behalf of the scheme.

## FCA – PENSION TRANSFERS

On 3 August the Financial Conduct Authority announced that it intends to consult in the autumn on updating the methodology used to calculate the levels of redress due in cases of unsuitable advice on transfers from DB occupational pension schemes to personal pensions. This is because the FCA is concerned that the current methodology used by the industry and the Financial Ombudsman Service may no longer achieve the objective of putting consumers back in the position they would have been in had they stayed in the DB scheme.

The FCA also provides information about what firms should do if they are currently handling a complaint regarding advice given in connection with pension transfers or they receive such a complaint before the outcome of the consultation is known.

The FCA expects to reach conclusions following the consultation by spring 2017.

## TEACHERS' PENSION SCHEME

On 29 July the Department for Education added a letter to the gov.uk website relating to a consultation on technical amendments to the Teachers' Pension Regulations 2010 and the Teachers' Pension Scheme Regulations 2014. The draft regulations – the Teachers' Pensions Schemes (Miscellaneous Amendments) Regulations 2016 – were published alongside the letter.

In the letter the Department explains that the draft amendments relate to four specific areas (ill-health retirement, serious ill-health commutation, phased retirement in relation to irregular workers, and minor technical amendments) and are needed to ensure that the arrangements work fully as intended in line with previous consultations. The closing date for comments is 16 September 2016.

# ON THE HORIZON

DATE	DEVELOPMENT
Unknown	A consultation on revised regulations about <b>equalising GMPs</b> is expected in this Parliament.
	The reforms in relation to <b>Defined Ambition, Collective Benefits</b> and <b>automatic transfers of small DC pots</b> will be revisited once the market has had time and space to adjust to the other reforms underway.
2016	A final response is expected from the Board of the UK Statistics Authority in relation to the 2015 consultation on <b>consumer price statistics</b> .
	The Regulator intends to review its <b>guidance on transfers</b> .
	The Regulator intends to publish <b>guidance on DB scheme investment strategy</b> .
	A consultation is expected on extending the ban on <b>member-borne commission payments</b> in certain DC qualifying schemes to existing arrangements. The ban already applies to new arrangements entered into on or after 6 April 2016 and existing arrangements that are varied or renewed on or after 6 April 2016.
	The <b>Finance Bill</b> is expected to receive Royal Assent. The Bill is currently before Parliament and includes provisions on: the reduction of the lifetime allowance to £1 million, fixed protection 2016 and individual protection 2016; and some changes announced in the Budget 2016 to ensure the DC flexibilities work as intended.
	A <b>Pensions Bill</b> is expected containing provisions in relation to the regulation of master trusts, the cap on early exit charges and restructuring financial guidance.
	In February 2016 it was stated that a new requirement would be introduced in the summer for trust-based schemes to <b>report regularly on their performance in processing transfers</b> but no further detail has yet been published in relation to this.
Late 2016 or early 2017	A consultation is expected in relation to the <b>PPF levy rules</b> for the third triennium including any proposed changes to the insolvency risk model.
End of March 2017	The Government will place a duty on the FCA to <b>cap excessive early exit charges</b> . The FCA intends to implement its duty by the end of March 2017 and published a consultation on its proposals in May 2016. In parallel, the DWP is consulting on implementing a comparable cap for occupational trust-based schemes.
April 2017	Legislation to enable the development of a <b>secondary annuity market</b> is expected to be introduced.
	It is expected that a <b>pensions advice allowance</b> will be introduced allowing members to make specified withdrawals from their DC pension pot to redeem against the cost of financial advice.
2017	The measures on <b>DC charges and governance standards</b> will be reviewed.
End of 2017	The transitional period in which employers and schemes may continue to use the <b>VAT</b> treatment in VAT Notice 700/17 ends on 31 December 2017.
6 April 2018	The <b>lifetime allowance</b> is due to be indexed annually in line with CPI.
May 2018	The new EU General <b>Data Protection</b> Regulation will apply.
2018	The <b>IORP II Directive</b> is awaiting formal approval by the European Parliament and, after that, it will be published in the Official Journal and will officially enter into force. Member States will have 24 months to transpose the Directive into national legislation.
2019	The Government will ensure the industry designs, funds and launches a <b>pensions dashboard</b> by 2019.

