PENSIONS ROUND-UP

MAY 2016

IN THIS ISSUE

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 May 2016 including the following.

- **The Pensions Regulator:** the publication of the response to the November 2015 consultation about the DC code; and the Regulator's latest annual funding statement providing guidance on areas likely to be of most concern for trustees and employers carrying out 2016 valuations.
- **Legislation and Consultations:** the publication by the FCA and the DWP of consultations about capping early exit charges; and legislation announced in the Queen's Speech including in relation to the regulation of master trusts.
- **HMRC:** the latest pension schemes newsletter which includes information about the tapered annual allowance and the status of temporary reference numbers obtained in relation to individual protection 2016 and fixed protection 2016; and the latest Countdown Bulletin which reports on next steps for the Scheme Reconciliation Service.
- **Public Service Pension Schemes:** the Enterprise Act 2016 (which contains regulation-making powers in relation to the cap on public sector exit payments) receiving Royal Assent; and the publication of a consultation about changes to the regulations governing the Local Government Pension Scheme including in relation to Fair Deal and the DC flexibilities.
- **Other News:** a High Court judgment looking at the interpretation of the legislation on bulk transfers of members' benefits without consent; the publication of a paper in relation to the pensions dashboard; and a report from the Work and Pensions Committee about automatic enrolment.
- **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

UPDATED DC CODE

In November 2015 the Regulator published a consultation on an updated draft of its code of practice which applies to trust-based schemes offering DC benefits. On 9 May the response to consultation was published and a draft of the code updated to reflect the outcome of the consultation was laid before Parliament.

Changes that have been made to the version of the code that was published for consultation include: (i) updating the title of the code so that it refers to schemes providing money purchase benefits rather than defined contribution schemes; (ii) some additional text in relation to the approach to be taken where the only money purchase benefits the scheme provides relate to AVCs; (iii) amendments to the time limits within which the Regulator expects contributions to be invested so that the expectation differs depending on whether or not the scheme operates a daily dealing cycle; and (iv) additional text to reflect new legislation introduced since November 2015 in relation to the ban on member-borne commission and the provision of retirement risk warnings.

The November consultation also asked for views on the areas that the supporting guidance should cover. Whilst the Regulator does not report on responses received on this point, it states that it took those responses into account when drafting the guides which were issued for consultation in April 2016 (reported in the April edition of Pensions Round-Up). There were also a number of issues raised by respondents in relation to the code but which the Regulator states will be addressed in guidance.

The code and guidance are expected to come into force in July. Once the documents are in final form, trustees of schemes providing money purchase benefits should consider reviewing their governance and administration processes against them and, if necessary, making any changes.

ANNUAL FUNDING STATEMENT

On 13 May the Regulator published its 2016 Annual Funding Statement, together with supporting analysis. The Statement is primarily aimed at those undertaking valuations with effective dates in the period 22 September 2015 to 21 September 2016. In the Statement, the Regulator highlights some of the key principles from the DB funding code that it expects trustees to take into account in their valuations and provides guidance on areas that are likely to be of most concern for trustees and employers carrying out 2016 valuations, given current market conditions. The key issues highlighted for schemes carrying out 2016 valuations are volatility and valuation dates, investment returns, affordability and managing deficits, managing risks, and valuation assumptions. Points to note from the Statement include the following.

- The Regulator's analysis suggests that many schemes will have larger funding deficits than previously predicted.
- The Regulator would expect that most schemes will set funding strategies based on lower expected investment returns from most asset classes than at their last valuation.
- The Regulator's analysis indicates that for the majority of schemes there may be sufficient affordability for the sponsor to increase contributions so that their existing recovery plan end date can be maintained. The Regulator expects trustees to seek higher contributions where there is sufficient affordability for the sponsor, without a material impact on its sustainable growth plans.
- For others, an increase in contributions may not be affordable, or affordability may have decreased and current levels of contributions may not be sustainable, meaning the scheme will need to make other adjustments in order to put in place an appropriate recovery plan. Where this is the case, it is important for trustees and employers to discuss openly why current levels of contributions cannot be increased.

