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CLEAR VIEWS

The Pension Schemes Bill

Just the beginning?

## OVERVIEW

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It was widely anticipated in the pensions industry that the Pension Schemes Bill (the **Bill**) would receive Royal Assent at the end of 2020. However, it is perhaps unsurprising it did not get over the line with much of the Government's time taken up with Brexit and Covid-19. It has, however now passed through all of the Parliamentary stages and is awaiting Royal Assent.

This Bill will introduce some important provisions that sponsors and those involved with defined benefit (**DB**) pension schemes in particular need to be aware of. Much of the detail and the practical application of these new provisions is not, however, provided for. This will be set out in secondary legislation and guidance which is yet to be produced. The passing of the Bill is, therefore, just the beginning for these changes.

The key provisions of the Bill relate to:

1. Extending the powers of the Pensions Regulator (**TPR**) including the creation of new criminal offences
  2. Changes to the funding requirements of DB schemes
  3. Creating a framework for collective money purchase pension schemes
  4. Provision for pension dashboards
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## Extending the powers of the Pensions Regulator

The extension of the powers of TPR, including the creation of new criminal offences, has perhaps been the most controversial element of the Bill. Whilst there is an understandable policy objective to protect the pensions of DB scheme members, there is a concern that the new regime will hamper legitimate business activity. A concern raised during the House of Lord's debate was that the new criminal powers are too wide ranging and risk criminalising the routine behaviour of those involved with DB schemes, and indeed those who are not directly involved at all. The Government's response was that there is no intent to fetter legitimate business activity conducted in good faith.

The position is that to avoid criminality, the "reasonable excuse" defence will need to be replied upon. This will partly be clarified by guidance to be issued by TPR on its new powers after consulting the industry.

An overview of these new powers is considered below.

## Extension of contribution notice regime

Under its so-called 'moral hazard' powers, TPR has the power to pierce the corporate veil and impose liability for DB pension scheme deficits on parties who are not necessarily sponsoring employers under the scheme. One power allowing TPR to do this is the issue of a contribution notice, requiring the party to whom it is issued to pay money into the scheme.

The Bill widens the circumstances in which TPR can impose a contribution notice on a party by including an additional two grounds:

- **The employer insolvency test** – this allows a contribution notice to be issued where a person was a party to an act or failure to act that materially reduced the amount of debt likely to be recovered by the scheme. For this test to be satisfied, the value of the scheme's assets must be less than its liabilities. The contribution notice can also be issued to those persons who knowingly assisted in the act.

A **defence** is available where, before becoming a party to the act or failure to act, the party gave due consideration to the extent to which the act or failure might have this effect and either (i) reasonably concluded that the act or failure to act would not have this effect or, if they did not conclude this, (ii) took all reasonable steps to eliminate or minimise the potential for the act or failure to have such an effect. This requires the party to have made the enquiries and done the other acts that a reasonably diligent person would have made or done in the circumstances. It is also a defence if, immediately after the time of the act or failure to act, the value of the assets of the scheme equalled or was more than the amount of the liabilities of the scheme.

- **The employer resource test** - this test will be satisfied if there is an act or failure to act which reduced the value of the resources of the employer in the scheme and the reduction was a material reduction relative to the estimated section 75 (or buy-out) debt in relation to the scheme. The contribution notice can also be issued to those persons who knowingly assisted in the act.

A **defence** is available if, before becoming a party to the act or failure to act, the party gave due consideration to the extent to which the act or failure to act might have this effect and either (i) reasonably concluded that the act or failure to act would not have this effect or, if they did not conclude this, (ii) took all reasonable steps to eliminate or minimise the potential for the act or failure to act to have such an effect. This requires the party to have made the enquiries and done the other acts that a reasonably diligent person would have made or done in the circumstances.

Under any contribution notice test (whether new or existing), a contribution notice can only be issued if it is reasonable to do so. Legislation sets out a number of matters that TPR can take into account when considering if the test for "reasonableness" has been satisfied. This list has been extended by the Bill to include (i) a failure to notify TPR of an event that was a notifiable event under legislation; and (ii) the effect of the act or failure to act on the value of the assets or liabilities of the scheme.

## New criminal offences

The Bill creates three new criminal offences.

| Offence   | Penalty                                      |
|---|--|
| <p><b>Failure to comply with a contribution notice</b> without a reasonable excuse.</p>   | A fine                                       |
| <p><b>Avoidance of employer debt</b> - where a person was a party to an act of deliberate failure to act the main purpose of which was to:</p> <ul style="list-style-type: none"> <li>prevent the recovery of the whole or any part of a debt due by an employer to the scheme under section 75;</li> <li>prevents such a debt becoming due;</li> <li>compromise or settle such a debt; or</li> <li>reduce the amount of such a debt that would otherwise become due.</li> </ul> <p>The person must have intended the act to have such an effect and not have a reasonable excuse for acting in that way.</p> | A fine and/or imprisonment for up to 7 years |
| <p><b>Conduct risking accrued scheme benefits</b> – where a person acts or deliberately fails to act in a way that detrimentally affects in a material way the likelihood of accrued scheme benefits being received. The person must have known or ought to have known that the act would have had that effect and cannot have a reasonable excuse for engaging in that conduct.</p>  | A fine and/or imprisonment for up to 7 years |

