Sackers

A stronger Pensions Regulator – the Government responds

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Introduction

On 11 February 2019, the Government published a response to its consultation on bolstering TPR's powers which it believes will help TPR "to meet [its] ambition to be 'clearer, quicker, and tougher'".

Key points

- Several proposals will ensure that TPR has access to more timely information to improve its oversight of corporate activity.
- Changes designed to achieve this include extending the current **notifiable events regime**, introducing a new requirement for sponsors to produce a "**declaration of intent**" (to be addressed to the scheme's trustees and shared with TPR) prior to certain business transactions, and improving TPR's existing **anti-avoidance powers**.
- The Government will also introduce **two new criminal offences** targeting "individuals who wilfully or recklessly mishandle pension schemes" and those who fail to comply with a contribution notice (CN). TPR will also be given power to issue a **new civil penalty** of up to £1 million for more serious breaches of pensions requirements (including failure to comply with a CN).
- Once implemented, the changes will raise the stakes considerably for all employers and trustees involved in occupational pension schemes.

Background

The Government's consultation on TPR's powers last summer (see our Alert) was the first to emerge as a consequence of last year's White Paper (see our Alert). Whilst the Government is of the view that the existing regulatory system is working well for the majority of DB pension schemes, enhancing TPR's powers is clearly seen as one way in which it can be improved.

The new powers are therefore designed to enable TPR to:

- be more proactive and get involved earlier when sponsoring employers make changes which could impact their pension scheme

- obtain the right information about a scheme and its sponsoring employer in a timely manner
- gain redress when things go wrong, and
- deter “reckless behaviours”.

Overseeing corporate transactions

Notifiable Events Framework

The purpose of the notifiable events regime is to assist TPR in reducing the risks of situations arising that may lead to calls on the PPF. New employer-related events will be introduced requiring the following to be reported to TPR:

- the sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme’s liabilities, and
- the granting of security on a debt to give it priority over the scheme.

However, in response to concerns that they may “potentially stifle legitimate business activity”, the Government has dropped some of its original proposals (for now). For example, its proposal to extend the notifiable event covering the breach of a banking covenant to include the deferral, amendment or waiver of the covenant.

The Government will work alongside TPR to define the terms being used in relation to the new notifiable events, engaging with stakeholders on this and the possibility of bringing forward or specifying more clearly the timing of such notifications (the current requirement being to inform TPR “as soon as reasonably practicable”). A further consultation on draft regulations, as well as a revised code of practice, will follow.

Declaration of intent

The idea underpinning the declaration of intent is to require businesses to think about their pension scheme(s) when considering particular transactions (such as the sale of a controlling interest in a scheme employer) and to ensure collaboration with trustees (and TPR) at an appropriate stage. The declaration, which would be addressed to the trustees from the transaction’s corporate planners (usually the board of directors) and shared with TPR, will need to help trustees understand the detailed nature and implications of the proposed transaction for the scheme.

Despite opinion being divided on the need for such an early warning system, as well as concerns that it could delay transactions and deter buyers, the Government will press ahead with legislation. Further work will be carried out to consider the content of the declaration (and the timing) and to ensure that the new requirement complements planned changes to the notifiable events regime.

Voluntary clearance

Voluntary clearance allows companies to seek confirmation from TPR that, in the circumstances set out in a clearance application, it would not be reasonable for TPR to use its anti-avoidance powers by issuing a CN or a financial support direction (FSD). The Government makes clear that there are no plans to replace clearance with the declaration of intent.

TPR will be reviewing its current clearance guidance, including providing more information about the clearance process and what applicants can expect.

Improving TPR's powers

Recognising that TPR's current powers to penalise individuals and corporate entities for non-compliance with pensions requirements are limited (with civil penalties of up to a maximum of £5,000 and £50,000 respectively), the consultation looked at how "reckless behaviours" towards DB pension schemes could be best deterred and punished.

Concerns highlighted in the response concerning TPR's new powers to sanction include that they could increase legal and compliance costs, and result in difficulties recruiting MNTs/MNDs. However, the Government believes that the greatest impact will be felt by "the small number of employers evading their responsibilities".

The new powers will include:

- a civil penalty of up to £1 million for more serious breaches which have resulted in actual harm to the pension scheme, or have the potential to do so if left unchecked. Examples here include failure to provide a declaration of intent, failure to comply with the notifiable events regime (having been downgraded from a criminal offence in the original proposals), and failure to comply with a CN or an FSD
- a new criminal offence of "wilful or reckless behaviour" in relation to a DB pension scheme, punishable by a maximum penalty of up to seven years' imprisonment and/or an unlimited fine
- a new criminal offence of failing to comply with a CN, punishable by an unlimited fine but not a custodial sentence.

Potential targets for the above penalties will include sponsoring employers, any associated or connected persons and, in some circumstances, the trustees themselves.

Anti-avoidance

To protect the benefits of pension scheme members, and to ensure that pension liabilities are not avoided or unsupported, anti-avoidance powers enable TPR to issue:

- CNs (requiring payment to be made into a scheme), and
- FSDs (requiring financial support to be put in place for a scheme).

Changes to both the CN and FSD requirements will be implemented, including:

- amending the reasonableness test (which requires TPR to consider whether it is reasonable to impose liability under a CN) to reflect that the actual or potential impact of the act, or failure to act, on the value of the scheme's assets or liabilities is a relevant consideration when determining the amount to be paid
- clarifying the application of the material detriment test (which allows TPR to impose a CN where an act or failure to act has a materially detrimental effect on the likelihood of members' benefits being received) by introducing "a snapshot funding approach" focusing on the potential weakening of the employer
- tightening up the forms of financial support to be given to a scheme under an FSD, to require either a cash payment and/or for the target to assume joint and several liability for the sponsoring employer's obligations to the scheme
- a rebranding of FSDs to "financial support notices" (or FSNs).

Next steps

The Government believes that the proposed upgrades to TPR's powers will build on the "robust" DB regulatory system which is already in place, helping to ensure that it "is equipped for the challenge of a continually evolving pension's landscape".

There is no clear indication on the likely timing of any changes, with legislation having to wait its turn until parliamentary time allows. In the interim, the Government "will continue to engage with stakeholders on the detail".

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