Corporate briefing

April 2021

Highlighting the latest developments in pensions
for employers and corporate investors

Welcome

2021 will see enhanced powers for the Pensions Regulator (TPR) to curb certain corporate behaviour. Whilst predominantly a concern for those involved in defined benefit (DB) schemes, defined contribution (DC) sponsoring employers also need to take heed. For example, the new civil penalty of up to £1 million could kick in where false or misleading information is provided to TPR about automatic enrolment compliance.

Despite the global pandemic, as the figures on page 3 show, last year's buy-in and buy-out market remained buoyant. We therefore share tips for sponsoring employers where such an exercise is on the cards. For DB sponsoring employers facing challenges in light of COVID-19, TPR's updated guidance is also worth noting.

Financial education and advice programmes in the workplace are becoming increasingly popular. We take a look at what sponsoring employers might offer, as well as the potential pros and cons.

Finally, our timeline of upcoming changes should be on all corporate radars.

The dawn of a new regulatory era

The most significant piece of pensions legislation in over a decade has finally hit the statute books. Several years in the making, the Pension Schemes Act 2021 (the PSA 2021) will bolster TPR's supervision and enforcement powers, reinforcing its mantra of being "clearer, quicker and tougher". The beefed-up powers, including in relation to interview and inspection, are expected to come into force this autumn, although much of the detail is awaited in regulations.

TPR's new powers

Two of the new criminal sanctions, avoidance of a statutory employer debt and conduct risking accrued DB scheme benefits, were hotly debated during the PSA 2021's passage through Parliament. With the potential to capture a wide range of corporate activity, as well as a broad spectrum of people (including directors of sponsoring employers, shareholders, trustees and advisers), the two new powers have set alarm bells ringing throughout the pensions industry.

Closing on 22 April 2021, TPR is currently consulting on its proposed policy approach towards investigating and prosecuting the two new criminal offences. Reassuringly, TPR's proposed approach is guided by its understanding that the new offences are aimed at enabling it to "address the more serious intentional or reckless conduct" that is already within the scope of its contribution notice powers, or would be in scope if the person was connected with the sponsoring employer. But its overall intention is that the offences will help "to deter conduct that could put pension schemes at risk".

Whilst the examples of behaviour set out in the draft policy might help to allay some industry fears, many shades of grey remain. As a result, we may well witness a more cautious approach to corporate behaviour until the legal position becomes clearer.

The dawn of a new regulatory era cont.

TPR's current powers

TPR already has a broad range of powers to help it regulate occupational pension schemes, including the ability to gather information and to inspect premises. Trustees and employers are also required to notify TPR of certain events about the scheme on the one hand and the employer on the other (known as "notifiable events"). Examples of existing employer events include a breach of a banking covenant or a decision to cease trading.

Crucially, TPR also has the following anti-avoidance powers enabling it to act against a sponsoring employer (and those associated or connected with it):

- contribution notices – under which TPR can require payment to be made into a DB scheme, and
- financial support directions – requiring financial support to be put in place for a DB scheme

TPR's new sanctions

Criminal offences:

- avoidance of a statutory employer debt – punishable by an unlimited fine and/or up to seven years in prison
- conduct risking accrued DB scheme benefits – punishable by an unlimited fine and/or up to seven years in prison
- failure to comply with a contribution notice – punishable by an unlimited fine
- failure to attend or respond to an interview (see below) – punishable by a fine

Civil penalty of up to £1 million:

- as an alternative to the above criminal sanctions
- where a person knowingly or recklessly provides false or misleading information to the trustees (capturing existing information requirements applicable to sponsoring employers and their advisers) or to TPR (the latter already being a criminal offence punishable by an unlimited fine and/or up to two years in prison)
- for breach of the new notifiable events requirements (see below)

Other new powers of note

New notifiable events
Expected to include a requirement to notify TPR on the sale of a material proportion of a sponsoring employer's business or assets (where that employer has funding responsibility for at least 20% of the scheme's liabilities), or where security on a debt is granted giving it priority over the scheme

Contribution notices
Broadening the circumstances in which contribution notices can be imposed, including introducing a snapshot test focusing on the potential weakening of a sponsoring employer's resources resulting from an act or course of conduct (including a failure to act)

Information gathering
Extending TPR's existing powers, with wider powers to inspect premises

Interviews
Enabling TPR, rather like the Financial Conduct Authority (FCA), to call to an interview sponsoring employers, trustees, professional advisers or any other person whenever it believes its regulatory functions might be in play

Action

Sponsoring employers should take advice before commencing corporate activity, including M&A, financing and refinancing, granting of security and/or paying dividends.