LEGISLATION AND CONSULTATIONS

CAPPING EARLY EXIT CHARGES

In light of concerns about whether there are barriers preventing people from accessing the new DC pension freedoms, earlier this year, the Government announced that it would place a duty on the Financial Conduct Authority (FCA) to cap excessive early exit charges for members of contract-based schemes eligible to access the pension freedoms, and that it would consider how existing powers to limit pension charges can be used to implement a comparable cap for trust-based schemes. On 26 May the FCA and the DWP published consultations on this issue.

The FCA consultation

The Bank of England and Financial Services Act 2016, which received Royal Assent on 4 May, contains the legislation which will place the duty on the FCA to introduce the cap. In summary, the Act defines early exit charges as charges imposed when a member who has reached normal minimum pension age (currently 55) is taking, converting or transferring pension benefits, where those charges are only imposed (or only imposed to that extent) if the member takes, converts or transfers benefits before their expected retirement date.

The FCA consultation proposes that the cap will be 1% of the member's policy value for existing personal pension contracts and 0% for new personal pension contracts. The FCA consultation closes on 18 August and it will aim to publish a Policy Statement confirming its final rules in the autumn, with a view to those rules coming into force on 31 March 2017.

The DWP consultation

The DWP consultation sets out proposals for occupational pension schemes including the following.

- The cap will apply to all occupational pension schemes from which an individual can draw a flexible benefit.
- The Government is minded to use the definition of early exit charges that applies to personal pension schemes.
- The cap will apply to charges imposed either by scheme trustees themselves or as a consequence of the contracts they have entered into, for example, with a third party administrator.
- The Government intends to legislate to mirror the FCA's proposed levels of cap for occupational pension schemes.
- The Government considers that it would be most effective to place the primary duty to comply with the cap on service providers and/or trustees, depending on who actually applies the charge in practice.

The consultation also considers statutory exclusions from the definition of early exit charges for both personal and occupational pension schemes. This involves looking at the definition of "Market Value Adjustments" (MVAs) that will be excluded from the cap.

The DWP consultation closes on 16 August and the DWP intends to implement the cap for occupational pension schemes in 2017. In the foreword to the consultation the Pensions Minister states that schemes which continue to apply early exit charges should be starting to plan for these changes.

As an initial step in their planning for these changes, trustees should check whether any such charges currently apply in their scheme and, if so, whether they would exceed the proposed cap.

LEGISLATION AND CONSULTATIONS

QUEEN'S SPEECH

The background briefing notes to the Queen's Speech which was delivered on 18 May set out proposals for a Pensions Bill making provision in the following areas.

Regulation of master trusts

The briefing notes state that: (i) master trusts would have to demonstrate that schemes meet strict new criteria before entering the market and taking money from employers or members; and (ii) the Bill will create greater powers for the Pensions Regulator to authorise and supervise these schemes and take action when necessary. The Regulator issued a press release welcoming the announcement about its new powers and stating that it looks forward to working with government over the coming months to develop the strategic application of these proposed new powers to ensure master trusts are strong, durable and well placed to deliver good member outcomes.

Cap on early exit charges

The Bill will make provision to implement the cap on early exit charges for trust-based occupational pension schemes. The DWP's consultation proposals in relation to this cap are reported on page 4 of this edition of Pensions Round-Up.

Restructuring financial guidance

The Bill will include provision for a new pensions guidance body bringing together the Pensions Advisory Service, Pension Wise and the pensions services offered by the Money Advice Service. This restructuring of financial guidance was first announced in the March 2016 Budget.

The notes also contain information about a Lifetime Savings Bill which will enable the Government to create the new Lifetime ISA announced in the March 2016 Budget.

DC GOVERNANCE – ANNUAL CHAIR'S STATEMENT

In April 2015 new statutory governance requirements were introduced in relation to occupational pension schemes providing money purchase benefits. One of the requirements is that trustees must prepare an annual statement regarding governance ("**Statement**") signed by their chair. The deadline for producing the Statement means that this is an issue which trustees may currently be looking at for the first time. You can find more information about these requirements in our Pensions Alert dated 27 May 2016.

