Sackers

Pension Schemes Act 2021 – the dawn of a new regulatory era?

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Introduction

Several years in the making, the Pension Schemes Act ("the Act") finally received Royal Assent on 11 February 2021. Key elements of the new Act include beefing up TPR's powers, changes in relation to scheme funding, and new restrictions on statutory transfers. Whilst the bulk of the Act is largely unchanged from the Bill introduced into Parliament over a year ago (see our Alert), there are a few additions and Parliamentary tussles of note.

Key points

With much of the detail to be set out in regulations, including the dates on which most of the provisions will come into force, the Act will introduce:

- new powers for TPR, including extensions to both criminal and civil sanctions
- new events which will need to be notified to TPR relating to the sponsoring employer of a DB scheme, as well as new circumstances in which contribution notices can be imposed
- a new requirement for trustees of DB occupational schemes to determine (with the agreement of the employer) a strategy for ensuring that pensions and other benefits under the scheme can be provided over the long term ("funding and investment strategy")
- restrictions on the right to a statutory transfer, unless prescribed conditions are met
- new climate change governance and disclosure requirements
- a framework for "collective money purchase schemes", also known as collective DC or "CDC" (see our Alert), with a regulatory regime closely resembling that put in place for master trusts (see our Alert)
- finally, provisions to enable pensions dashboards, although dashboards are not expected to be available until 2023 (see our 7 Days).

A stronger TPR

A raft of new offences, both criminal and civil, as well as extended information-gathering and new interviewing powers, will go some way to helping TPR fulfil its "clearer, quicker, and tougher" mantra.

Criminal sanctions

New criminal offences include:

- failure to comply with a contribution notice – punishable by an unlimited fine
- avoidance of an employer debt (ie under section 75 of PA95) – punishable by an unlimited fine and/or up to seven years in prison
- conduct risking accrued scheme benefits – punishable by an unlimited fine and/or up to seven years in prison.

The latter two offences attracted a great deal of debate, as well as industry concern, during the Act's passage through Parliament. Owing to the breadth of the drafting, these offences have the potential to capture ordinary business activity, as well as a wide spectrum of people (including directors of sponsoring employers, trustees and their advisers).

Attempts by the House of Lords to narrow the scope of the above sanctions ultimately failed, but hopefully TPR guidance will be forthcoming to help allay industry concerns.

Civil sanctions

As an alternative to the criminal sanctions outlined above, TPR will have power to impose a civil penalty of up to £1 million. Such a penalty can also be imposed where a person knowingly or recklessly provides TPR, or the trustees in certain circumstances, "with information which is false or misleading in a material particular" (knowingly or recklessly providing TPR with false or misleading information is already a criminal offence punishable by an unlimited fine or up to two years in prison).

TPR's information-gathering powers will also be extended, including wider powers to inspect premises and to require trustees, scheme employers, professional advisers (and "any other person appearing to TPR to be a person who holds, or is likely to hold, information relevant to the exercise of TPR's functions") to attend an interview. Failure to attend an interview or to answer a question will also be a criminal offence, punishable by an unlimited fine.

Threshold for imposing liability?

Imposing liability in relation to the criminal sanctions and civil penalties outlined above may come down to whether the person had the requisite intent or knowledge (as appropriate), and whether they had a reasonable excuse (in the case of the criminal sanctions) or it was reasonable for the person to act (or fail to act) in the way that he/she did (in relation to the civil penalties).

Notifiable events

Details of the new notifiable events will be set out in regulations but are expected to include:

- the sale of a material proportion of the business or assets of a sponsoring employer which has funding responsibility for at least 20% of a DB scheme's liabilities, and
- the granting of security on a debt to give it priority over a DB scheme (see our Alert).

Notifications to TPR will generally need to be made as soon as reasonably practicable after the sponsoring employer becomes aware of the event. An accompanying statement must also cover how any detriment to

the scheme resulting from the event is to be mitigated, and a description of any communication with the scheme trustees. The aim is to require businesses to think about their pension scheme(s) when considering particular transactions, and to ensure collaboration with the trustees (and TPR) at an early stage.

