

UK PENSION SCHEMES BILL: POTENTIAL CONSEQUENCES FOR LENDING TRANSACTIONS

The Pension Schemes Bill is currently making its way through Parliament. The bill introduces significant changes to the UK's existing legislative framework in respect of defined benefit pension schemes. One of the key changes is the introduction of a new criminal offence for anyone engaging in conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received. While new defined benefit pension schemes are increasingly rare in the UK, the potential consequences are severe in relation to legacy schemes. The threshold for detrimental conduct is low and the net is cast widely to any person who engages in such conduct. In this briefing, we consider how the proposed changes may impact lending transactions.

THE NEW OFFENCE

A person will be liable on conviction to a prison term of up to seven years where (a) they do an act or engage in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received; (b) they knew or ought to have known that the act or course of conduct would have that effect; and (c) they did not have a reasonable excuse for engaging in such conduct. Where criminal proceedings are not instituted, a person may still be exposed to the risk of a financial penalty of up to £1 million.

KEY CONCERNS FOR LENDING TRANSACTIONS

Scope: the offence applies to "persons". Unlike exposure to defined benefit liabilities through the existing so-called "moral hazard" powers of the Pensions Regulator, it is not limited to employers and their associates and connected persons, but could be anyone involved with a group which has a defined benefit pension scheme, such as lenders lending to the group.

Low bar: the threshold for meeting the test of detrimental conduct is not very high. In theory, there are many circumstances in which an act may detrimentally affect the "likelihood" of scheme benefits being received e.g.

Key issues

- The Pension Schemes Bill introduces a new criminal offence in relation to defined benefit pension schemes
- The offence captures conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received
- The threshold for detrimental conduct is low - lending transactions could potentially be caught
- The offence has broad application - it applies to *anyone* engaging in the detrimental conduct, which could include lenders lending to a group with a defined benefit pension scheme
- There is a defence of reasonable excuse for engaging in the detrimental conduct – what constitutes a reasonable excuse remains to be seen

taking on additional company debt. Detriment could also be interpreted widely and not restricted to financial detriment e.g. administrative failures.

Reliance on the reasonable excuse defence: the low threshold for detrimental conduct is likely to mean in practice that lenders and other persons would be forced to rely on the reasonable excuse defence. Although, given the potential criminal sanctions, whether a lender would be confident in taking this course of action is questionable. It is also unclear what would constitute a reasonable excuse. For example, for any lender lending to a company or group with a defined benefit pension scheme, if the lender subsequently seeks to enforce the loan, arguably this is likely to have an adverse consequence for the pension scheme: the lender might feel it has a reasonable excuse in these circumstances (that it has made a loan on commercial terms) but would a Court necessarily agree?

NEXT STEPS

The new offence was presented by government as a means to punish wilful or reckless behaviour in relation to a pension scheme, in response to some high profile failures of UK corporates with defined benefit pension schemes. The breadth of its potential application has been the subject of extensive lobbying from various industry bodies, but to little effect. While the legislature maintain that it is aimed at egregious behaviour and that may well prove to be the case, the language of the offence operates at a much lower level. The key question at this stage is whether parties will be comfortable relying on such assurances. Some helpful comments supporting that approach were made during the passage of the bill through the House of Lords, however Pensions Regulator guidance is likely to be fundamental if amendments are not made to the bill. It is certainly not in anyone's interests to discourage lenders from lending to groups with defined benefit pension schemes.

CONTACTS

Charles Cochrane
Partner

T +44 20 7006 2196
E charles.cochrane
@cliffordchance.com

Emma Folds
Partner

T +44 20 7006 2231
E emma.folds
@cliffordchance.com

Avril Forbes
Knowledge Director

T +44 20 7006 8278
E avril.forbes
@cliffordchance.com

Kate Gibbons
Partner

T +44 20 7006 2544
E kate.gibbons
@cliffordchance.com

Philip Hertz
Partner

T +44 20 7006 1666
E philip.hertz
@cliffordchance.com

Iain White
Partner

T +44 20 7006 2825
E iain.white
@cliffordchance.com

Hywel Robinson
Partner

T +44 20 7006 8387
E hywel.robinson
@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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