## New civil liability

| Cause of action   | Penalty                  |
|---|--------------------------|
| <p>Failure to comply with a contribution notice without reasonable excuse.</p>  | Fine of up to £1 million |
| <p>A party failing to notify TPR of an event which is a notifiable event under legislation.</p> <p>The notifiable events regime has also been expanded and the Bill includes more detail as to the information that is required to be given to TPR when a notification is to be made.</p> | Fine of up to £1 million |
| <p>Knowingly or recklessly providing TPR or a trustee with false or misleading information in certain circumstances.</p>  | Fine of up to £1 million |

## Not retrospective

In a written answer to Parliament published on 11 January, Guy Opperman, Minister for Pensions and Financial Inclusion, guaranteed that the new criminal sanctions will not be applied retrospectively. The new criminal sanctions will apply to all schemes where the act it refers to occurs after these powers come into force. It is expected the offences will come into force in Autumn 2021 after TPR has issued guidance on how they will be applied in practice.

This would be a departure from TPR's previous practice as it has not considered itself fettered in this way before - most notably, in the case of *Box Clever* where it exercised its moral hazard powers long after the relevant events occurred and where those events occurred before TPR's regime was brought in.

## Changes to defined benefit funding requirements

Trustees of defined benefit schemes will be required to determine and keep under review a written funding and investment strategy for ensuring that benefits under the scheme can be provided over the long-term.

Trustees must also state the extent to which the strategy is being successfully implemented and, where it is not, what steps are being taken to remedy the position. The main risks faced by the scheme in implementing the strategy must also be set out, together with how these will be mitigated. Trustees will also need to reflect on any significant past trustee decisions that are relevant to the strategy.

A scheme's technical provisions must be calculated in a way that is consistent with the scheme's funding and investment strategy.

Trustees must send a copy of the actuarial valuation to TPR as soon as reasonably practicable after receiving it.

TPR is revising its defined benefit funding code of practice, a draft of which will be published later this year to ensure it is line with the new Bill, which will provide further detail and requirements in this area.

## Collective money purchase benefits

### What are they?

The Bill provides a framework for collective money purchase benefits. A collective money purchase benefit is one that:

- is provided out of the available assets of the scheme; and
- under the rules of the scheme, the rate or amount of the benefit is subject to adjustment designed to achieve a balance between the value of available assets of the scheme and the amount expected to be required for the purpose of providing benefits under the scheme to or in respect of the members of the scheme collectively.

In other words, unlike with defined benefit pensions, collective money purchase benefits cannot exceed the available assets in the scheme, and the targeted benefits which are to be provided can be adjusted in order to balance what members are expecting to receive with what the scheme can actually afford to provide.

The scheme providing a collective money purchase benefit must be:

- an occupational pension scheme; and
- used by only a single employer or two or more employers that are connected with each other. The implication, therefore, is that master trusts could not provide such benefits.

## What does the framework provide?

Much like the master trust regime, the Bill requires that collective money purchase schemes receive authorisation from TPR in order to operate. TPR must decide within six months of the application whether to grant authorisation. A list of authorised schemes will then be published.

The Bill sets out the authorisation criteria, which include:

- the persons involved in the scheme must be “fit and proper” persons;
- the design of the scheme must be sound – to show this, the application must include a viability report by the trustees explaining why it is considered the design is sound, together with a viability certificate from the scheme actuary. The report must be reviewed and a new certificate obtained at least once a year;
- the scheme must be financially sustainable;
- the scheme has to have adequate systems and processes for communicating with members and beneficiaries;
- the systems and processes used to run the scheme need to be sufficient to ensure it is run effectively; and
- the scheme must have an adequate continuity strategy – as part of this, the trustees must prepare a document stating how interests of members will be protected in the event of a triggering event (for example, employer insolvency).

TPR can withdraw a scheme’s authorisation if it ceases to meet the authorisation criteria. The scheme will, therefore, be subject to TPR’s ongoing supervision.

## Pensions dashboards

A pensions dashboard is stated to be an “*electronic communications service by means of which information about pensions may be requested by, and provided to, an individual...*”

For a pensions dashboard to be “qualifying” it will have to meet certain requirements, the details of which will be set out in regulations.

Regulations may also impose requirements on trustees of occupational pension schemes to provide certain information regarding the scheme via a dashboard service.

The information that is likely to be required to be presented on the dashboards will include the administration and finances of the scheme, the rights and obligations that arise under the scheme and the pension and other benefits which are likely to be accrued by a member under that scheme.

## Comment

Trustees and sponsors of DB schemes in particular should have the provisions of the Bill high on the agenda. Sponsors should consider if they are at risk of being caught by any of the new civil or criminal acts, taking into account their fairly broad nature and the uncertainty surrounding how the "reasonable excuse" defence may work in practice. Trustees should also consider the new requirements surrounding defined benefit funding obligations.

Whilst the Bill sets out a framework for a number of significant developments in the pensions world, much of the detail will be contained in secondary legislation and guidance to be produced by TPR. Whilst we finally have the Bill in final form, the full extent and nature of the changes it will bring about are still to be seen.

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