

Snapshot

October 2021

Overview

- [How will the new criminal offences under the Pension Schemes Act 2021 be enforced in practice?](#)
The Pensions Regulator (Regulator) has issued a criminal offences policy to provide some guidance on when it will prosecute the very widely drafted (and potentially far-reaching) new criminal offences introduced by the Pension Schemes Act 2021 (PSA21). The policy reiterates that anyone is in scope of the offences, regardless of whether there is a connection with the scheme or the sponsoring employer.
- [How will the Regulator's new contribution notice powers be used in practice?](#)
The Regulator has laid before Parliament a revised Code of Practice 12 detailing when it will look to exercise its new contribution notice (CN) powers. The Code sets out some examples of behaviour and categorises these by whether the Regulator would consider itself compelled to intervene and use its CN powers.
- [How will the Regulator choose whether to exercise its civil or criminal powers and what level of fines will it impose?](#)
The Regulator is consulting on its proposed approach to enforcing its new powers under the PSA21. The consultation discusses when the Regulator would pursue criminal or civil action in cases where there is overlap. It also sets out bands relating to the level of fines it could impose (and which could be up to £1 million).
- [Rules in force requiring personal pension schemes to undertake value for money assessments from September 2022](#)
The FCA has published new rules (in force from 4 October 2021) requiring new value for money assessments in relation to FCA-regulated pension products and services. The new FCA rules require Independent Governance Committees and Governance Advisory Arrangements to assess and report on value for money through comparison with other market options and by taking account of costs and charges, investment performance, and services provided. The first reports will be due at the [end of September 2022](#).
- [The Regulator updates its guide to investment governance regarding the creation of default funds](#)
The Regulator has updated its guide relating to investment governance and, in particular, advising trustees on when a default arrangement is created following the diversion of contributions to or from funds that are 'gated' (closed) due to uncertain markets. Whether a default fund is created (and therefore whether the requirements relating to default funds need to be complied with) will depend on what members have been told both pre- and post-gating and on the terms of the original consent given by members to investment of their contributions.

How will the new criminal offences under the Pension Schemes Act 2021 be enforced in practice?

The PSA21 introduced two new criminal offences of the 'avoidance of employer debt' and 'conduct risking accrued scheme benefits'. The very wide drafting of these offences has caused concern in the industry. They are potentially far-reaching and could cover not only sponsors and sponsor groups with defined benefit schemes but also trustees, advisers and lenders. To find out more about the new offences, please see our detailed briefing on the topic [here](#).

Against this background, the Regulator has issued a [criminal offences policy](#) to provide guidance on when it will prosecute under the new criminal offences. The Regulator tries to allay fears by explaining that it does not intend to prosecute "*ordinary commercial activities*" but rather "*the most serious examples of intentional or reckless conduct*". Having said that, the examples in the guidance itself may still cause some concern.

The policy confirms that the offences can be committed by any person, regardless of their connection or otherwise with the scheme or its sponsoring employer (although there is a carve-out for someone acting within their function as an insolvency practitioner). In addition to anyone who commits an offence, a person can also be convicted if they are a 'secondary offender' i.e. someone who helps or encourages another to commit the primary offence without having a reasonable excuse for acting in the way that they did.

The offences cannot be committed if a person has a 'reasonable excuse' for acting in the way they did. In establishing if a person has a reasonable excuse, the Regulator will look at:

- the extent to which the detriment to the scheme was an incidental consequence of the act or omission;
- the adequacy of any mitigation provided to offset the detrimental impact; and
- where no, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact.

In addition, the Regulator may consider:

- the extent of communication and consultation with the trustees of the scheme before the act took place;
- in the case of a person who owes fiduciary duties to the scheme, whether they complied with those duties when doing the act or carrying out the course of conduct; and
- where a person was acting in a professional capacity, whether they acted in accordance with the applicable professional duties, conduct obligations and ethical standards.

The Regulator also sets out examples of where it would consider prosecuting advisers (including legal advisers, investment managers, actuaries and accountants).

Although the Regulator states that it will not target usual commercial activity, it remains to be seen if the Regulator's view of 'business as usual' corresponds to that of the corporate reality of business dealings.

How will the Regulator's new contribution notice powers be used in practice?

The Regulator has laid a [revised Code of Practice 12](#) before Parliament providing detail about when it would look to exercise its new CN powers. The PSA21 introduced two new tests under which the Regulator could impose a CN. For more information on these new powers, please see our detailed briefing [here](#).

The Code sets out some examples of behaviour and categorises these by whether the Regulator would consider itself compelled to intervene and use its CN powers.