Breach of the new events (or failure to provide an accompanying statement) without reasonable excuse will be punishable by a civil penalty of up to £1 million.

Contribution notices

The Act also introduces two new "snapshot" tests for imposing a contribution notice (under which TPR can require payment to be made into a DB scheme):

- the "employer insolvency test" – broadly, this will be met if TPR considers that at the time of an act or failure to act a scheme was in deficit and, had a statutory employer debt fallen due (under section 75 of PA95), this act or failure to act "would have materially reduced the amount of the debt likely to be recovered", and

- the "employer resources test" – broadly, this will be met if TPR considers an act or failure to act "reduced the value of the resources of the employer" and that reduction was material relative to the estimated section 75 debt in relation to the scheme.

New funding and investment strategy

In future, DB scheme trustees will be required to produce a funding and investment strategy setting out the funding level which they "intend the scheme to have achieved", and the investments they intend to hold, as at a date to be determined in accordance with regulations. The scheme's "technical provisions" under the statutory funding regime will need to be calculated "in a way that is consistent with" this strategy.

As soon as reasonably practicable after determining or revising the scheme's funding and investment strategy, the trustees will have to prepare a "statement of strategy", capturing the detail in writing. This statement must be signed by the chair of trustees, provided he or she "meets such other conditions as may be prescribed". Where there is no chair of trustees, one must be appointed.

Employer agreement to the strategy, as set out in the scheme's statement of strategy, must be obtained. Sponsoring employers must also be consulted on the following issues:

- the extent to which, in the trustees' opinion, the strategy "is being successfully implemented" and, where it is not, the steps proposed "to remedy the position", including details about timing

- "the main risks faced by the scheme in implementing" the strategy, and how the trustees intend to mitigate or manage them, and

- the trustees' reflections on "any significant decisions taken by them in the past" that are relevant to the strategy, including "any lessons learned that have affected other decisions or may do so in the future".

During the Act's passage through Parliament, the House of Lords tried to introduce a requirement for open DB schemes to be regulated differently for scheme funding purposes. Whilst rejected, following a last-gasp challenge in the Lords, important Government assurances were secured. Not wanting to see "good and viable" DB schemes close unnecessarily, Baroness Stedman-Scott stated that both the regulations under the Act and TPR's revised funding code "will acknowledge the position of open and less mature schemes", and the scheme funding regime "will continue to apply flexibility to take account of individual scheme circumstances".

Finally, bolstering its information-gathering powers further, trustees will be required to send TPR a copy of an actuarial valuation as soon as reasonably practicable after receipt, "together with such other information as may be prescribed" (this is likely to include the statement of strategy).

Statutory transfers

Under changes to be made by the Act, trustees will be prevented from making a statutory transfer unless prescribed conditions are met. These conditions will be set out in regulations, alongside additional "red flags", but will include providing the trustees "with information or evidence about the member's employment or place of residence". Crucially, the member may also be required to provide the trustees with evidence that they have obtained information or guidance from a prescribed person before a transfer is allowed to proceed.

These protections form part of a suite of measures designed to protect consumers from scams. Shifting the onus so that trustees cannot make a statutory transfer unless prescribed requirements are met should go some way to reducing the possibility of members falling victim to scams. The new provisions should also help to take some pressure off trustees whose hands are often tied in the face of strict statutory deadlines.

Climate change

Regulations will impose new requirements on trustees "with a view to securing that there is effective governance of the scheme with respect to the effects of climate change". Trustees will also be required to publish "information of a prescribed description" relating to the effects of climate change on their scheme.

Draft regulations detailing the above were published for consultation on 27 January 2021, together with draft statutory guidance (see our Alert for details). Final, non-statutory guidance from the Pensions Climate Risk Industry Group (PCRIG) on assessing, managing and reporting climate-related risks was issued on the same day.

Next steps

Clearly, much of the detail in the Act remains to be fleshed out in regulations. Given the big guns added to TPR's armoury, we are likely to see a substantial uptick in the number of clearance applications (ie parties involved in corporate activity or events seeking advance reassurance from TPR that it will not use its civil powers). Revised clearance guidance has been on the horizon for some time now, so its contents may also be an important indicator as to when and how TPR intends to deploy its new powers.

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