SECONDARY ANNUITY MARKET

The Bank of England and Financial Services Act 2016 received Royal Assent on 4 May. The Act contains provision to extend the scope of Pension Wise to cover the secondary annuity market, with some detail to be set by regulations. On 23 May the Financial Services and Markets Act 2000 (Pensions Guidance) Regulations 2016 were laid before Parliament. The regulations specify that: (i) annuity arrangements which are in an individual's name and which are not held by an occupational pension scheme as a scheme asset will be in scope of the expanded Pension Wise guidance service; and (ii) those who are the named main beneficiary of the annuity and those who have a right to a payment under the annuity once the main beneficiary has died should have access to the guidance. The regulations come into force on 15 June 2016 and the Explanatory Memorandum states that the expanded guidance service is planned for introduction from December 2016.

HMRC

ANNUAL ALLOWANCE AND LIFETIME ALLOWANCE

On 17 May HMRC published its latest Pension Schemes Newsletter which includes some information about recent changes to the annual allowance and the lifetime allowance.

Annual allowance

HMRC addresses two issues that it has been asked to clarify in relation to the tapered annual allowance that was introduced in April 2016.

- HMRC confirms that the position as to when scheme administrators are required to provide a standard pension savings statement to members is unchanged for 2016/17 onwards – a scheme must provide a statement only if the member's pension input amount for the scheme exceeds the general untapered annual allowance (currently £40,000) rather than if it exceeds the member's personal tapered annual allowance. HMRC also states that the requirements for providing a money purchase pension savings statement remain unchanged.
- HMRC states that from 2016/17 onwards, those who are subject to the tapered annual allowance can still use mandatory 'scheme pays' (whereby the member can require the scheme to pay any annual allowance charge and make a consequent adjustment to their benefits) provided: (i) their annual allowance charge for the tax year exceeds £2,000; and (ii) their pension input amount for the scheme for the tax year exceeds the general untapered annual allowance. HMRC also sets out a slight variation to the position in certain circumstances where the money purchase annual allowance applies.

Lifetime allowance

On 6 April 2016 the lifetime allowance reduced from £1.25 million to £1 million. There will be an online process by which members can apply for Individual Protection 2016 (IP2016) and Fixed Protection 2016 (FP2016). However, this online process will not be available until the summer and in the meantime there is an interim process by which members can write to HMRC and receive a temporary reference number. In the newsletter HMRC states that it has received a number of questions about the tax consequences for scheme administrators with members who apply for IP2016 or FP2016 using the interim process but fail to follow this up with an online application. HMRC states that, providing these individuals have not lost their protection, their pension savings will continue to be protected and there will be no tax consequences. However, from August 2016 onwards, only permanent reference numbers will be recognised by HMRC.

Updated versions of the pro forma letter text to use when applying for IP2016 or FP2016 under the interim process are also appended to the newsletter.

THE END OF CONTRACTING-OUT

On 23 May HMRC published its latest Countdown Bulletin which includes some information about next steps for the Scheme Reconciliation Service. HMRC states that the Customer Relationships Manager team will in due course contact all administrators who submitted an expression of interest to use the service in order to allocate time slots for the receipt of queries. Where possible, the team will prioritise query submissions based on when the expression of interest was received. The team will also contact administrators near the agreed date to ensure that they are ready to submit queries.

The newsletter also contains a reminder that schemes that ceased to contract-out prior to 6 April 2016 need to notify HMRC of this and states that, to help HMRC's planning, it would be useful for notification to be given as soon as possible.

PUBLIC SERVICE PENSION SCHEMES

ENTERPRISE ACT

The Enterprise Act 2016 received Royal Assent on 4 May. In relation to pensions, it is worth noting that the Act includes power for regulations to be made restricting public sector exit payments. The cost to the employer of funding early access to unreduced pensions is to be included in the cap.

While the Act was progressing through Parliament, draft indicative regulations in relation to the cap were published but final form regulations are awaited. In terms of timing, it is worth noting that during the Public Bill Committee debate on the clauses relating to the exit cap, the Minister for Small Business, Industry and Enterprise stated that "*... the regulations giving effect to the cap will not be in force until 1 October 2016 at the earliest, giving employers and employees time to prepare*".

LOCAL GOVERNMENT PENSION SCHEME

On 27 May the Department for Communities and Local Government published a consultation on the draft Local Government Pension Scheme (Amendment) Regulations 2016.