The following behaviour would not normally be considered as compelling an intervention:

- trustees arranging to buy out pensioner liabilities with annuities purchased from a regulated insurer chosen through a careful due diligence exercise;
- poor trading by the employer as a consequence of deteriorating market conditions; and
- the employer granting a first charge over some of its assets to renegotiate its borrowings and, as part of that, engaging with the trustees and putting in place appropriate 'mitigation' for the scheme to address any resulting changes in employer covenant.

On the other hand, the following examples are included in the Regulator's list of circumstances where it would consider it reasonable to intervene:

- where sponsor support becomes 'nominal';
- where sponsor support is 'reduced';
- where an 'unnecessary insolvency' is manufactured;
- where significant dividends are paid in the context of an underfunded pension scheme, constituting much larger payments than were paid in the past and greater than the company's net profit generated during the same reporting period;
- where a leveraged acquisition takes place weakening the position of the scheme as creditor; and
- where an unscheduled repayment of an intercompany loan is made by an employer which is facing financial difficulty and has diminishing financial headroom.

The existing version of the Code remains in force until the new Code completes the parliamentary process.

How will the Regulator choose whether to exercise its civil or criminal powers and what level of fines will it impose?

The Regulator has published a consultation on its proposed approach to enforcing its new powers under the PSA21 ([Proposed approach to our new powers](#)).

As part of the proposed policy, the Regulator notes that there may be points of overlap where the Regulator can use its regulatory powers as well as impose criminal sanctions (for example CNs and a criminal prosecution). The Regulator acknowledges that criminal sanctions are harsher and this is reflected in the fact that, while the criminal courts require offences to be proven beyond reasonable doubt, the Regulator can use its regulatory and financial penalty powers if it is satisfied on the balance of probabilities.

Where the Regulator does intend to pursue both regulatory and criminal proceedings, it will usually exhaust criminal proceedings before seeking any regulatory remedy. However, it may

pursue regulatory proceedings for a CN first, or in tandem with criminal proceedings, to address the harm to the scheme and to ensure that time limits for exercise of the CN power are not exceeded. The Regulator also notes that it may pursue criminal prosecution without pursuing a CN..

The policy then goes on to provide specific frameworks for certain of the offences under the PSA21 where a financial penalty not exceeding £1 million can be issued. For some of these offences the Regulator sets out 'bands' where the penalty payable will be referable to the degree of culpability of the actor who committed the offence and the degree of harm suffered by the scheme membership as a result.

Whilst clearly not an exhaustive document, the policy does provide an indication of how the Regulator intends to use its new powers. It remains to be seen how this will all play out in practice.

Value for member requirements in personal pension schemes

The FCA has published new rules (in force from 4 October 2021) requiring new value for money assessments in relation to FCA-regulated pension products and services. The new FCA rules require Independent Governance Committees and Governance Advisory Arrangements to assess and report on value for money through comparison with other market options and by taking account of costs and charges, investment performance and services provided. The first reports will be due at the [end of September 2022](#).

These rules come alongside the new requirements for trustees of smaller defined contribution occupational pension schemes to carry out a value for money assessment, including a comparison against at least three larger schemes (see our [September snapshot](#) for more details).

We expect further developments in this area in due course. In the [FCA policy statement](#) accompanying the new rules, the FCA stated that it considers more work is required to improve the comparability of value for money across the market. A [separate joint discussion paper](#) by the Regulator and the FCA asks for input on standardised metrics and benchmarks for measuring value for money and is open for submissions until 10 December 2021.

The Regulator updates its guide to investment governance

The Regulator has updated the fourth of its six guides which supports trustee boards in meeting the standards set out in Code of Practice 13 (Governance and administration of occupational trust based schemes providing money purchase benefits), aka the "**DC Code**". Guide 4 relates to investment governance.

[Appendix 1 of Guide 4](#) deals with the treatment of "default arrangements" under the legislation. Default arrangements are ones into which members' contributions are invested but where members do not choose their own investments (and schemes which are used for automatic enrolment must have at least one default arrangement). Issues have arisen in the past where members' investments have been "mapped" to new investments and, as a result, members have ended up investing in a fund which they have taken no active choice to invest in. The lack of member choice can result in the creation of a default arrangement.

The new section of Guide 4 aims to put more flesh on the bones where certain funds with more illiquid assets (such as those invested in property) temporarily close due to uncertainty in the

market. This is known as "gating" and can lead to the creation of default arrangements - usually where trustees redirect scheme contributions into alternative funds until the gated fund reopens or reapply members' contributions when the gated fund reopens. In either case, trustees need to consider what members have been told both pre- and post-gating and what the terms were of the original consent given by members to investment of their contributions. The answers to those points will then dictate whether a new default arrangement has been created and what trustees need to do to address the position.

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