Risk transfer

As highlighted in our July 2020 Corporate briefing, activity in the risk transfer (or liability management) market remained bouyant despite the pandemic. Options available for DB schemes and sponsoring employers include:

- buy-ins – certain assets are transferred to an insurer which then pays future cash flows to scheme trustees to cover selected liabilities (eg pensioner benefits)
- transactions designed to mitigate certain risks – such as longevity, inflation, interest rate and investment risk
- partial or full buy-out – often preceded by a buy-in, assets and liabilities referable to either a class of members or the entire membership are secured with an insurer, the latter becoming legally responsible for paying benefits to relevant beneficiaries
- transfers to so-called “superfunds” (or DB consolidators) – where the sponsoring employer’s covenant is replaced by a special purpose vehicle backed by a capital buffer (including contributions from the original sponsoring employers).

With costs varying depending on the degree of liability coverage and scheme size, factors to consider in advance include:

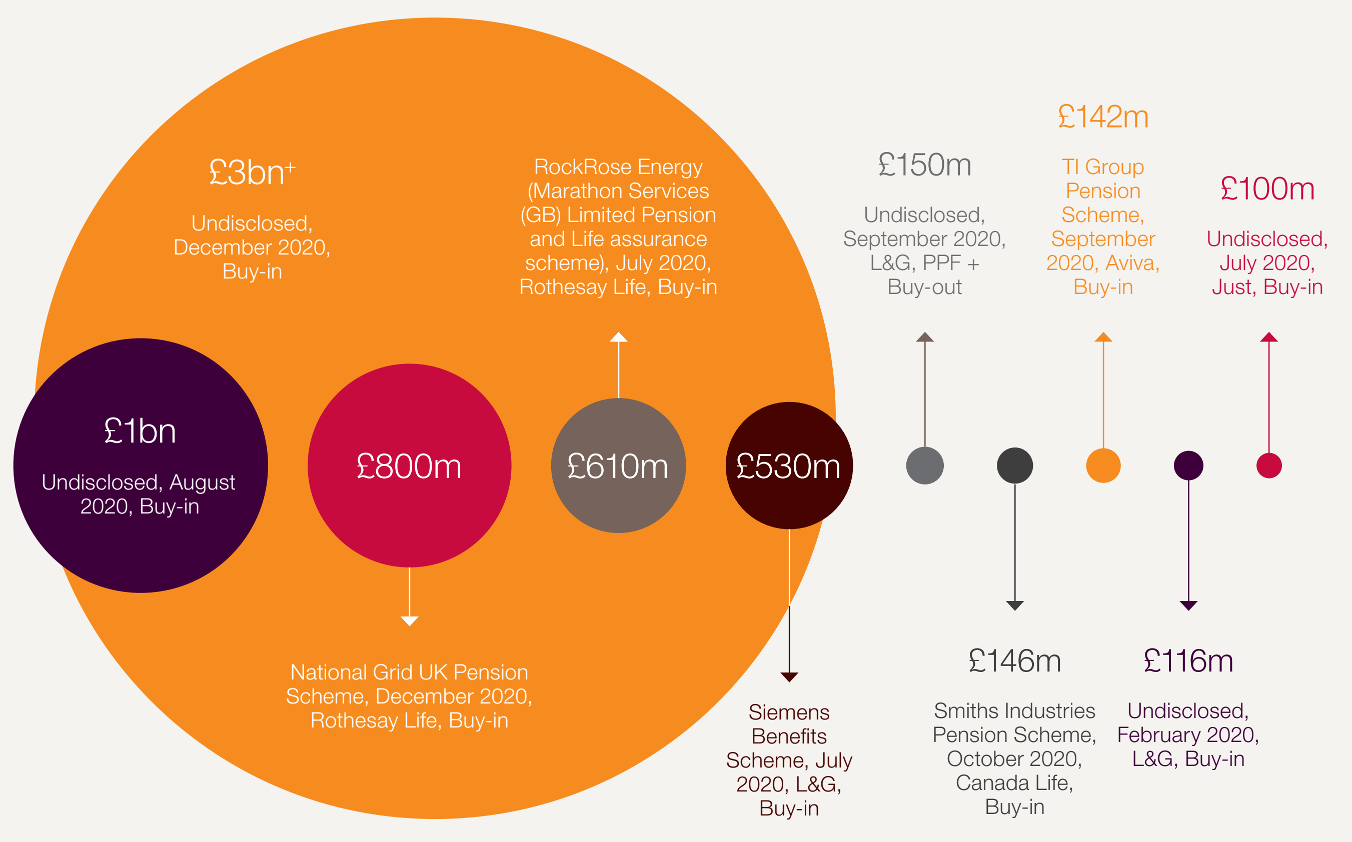
- benefit specification and data – both quality and accuracy, as their reliability will affect the ultimate price paid
- other potential obstacles – such as possible sex or age inequality (including GMP equalisation) which may need ironing out
- insurer terms – the level of risk the insurer is willing to assume and the price tag for areas of uncertainty
- timing – just how quickly can the parties realistically move?
- budget – is what is on offer within the trustees’ budget or are additional funds needed from sponsoring employers?