One of the areas covered by the draft regulations is pension protection following a TUPE transfer to an independent provider. Currently, in local government, the Best Value Staff Transfers (Pensions Direction) 2007 sets out the level of pension protection for employees of best value authorities where the provision of services is contracted out and staff are transferred under TUPE to an independent provider. This Direction ensures that the employee has the right to acquire pension benefits that are the same as, or are broadly comparable to or better than those that he had as an employee of the authority. The independent provider could therefore provide either a broadly comparable scheme or become an admission body participating in the LGPS.

In October 2013 the Treasury published an updated version of the non-statutory 'Fair Deal' guidance which provides protection of pension rights for those who transfer under TUPE from central government departments to an independent provider. Protection under Fair Deal previously took the form of the provision of a broadly comparable scheme but the October 2013 guidance states that it should take the form of the contractor participating in the relevant public service scheme.

In light of these changes to Fair Deal, changes are now proposed so that the regulations governing the LGPS will permit all transferring members to remain in the scheme. Under the proposals, independent providers will be obliged to enter into an admission agreement so that the protected transferees can retain their eligibility for the LGPS. Employees who would be covered by the draft regulations are those eligible for the LGPS and compulsorily transferred from local authorities and other employers listed in the 2013 LGPS regulations (this includes those employees designated as eligible and employees of admission bodies). It is proposed that the 2007 Pensions Direction will be revoked in due course. In relation to retenders of contracts involving members who were previously transferred out and joined the provider's broadly comparable scheme, the consultation states that whilst new providers at the retender can access LGPS if they wish by seeking admission body status, it is not proposed that they will be required to do so.

Other provisions proposed in the draft regulations relate to: (i) how LGPS operates within the Public Sector Transfer Club; (ii) providing members with more options for using their AVCs in light of the DC flexibilities; and (iii) amendments intended to improve the administration of the scheme.

The consultation closes on 20 August but the draft regulations do not include a coming into force date. Administering authorities and private sector contractors who are currently negotiating contracts should consider taking advice about the extent to which these proposals should be taken into account.

OTHER NEWS

CASE LAW – TRANSFERS WITHOUT CONSENT

The Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 set out requirements which must be met in order for a bulk transfer of members' rights to be made without their consent. One of the requirements is that the actuary must provide certification in relation to the members' rights in the receiving scheme, with the pro forma wording for the certificate including: "*I certify that in my opinion, the transfer credits to be acquired for each member under the receiving scheme in the categories of member covered by this certificate are, broadly, no less favourable than the rights to be transferred*".

A High Court judgment published in May looked at whether, when making this comparison, the actuary should (or may) take into consideration the security of the benefits in each of the schemes. The case involved a proposed transfer where the headline benefits in the receiving scheme would not be as extensive as those in the transferring scheme in relation to increases to pensions in payment and in deferment, but the security for the payment of benefits would be greater in the receiving scheme.

The High Court concluded that the security of benefits is **not** a factor to be taken into account by the actuary in the certification process. The judge's reasoning included that: (i) no express reference is made to the security of the benefits and, had it been intended that such a factor be taken into account, the regulations would have said so; (ii) had the actuary been required to consider relative funding and employer covenant strength, the certification wording quoted above would have included wording similar to another part of the regulations which does require the actuary to look outside of the rules of the schemes and therefore refers to the actuary having "*good cause to believe*" the matters being certified; and (iii) the decision whether to make the transfer is something for the trustees to decide in accordance with their fiduciary duties but if security of benefits was part of the certification process, there would be little left for the trustees to determine.

WORK AND PENSIONS COMMITTEE – AUTOMATIC ENROLMENT

On 15 May the Committee published a report about its inquiry on automatic enrolment. The Committee states that it instigated the inquiry with the principal objective of establishing whether small businesses were being adequately supported in introducing automatic enrolment, but the evidence pointed it to two additional significant concerns – the regulation of master trusts and the impact of the proposed introduction of Lifetime ISAs (LISAs). The Committee's recommendations in relation to LISAs include that the Government: (i) develops a communications campaign that highlights the differences between the LISA and workplace pensions; and (ii) should conduct urgent research on any effect of the LISA on pension saving through automatic enrolment.

The Committee also recommends areas for consideration as part of the 2017 review of automatic enrolment, including: (i) removing the lower qualifying earnings band for contributions and lowering the earnings trigger threshold; and (ii) approaches to increasing contributions beyond the statutory minimum of 8% of qualifying earnings, including mandatory increases in employee and employer contribution rates and means of encouraging greater voluntary contributions.