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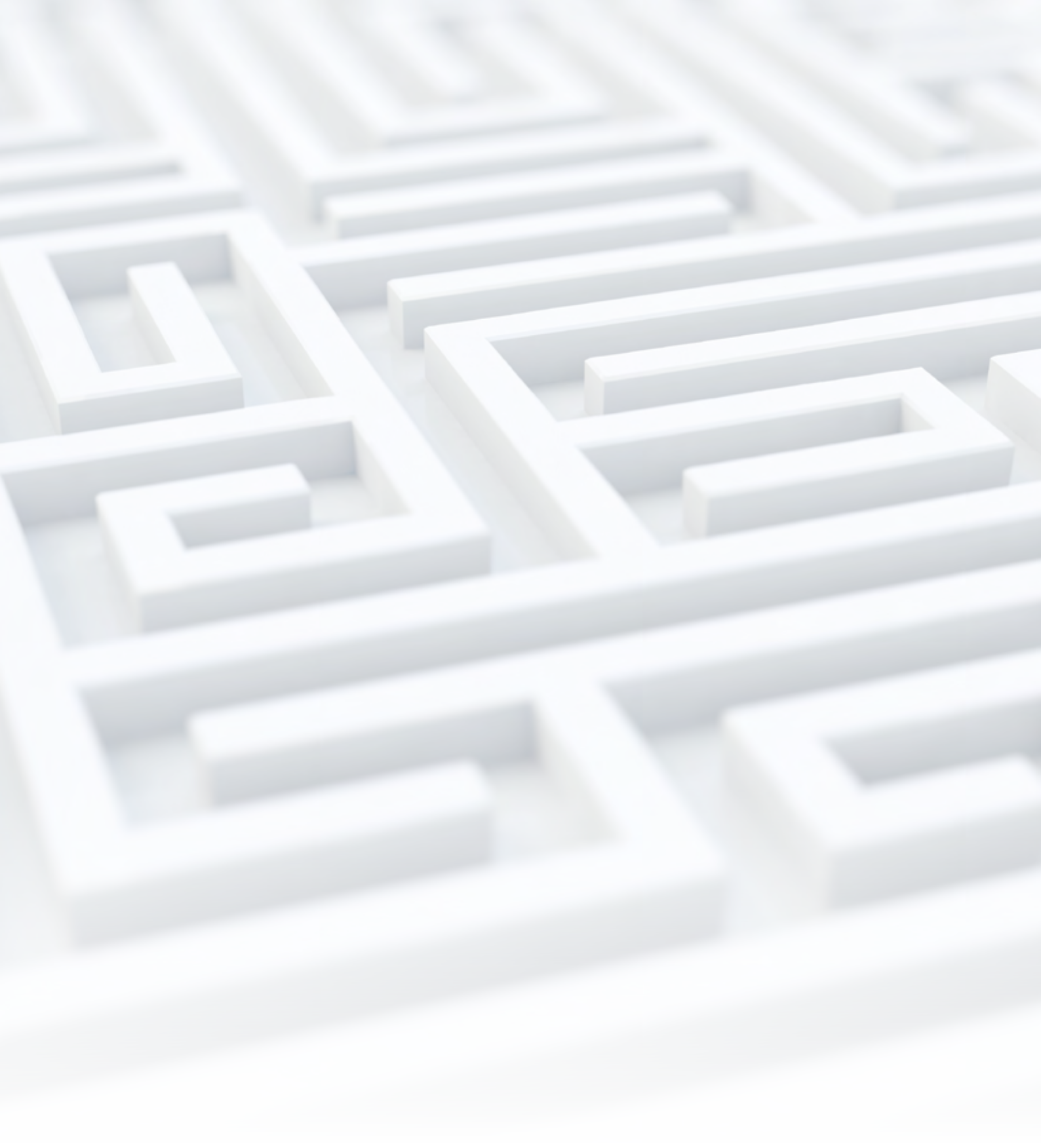
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