Action

Sponsoring employers contemplating a risk transfer exercise should seek specialist advice at an early stage. Having advised on 20-30% of buy-in/out transactions over a three-year period, including many of the largest in the market as well as industry leading longevity transactions, Sackers is well placed to assist.

Transactions over £100m on which Sackers advised in 2020

Listed by size, client, date, insurer and transaction type



In other news

Financial education and advice programmes in the workplace

It is generally accepted that there is a correlation between good levels of DC member engagement and improved decision making at retirement. A growing number of DC sponsoring employers are therefore either considering, or have already put in place, some form of financial education programme in the workplace. This goes beyond the guidance available through not-for-profit organisations like TPAS and Pension Wise (both shortly to be rebranded as "MoneyHelper").

Financial education can take the form of a targeted financial guidance programme and/or the appointment of a selected financial adviser (or panel of advisers), with employees having access to regulated financial advice. This is most commonly put in place in relation to DB to DC transfers or DC decumulation options, and often on a subsidised basis.

Lack of access to good quality financial advice can lead to members making poor decisions about their options. But putting a financial programme in place raises the spectre of potential legal and regulatory exposure that needs to be properly considered upfront so as to reduce the possibility of liability in the event of a member suffering financial loss, as well as to avoid straying inadvertently into regulated FCA territory.

By undertaking thorough due diligence on any selected provider or financial adviser at the outset, as well as carrying out ongoing monitoring, sponsoring employers can help to mitigate some of these risks. Legal input on any contractual terms should also be sought, and member communications should be clear as to the roles and responsibilities of the various parties involved.

Recently published guidance from the Pensions Ombudsman is aimed at anyone facilitating financial advice, outlining its approach to the provision of factual information about financial advisers. The FCA's new guide for sponsoring employers and trustees on providing support with financial matters without needing to be subject to FCA regulation also counts as essential reading.

Employers under strain – an update

Over the last year, many businesses have had to consider ways to ease cash flow, with some DB sponsoring employers exploring the possibility of temporarily reducing or suspending deficit repair contributions (DRCs). By August 2020, TPR had already received 108 revised recovery plans for DB funding purposes, 86% of which involved an agreement to defer DRCs. Whilst the majority were from small schemes and sectors under particular pressure, given the dual economic threats of COVID-19 and the UK's EU exit, TPR is expecting "more companies to be looking at restructuring".

