ALLEN & OVERY

Strengthening the Pensions Regulator's powers: what's in, what's out

Headline changes to the powers of the Pensions Regulator include two new criminal offences: wilful or reckless behaviour in relation to a pension scheme; and failure to comply with a contribution notice. In other respects, some of the government's proposals have been tempered – there will be fewer new notifiable events, and more flexibility around timing for these and for the new Declaration of Intent. The overall timing of the changes, and much of the detail, also remains to be settled.

Strengthening TPR's powers: consultation response

The government's response to its recent consultation on strengthening the powers of the Pensions Regulator (TPR) provides an indication of the intended direction of travel, but with key details still to be clarified. Pressure on the Parliamentary timetable may mean that other changes that are not included in this response arrive sooner – for example, a revised Code of Practice setting out clearer expectations on DB funding standards. TPR intends to consult on a revised Code in the next few months.

For now, the government has indicated what changes it intends to take forward, including fewer new notifiable events than proposed, plus a new Declaration of Intent on certain corporate transactions, but with greater flexibility on timing. Higher penalties and new offences are also covered, together with changes to the moral hazard regime.

Oversight of corporate transactions

Only two new notifiable events will be taken forward:

– 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 debt to the scheme.

Both of these events will require further consultation to make their meaning precise – for example, what do 'material' and 'funding responsibility' mean in relation to a scheme's liabilities? Other proposed additions to the list of notifiable events (such as the breach of a banking covenant) will not be taken forward. The government had also proposed that certain events should be notifiable at an earlier stage, for example when Heads of Terms are agreed. In response to feedback, it now recognises that this is not a clear or consistent event across all transactions. Timing will be clarified following further consultation.

The government has confirmed that it will legislate for the 'corporate planners' of a transaction (including the sponsoring employer or parent company) to share a Declaration of Intent with trustees and TPR to help them understand the detailed nature and implications of certain transactions. The Declaration would explain the transaction, confirm that the trustees had been consulted and explain how any detriment to the scheme would be mitigated. It would be triggered by:

– the sale of a controlling interest in a sponsoring employer;
– the sale of the business or assets of a sponsoring employer; or
– the granting of security on a debt to give it priority over debt to the scheme.

The first of these is already a notifiable event; the other two are new notifiable events. The content of the declaration will be the subject of further consideration. In terms of timing, the government recognises a conflict between providing early information and commercial sensitivity – a 'flexible approach' is intended rather than specific legislation on timing.

Overall, the reduced scope of the proposed changes should avoid some of the more disruptive elements for commercial activity while still providing additional protection for schemes. However, much will depend on the approach to timing, which remains unclear for the moment.

Penalty regime

Two new offences may attract criminal penalties – wilful or reckless behaviour in relation to a pension scheme (up to seven years' imprisonment and/or unlimited fines) and failure to comply with a contribution notice (unlimited fines and/or a civil penalty, but no custodial penalty). Other offences will attract civil penalties of up to GBP1m; these include failure to comply with the notifiable events framework, knowingly or recklessly providing false information to trustees, and failing to provide a Declaration of Intent.

Anti-avoidance powers

The government will take forward changes to strengthen the contribution notice regime, including:

– changes to the reasonableness test to focus on the actual or potential impact of the act, or failure to act, on the value of the scheme's assets or liabilities;
– the material detriment test: this would be met if on a snapshot basis either the amount recoverable on a hypothetical insolvency is materially reduced, or employer 'value' is reduced in relation to the scheme's s75 deficit; and
– consideration of a mechanism to uprate the Contribution Notice (CN) amount from the date of the relevant act to the CN determination; and bringing the calculation date for the CN cap amount closer to the determination date.

Financial Support Directions will be renamed Financial Support Notices, and a single-stage process will be introduced. The scope of FSN targets will be broadened to include individuals who are controlling shareholders of the sponsoring employer, but not directors; however, there will be no change to the reasonableness test. Other changes include replacement of the 'insufficiently resourced' test and clarification of the current service company definition.

Information-gathering powers

The response provides further details on previously confirmed proposals to broaden TPR's information-gathering powers. TPR will have a stand-alone interview power to require any 'relevant person' who can reasonably assist TPR in discharging any of its functions to attend an interview. This power would override an adviser's duty of confidentiality, but information generated by the interviewee may not be relied on by TPR as evidence in criminal proceedings or for issuing civil penalties (TPR would need to rely on other sources of evidence), and TPR will remain unable to order the production of legally privileged communications.

TPR's power to enter premises for investigative purposes will also be broadened to close off current loopholes. Fixed and escalating civil penalties will be introduced as an alternative sanction for non-compliance (criminal prosecution may apply to the most serious breaches). TPR will review its compliance and enforcement policies in light of the changes.

Timing

Many of the intended changes require further work with TPR, the PPF and other stakeholders; legislation will be brought forward 'as soon as Parliamentary time allows', although as indicated above, this may not be particularly soon.

Helen Powell
PSL Counsel
Tel +44 203 088 4827
helen.powell@allenovery.com