PENSIONS ADMINISTRATION STANDARDS ASSOCIATION

In May the Pensions Administration Standards Association (PASA): (i) issued a press release urging schemes to move forward with their GMP reconciliation; and (ii) issued its revised standards to market. Key to the changes to the standards is clarification of what administrators need to do to become PASA Accredited and making the initial stage of Accreditation more straightforward.

OTHER NEWS

PENSION TRACING

On 9 May the DWP and the Pensions Minister announced that a new DWP website has been launched by the Pension Tracing Service to help people more easily and quickly locate their lost pension savings. The press release explains that: (i) the new service is simple to use and provides trace results immediately; and (ii) individuals enter their former employers' details into the online database and are provided with contact details for pension schemes that they may have paid into.

PENSIONS DASHBOARD

On 26 May the Pension Finder working group (a collaboration of 14 organisations including the Money Advice Service and Association of British Insurers) published "*Creating a Pensions Dashboard. Pensions Finder Alpha White Paper*". The Money Advice Service states that this is a key milestone in achieving the Government's vision for pensions dashboards by 2019. The White Paper looks at consumer journeys, consumer research, architecture and data standards, policy and governance, and provides recommendations for the next phase of the project. The next phase of the project involves developing a prototype dashboard and continuing to work on architecture and governance.

BRITISH STEEL PENSION SCHEME

On 26 May the DWP published a consultation setting out various options for potentially helping the British Steel Pension Scheme ("**BSPS**") as part of a wider package of Government support to do what it can for UK Steel, steel workers and affected localities. This is in response to proposals put forward by the BSPS and supported by Tata Steel UK. However, the Government has not yet taken any decisions on the proposals set out in the paper. The consultation looks at four options: (i) using existing regulatory mechanisms to separate the BSPS; (ii) payment of pension debts; (iii) reduction of the BSPS's liabilities through legislation to allow the levels of indexation and revaluation payable on future payment of accrued pension rights to be reduced to the minimum level required by law; and (iv) allowing for bulk transfers without individual member consent to a new scheme paying lower levels of indexation and revaluation.

In relation to option (iv) the consultation states that the regulations to allow this would not just apply to BSPS but would also apply where there are schemes in similar circumstances – where the size of the scheme makes obtaining individual consent impractical and where the transfer would be in the members' interests when compared with PPF level benefits. The consultation goes on to set out examples of what the DWP thinks would be appropriate requirements for this option to apply which include that it could only be used: (i) by very large schemes (over 100,000 members) where obtaining individual consent is impractical; and (ii) in the context of a regulated apportionment arrangement happening immediately afterwards.

ON THE HORIZON

DATE	DEVELOPMENT
Unknown	A consultation on revised regulations about **equalising GMPs** is expected in this Parliament.
	The reforms in relation to **Defined Ambition**, **Collective Benefits** and **automatic transfers of small DC pots** will be revisited once the market has had time and space to adjust to the other reforms underway.
	A draft updated **IORP Directive** is under consideration. The current draft states that Member States would have 18 months after the Directive comes into force to transpose provisions into national law.
Autumn 2015	Further developments were expected on proposals for **transparency of costs and charges**.
2016	A final response is expected from the Board of the UK Statistics Authority in relation to the June consultation on **consumer price statistics**.
	The Regulator intends to review its **guidance on transfers**.
	The Regulator intends to publish **guidance on DB scheme investment strategy**.
	A consultation is expected on extending the ban on **member-borne commission payments** 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 **Finance (No. 2) Bill** 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 **Pensions Bill** is expected containing provisions in relation to the regulation of master trusts, the cap on early exit charges and restructuring financial guidance.
July 2016	An updated version of the **DC Code** is expected to come into force and the final version of supporting guidance (currently subject to consultation) is expected to be published.
Summer 2016	A new requirement will be introduced for trust-based schemes to **report regularly on their performance in processing transfers**.
End of 2016	The transitional period in which employers and schemes may continue to use the **VAT** treatment in VAT Notice 700/17 ends on 31 December 2016.
End of March 2017	The Government will place a duty on the FCA to **cap excessive early exit charges**. 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 **secondary annuity market** is expected to be introduced.
2017	The measures on **DC charges and governance standards** will be reviewed.
6 April 2018	The **lifetime allowance** is due to be indexed annually in line with CPI.
May 2018	The new EU General **Data Protection** Regulation will apply.
2019	The Government will ensure the industry designs, funds and launches a **pensions dashboard** by 2019.

