Sackers

Protecting DB pension schemes - A Stronger Pensions Regulator

Alert | 27 June 2018

Introduction

On 26 June 2018, the DWP published the first of the consultations promised by this year's White Paper (see our Alert), "Protecting [DB] pension schemes – a stronger Pensions Regulator".

Key points

The consultation seeks views on proposals in three key areas:

- increasing TPR's and trustees' access to timely information to allow greater corporate oversight
- extending the sanctions regime to deter wrongdoing and to punish it when necessary and
- improving TPR's existing anti-avoidance powers.

The Government aims to improve TPR's oversight of corporate transactions by broadening the current **notifiable events regime** and 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.

The DWP proposes extending the existing **penalty regime** to include a new power to impose a civil penalty of up to £1 million for serious breaches and new criminal offences to punish wilful or grossly reckless behaviour in relation to a DB scheme.

The online consultation certainly raises the question of how strong TPR's powers should be ("something stronger than tea?")

Background

The White Paper, "Protecting [DB] Pension Schemes" was published in March 2018. In it, the Government argued that the existing regulatory system is working well for the majority of DB pension schemes, members, trustees and sponsoring employers but that it could see ways in which it could improve the system further. It is now working to make these improvements and will be carrying out a number of consultations focused on different areas.

This first consultation sets out the Government's proposals to improve TPR's powers so that it:

- can be more proactive and get involved earlier when employers make changes which could impact their pension scheme
- can obtain the right information about a scheme and its sponsoring employer, and
- is able to gain redress when things go wrong.

Corporate Transaction Oversight

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. When an event is notified to TPR, it is intended to serve as an early warning mechanism of potential financial difficulties, which in turn might result in the PPF having to assist a scheme.

The DWP considers that the notifiable events framework could be improved by broadening the range of employer-related events which need to be reported to include, for example:

- the granting of security on a debt to give it priority over the scheme
- the significant restructuring of the employer's board of directors
- the taking of independent pre-appointment insolvency / restructuring advice.

The DWP also proposes bringing the timing for notification forward and extending the reporting obligation to other parties, for example, the directors of a sponsor's parent.

Declaration of intent

The Government proposes that, subject to certain risk criteria, particular transactions (such as the sale of a controlling interest in a scheme employer), should trigger the production of a "**declaration of intent**". The aim being to oblige corporations to think about how their decisions will affect the pension scheme(s) "in more detail and at an appropriately early point in the transaction process".

The declaration would be addressed to trustees from the transaction's corporate planners (usually the board of directors), shared with TPR and should:

- explain the nature of the planned transaction
- confirm both that the corporate planner has consulted on its terms with the trustees and the trustees' agreement (or otherwise) to the planned transaction
- explain any detriment to the scheme and how this is to be mitigated.

Declarations of intent would work closely alongside the notifiable events framework but would be required at a later point in a corporate transaction, when there is greater certainty as to the nature of the transaction, whether it will go ahead and the implications for the scheme.

Voluntary clearance regime

Under the voluntary clearance regime, companies can seek confirmation from TPR that, in the circumstances set out in a clearance application, TPR does not consider that it would be reasonable to use its anti-avoidance powers to issue a financial support direction ("FSD") or a contribution notice ("CN").

TPR will be reviewing its current guidance on the clearance process with the aim of clarifying its expectations as to what employers and trustees should do.

Improved powers for TPR

TPR's current powers are relatively limited in scope. For example, it is able to penalise individuals and corporate entities for non-compliance with a range of duties by imposing civil penalties of up to a maximum of £5,000 or £50,000 (respectively).

The Government proposes introducing additional options to enable TPR and/or the Courts to impose more severe penalties in certain circumstances. The new regime would include:

- the continuation of the existing civil penalties for low-level non-compliance
- a new TPR power to issue a civil penalty of up to £1 million for more serious breaches, such as those which have resulted in actual harm to the pension scheme or have the potential to do so if left unchecked
- new criminal offences to punish "wilful or grossly reckless behaviour" in relation to a DB scheme, non-compliance with a CN and failure to comply with the notifiable events framework.

The DWP believes that the range of possible targets for these penalties should include all of those who have responsibility for the scheme, ie directors, sponsoring employers, any associated or connected persons and, in some circumstances, the trustees themselves.

Anti-avoidance

In order to protect the benefits of pension scheme members and to ensure that pension liabilities are not avoided or unsupported, the Pensions Act 2004 gave TPR the power to issue:

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

Please see, "Anti-avoidance: TPR's powers for further details".

The DWP proposes technical changes to bolster both the CN and FSD regimes and, in particular, would like views on:

- improvements to TPR's current powers to make it easier to compel related companies to provide financial support to a scheme, and to require companies to compensate a scheme if they have caused loss or detriment to it
- how this should be enforced.

Next steps

This consultation closes on 21 August 2018. If the proposals are implemented in their current form, they will raise the stakes considerably for all employers and trustees involved in occupational pension schemes. The aim appears to be to change the nature of boardroom discussions on pensions so the situation is not reached where TPR needs to bring out the big guns.

Over the coming months, TPR will be talking to "interested stakeholders" on the design of clearer funding standards and that this is intended to culminate in a formal consultation on a revised DB Funding Code of Practice in 2019. The DWP also plans to consult on the design of the legislative framework and authorisation regime for commercial consolidation of DB pension schemes later this year.

Sacker & Partners LLP
20 Gresham Street
London EC2V 7JE
T +44 (0)20 7329 6699
E enquiries@sackers.com
www.sackers.com