

TPR's new powers – practical ways for corporates to engage with their pension scheme trustees in the new world

The Pension Schemes Act 2021 (PSA21) has received Royal Assent and many of the broader new powers of The Pensions Regulator (TPR) should be in play from 1 October 2021. These powers, particularly new criminal offences and civil penalties, are very wide ranging with hefty sanctions attached, and are therefore potentially concerning to corporates and related parties (including individuals).

Here, we offer a combined viewpoint on the potential implications of the new regime from Hymans Robertson, Travers Smith and 2020 Trustees – from actuarial, legal and pension trustee points of view.

In our view, in most circumstances, corporates should be able to take steps to mitigate the risks posed by the new measures. Absolutely they should take them seriously and understand their implications. But we're hopeful that, together with new notification requirements, in many cases they will lead to a more consistent and careful approach by parties to corporate transactions to dealing with pensions.

So, what are these new powers and how should corporates engage with their DB scheme trustees going forward?

What is changing?

The key corporate activity related changes in PSA21 are:

1 Two new criminal offences, relating to conduct (including failure to act) that either avoids an employer debt or has a materially detrimental effect on the likelihood of accrued benefits being received. These offences are based on existing contribution notice grounds but are much wider – they can apply to almost anyone whose actions relate to or affect a pension scheme, not only employers and those associated or connected with them. These offences can result in unlimited criminal fines or up to seven years in prison. There is a reasonable excuse defence. TPR is one of the possible prosecutors.

2 New discretionary civil penalties up to £1m on similar grounds to the new criminal offences.

3 Two new grounds for TPR's Contribution Notice power, making it easier for TPR to issue contribution notices. Both have statutory defences. These grounds are:

- If a section 75 employer debt had hypothetically fallen due, as a result of employer insolvency immediately after an act or failure to act, the act or failure to act would have materially reduced recovery of that debt.
- The act or failure to act reduced the employer's resources by an amount that is material, relative to the estimated section 75 employer debt.

4 An accelerated regime for notifying and engaging with pension scheme trustees and TPR in relation to specified corporate activity, with the requirement to disclose an Accompanying Statement to the Trustees and TPR setting out the implications for the scheme of the transaction and how any potential detriment will be mitigated.

We expect most of these new requirements will come into force from October 2021, with the revisions to the notifiable events regime (including Accompanying Statements) perhaps being commenced a little later.

The PSA21 also sets out a new funding framework including long-term funding objectives, which may have an effect on corporate transactions. Draft regulations are expected, but the new regime is unlikely to come in until the end of 2022 at the earliest, after TPR has finished consulting on the new Code.

How should corporates engage with their trustees?

Some good news is that, broadly speaking, a reasonableness requirement applies to the way TPR uses all of its discretionary powers. Complementing this, the corporate may be able to defend itself on the basis that it has acted reasonably. So how can corporates act reasonably in relation to pension schemes? We are expecting guidance from TPR in relation to all these new powers, and this area is likely to continually evolve. Those involved will need to think carefully about the circumstances of each transaction. For now, the key areas we think corporates should be focussing on in this regard are:

- **Appropriate governance structures** – set up a corporate pensions governance framework to give a clear structure and audit trail in relation to corporate pension decisions. Generally, pension scheme trustees need to act independently and provide appropriate scrutiny. Appointing a professional, independent trustee with the right skill set can help, and is certainly better than the extreme alternative of a relationship being left unchecked and TPR subsequently deciding to take action. This is easier for employers to address than other parties to corporate transactions, but all parties should be aware of this as a potential issue. Trustees should be treated as a creditor, often a major one, and not as a ‘soft touch’ or just part of the corporate group. This becomes particularly important in distress scenarios or where covenant is weakening.
- **Early and transparent engagement with trustees** (and where relevant TPR and the Pension Protection Fund). This may go to reasonableness. Among PSA21 provisions is a new financial penalty of up to £1m for knowingly or recklessly misleading trustees. TPR already has wide-ranging information gathering powers. To support early engagement, we are seeing more formal information sharing protocols being put in place between trustees and employers, and TPR has said it supports this.

- **Consider whether the corporate can seek to defend itself on the basis that it has acted reasonably.** In particular, the existing statutory defence for contribution notices on the material detriment ground is a form of informal self-clearance. TPR has also indicated that this may protect against the similar criminal offence. Creating a contemporaneous record of considerations about whether there is detriment, whether it has been mitigated and the net effect can potentially help with reasonableness of TPR powers. With that, early engagement with your pension advisers can be essential.
- Given the increased TPR powers and the lack of precedent, at least initially, as to how these powers will be exercised, we may well see **an increase in the number of formal applications for TPR clearance** from corporate planners who are concerned about the risk of these powers.

What about planning for a corporate transaction?

The Accompanying Statement requirement means DB schemes will need to be front-of-mind in corporate transactions, such as M&A, disposals of employer business, refinancing and restructuring. TPR also has a continued interest in dividends and other returns of capital.

A key issue is deciding exactly when to engage with the trustees. Subject to new requirements in the notifiable events regime, it needs to be early enough for the trustees to understand and react to the proposal but not so early that they commission work that is wasted if the transaction does not progress. This is a consideration for sellers as well as buyers in a transaction, especially in an auction scenario. Because of the new powers, buyers will want to know when and how they can start engaging with trustees. To make the transaction process smoother and more credible, sellers may find it useful to have a thought-through plan for this from the outset.

Make this call with your corporate pensions advisers. The judgement is driven by the significance of the transaction to the pension scheme, the level of detriment and the extent of the mitigation that you can offer. Ordinarily, we find that early engagement is better and can be a win-win. It protects the employer by clearly following best practice, and demonstrating reasonable behaviour, while also giving time for the trustees to negotiate an outcome that meets their needs- therefore helping to avoid any significant bumps in the road on the way to completion of the transaction.

Conclusion / closing thoughts

The new powers and offences are very wide. At present, we don't have full visibility of their implications. Despite that, many questions about their impact will need to be answered by advisers in fast-developing transactions. One of the policy intentions behind these new powers was to influence market behaviour and they will undoubtedly do that. In our view, in most circumstances, corporates should be able to take steps to mitigate these new risks.

If you would like any further advice or information, get in touch with one of our experts:



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