

Pensions law team – October 2019

## The Pension Schemes Bill – new powers for the Pensions Regulator

and a bit more...

The Pension Schemes Bill (the **Bill**) proposes changes to a number of areas of pensions law. This briefing takes a look at some of the key points that sponsors and trustees should be aware of if the Bill becomes law.

### Changes to the powers of the Pensions Regulator (TPR)

In its consultation response earlier this year, the government set out a number of changes it proposed to make to TPR's powers. Many of the provisions in the Bill in this area will not, therefore, come as a surprise.

#### 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 defined benefit 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.

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 took all

reasonable steps to eliminate or minimise the potential for the act or failure to have such an effect. It is also a defence if, immediately after the time of the act or failure to act, there was no deficit in 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 amount of the estimated section 75 (or buy-out) debt in relation to the scheme.

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 an effect and that the party took all reasonable steps to eliminate or minimise the potential for the act or failure to act to have such an effect.

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
Failure to comply with a contribution notice.	A fine
<p><b>Avoidance of employer debt</b> - where a person engages in a course of conduct that:</p> <ul style="list-style-type: none"> <li>prevents 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>compromises or settles such a debt; or</li> <li>reduces 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 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 course of conduct 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
Failure to comply with a contribution notice	Fine of up to £1 million
Avoidance of employer debt (as above)	Fine of up to £1 million
Conduct risking accrued scheme benefits (as above)	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
Knowingly or recklessly providing TPR or a trustee with false or misleading information in certain circumstances.	Fine of up to £1 million

TPR's information gathering powers and powers to impose penalties where individuals do not comply with certain information and interview requests have also been expanded.

## 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.

## 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 will 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 accrued by a member under that scheme.

## Comment

There has been some criticism in the industry that the Bill does not go far enough - it does not cover any extension of the auto enrolment regime or defined benefit consolidation. The future of the Bill is also uncertain with a potential general election looming and a lack of government majority.

However, the Bill’s current contents - in particular, with regard to the extension of TPR’s powers - are to be welcomed. If the Bill does get through the legislative process, it should continue to ensure that defined benefit pension schemes are at the forefront of minds during corporate decision-making.

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