In November 2020, TPR issued guidance on protecting schemes from sponsoring employer distress. Designed to prepare for the possibility of financial difficulties in the future, it offers a timely reminder for trustees that options available for mitigating pension scheme loss inevitably reduce the further along the "corporate stress curve" a sponsoring employer moves.

Top tips

Given the speed at which distressed scenarios can unfold, some key takeaways for sponsoring employers include:

- ✓ open an early dialogue and get professional advice
- ✓ expect rigorous due diligence, including enhanced covenant monitoring, details of the business case, financial projections, and discussions with other stakeholders
- ✓ put in place information sharing protocols, so it is clear what information needs to be shared and when
- ✓ where relevant, consider non-disclosure agreements
- ✓ keep in mind other cash flow options, eg suspending dividends and renegotiating credit arrangements
- ✓ expect to be asked about appropriate security and/or mitigation

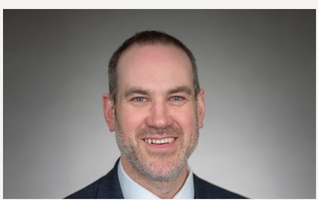
On the horizon

Date	Event
11 February 2021	The PSA 2021 received Royal Assent (see our Alert)
1 April 2021	Requirement reinstated for trustees / providers to report late DC contribution payments to occupational and personal pension schemes to TPR no later than 90 days after they fall due (following the temporary extension to 150 days to take account of the COVID-19 crisis)
5 April 2021	Expiry of statutory modification power allowing employers to recoup the increase in their NICs, following the abolition of DB contracting-out in April 2016, by either adjusting members' future pension accrual or future contributions
30 April 2021	Deadline for submitting Pension Protection Fund deficit reduction contributions certificates via Exchange (by 5pm)
30 June 2021	• Temporary COVID-19 related restrictions on presenting winding-up petitions and on the use of statutory demands now due to expire • Suspension of company directors' personal liability for wrongful trading scheduled to end
30 September 2021	• Current scheduled end of the Coronavirus Job Retention Scheme • Temporary relaxation of the usual requirement that a company seeking a free-standing moratorium is likely to be rescued as a going concern, where its potential failure is due to COVID-19, now due to expire
Q3/4 2021	TPR's second consultation on its revised DB scheme funding code expected
October 2021	Earliest date from which TPR's new criminal and civil sanctions likely to be introduced[1]
Q2 2022	Earliest date from which actuarial valuations may be required to be undertaken reflecting the new funding and investment strategy under the PSA 2021 and in accordance with TPR's revised DB scheme funding code of practice

1 Although the new offences will not apply retrospectively, TPR has said that evidence pre-dating their commencement may be relevant to its investigation or prosecution if, for example, it indicates someone's intention and/or knowledge

Contact

Sackers is the leading law firm for pension scheme employers, trustees and providers. Over 60 lawyers advise employers on all aspects of their pension arrangements. This includes getting automatic enrolment right, moving to a master trust, advising on corporate pensions strategy, advice relating to DB schemes such as DB risk and funding solutions, and advising on the pensions aspects of M&A activity and corporate group restructuring. For more information, please get in touch with David Saunders, Philippa Connaughton, Faith Dickson, Fuat Sami, Tom Jackman or Ferdy Lovett, or your usual Sackers contact.



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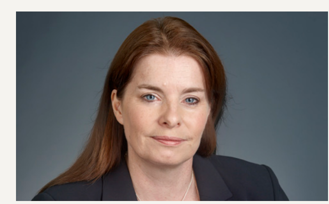

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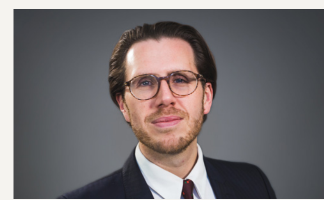

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Upcoming webinars

06/05/21 (12:30pm-1:30pm)
Quarterly legal update – the latest legal and regulatory developments in the pensions world

20/05/21 (12:30pm-1:30pm)
GMP equalisation and conversion – tips and traps

26/05/21 (12:30pm-1:15pm)
Providing guidance and advice – are you clear on your role and responsibilities?

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