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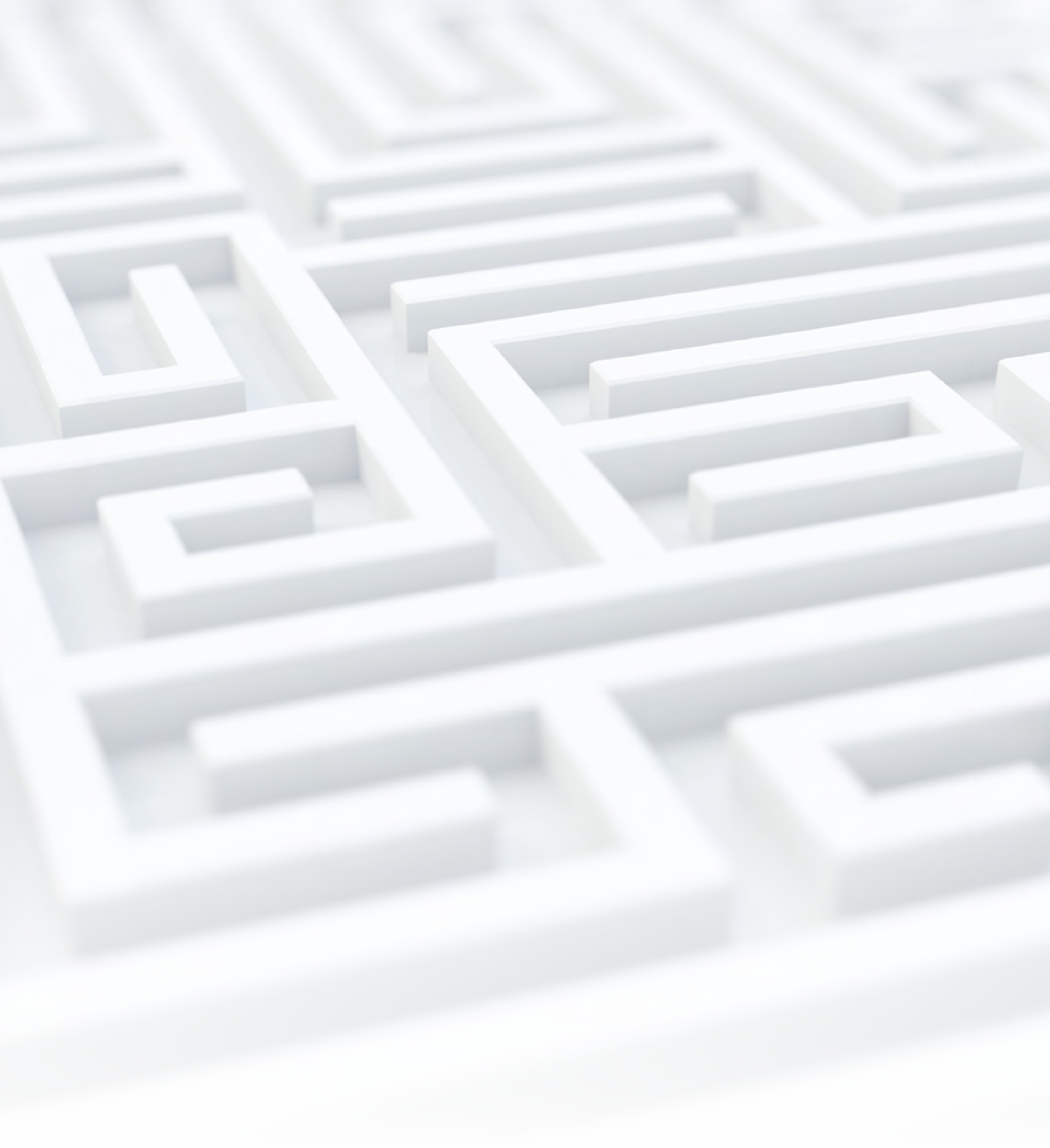

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