

## PENSION SCHEMES BILL RECEIVES ROYAL ASSENT A BLOW FOR BUSINESS ACTIVITY?

On 11 February 2021, the Pension Schemes Bill received Royal Assent and became the Pension Schemes Act 2021 (the "Act"). Its passage through parliament following its introduction in October 2019 garnered much attention given some of the rather surprising elements of the proposed criminal offences which remain unchanged in the Act (see our [October 2019 Special Edition](#) for details). Running to circa 200 pages, the Act covers a wide-range of modifications around strengthening Pensions Regulator (TPR) powers and sanctions; funding; transfers and Pension Protection Fund (PPF) changes; and introduces a framework for pensions dashboards and also collective money purchase schemes (see our [UK: Pensions Update – January 2020](#) edition, which considers some of these aspects in more detail). In short, many of the new provisions are wide enough to affect normal business activities, at least in the near term, while parties try to get comfortable managing and documenting compliance with the new provisions. Now that the Act has received Royal Assent, it's a good time for parties to take stock of what happens next and the potential implications of some of the key changes made by the Act, which we touch on below.

### Key issues

- New Criminal Offences
- Extension of Contribution Notice Powers
- Corporate Transaction Oversight
- Changes to Scheme Funding
- Climate-Related Disclosures
- Other Changes
- Annex

### WHAT HAS BEEN BROUGHT INTO FORCE?

It is worth noting that, in practice, the only aspects of the Act that have been brought into force are the various regulation making powers and, save for the illustrative draft collective money purchase schemes regulations published during parliamentary debate, the only regulations currently in play relate to climate-related disclosures. It's therefore going to be important for parties to keep a watching brief as to when the various provisions of the Act are brought into force and detailed regulations (where applicable) are introduced. As a starting point, we have included a table in the Annex summarising where regulations are needed and the expected 'in force' dates for the various key changes made by the Act.

#### 1. NEW CRIMINAL OFFENCES

***Engaging in conduct that "detrimentally affects in a material way the likelihood of accrued scheme benefits being received"***

<b>Offence</b>	A person, if prosecuted, will be guilty of an offence where (on a criminal burden of proof) they: (a) do an act or engage in a course of conduct (including a failure to act) 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 course of conduct "would" have that effect; and (c) they did not have a "reasonable excuse" for engaging in such conduct.
<b>Penalty</b>	A maximum custodial sentence of up to 7 years and/or a fine (unlimited) or new civil penalty up to £1m.

<b>Avoidance of employer debt</b>	
<b>Offence</b>	A person, if prosecuted, will be guilty of an offence where (on a criminal burden of proof) they: (a) do an act or engage in a course of conduct (including a failure to act) that (i) prevents the recovery of the whole or any part of a Section 75 Debt, (ii) prevents such debt becoming due, (iii) compromises or otherwise settles such debt, or (iv) reduces the amount of such debt which would otherwise become due; (b) they intended the act or course of conduct to have such effect; and (c) they did not have a "reasonable excuse" for the act or for engaging in the conduct.
<b>Penalty</b>	A maximum custodial sentence of up to 7 years and/or a fine (unlimited) or new civil penalty up to £1m.
<b>Failure to pay a Contribution Notice (CN)</b>	
<b>Offence</b>	A person, if prosecuted, will be guilty of an offence where (on a criminal burden of proof) they fail to pay a CN, absent a "reasonable excuse" for not doing so.
<b>Penalty</b>	A fine (unlimited) or new civil penalty up to £1m.
<b>False or misleading information to TPR</b>	
<b>Offence</b>	The Act expands the circumstances in which a person commits a criminal offence for knowingly or recklessly providing TPR with false or misleading information in purported compliance with certain requirements of the notifiable events regime as expanded by the Act.
<b>Penalty</b>	A maximum custodial sentence of up to 2 years and/or a fine (unlimited) or new civil penalty up to £1m.
<b>Obstruction of TPR's investigatory powers</b>	
<b>Offence</b>	A person is guilty of an offence where, without reasonable excuse, they neglect or refuse to (i) attend an interview with TPR as required; or (ii) answer questions at such interview with TPR.
<b>Penalty</b>	A fixed penalty notice not to exceed £50,000 or escalating penalty notice not to exceed £10,000 per day.

### **Implications**

Despite considerable concerns being raised by the industry and peers over the past year, the scope of the two key new criminal offences listed first above remains uncomfortably wide. They are not limited to employers and/or associates of employers and could, theoretically at least, apply to anyone involved with an occupational defined benefit pension (DB) scheme or the employers that sponsor it, including trustees, banks, advisers and investment counterparties.

*"The Act gives us new powers to act against unscrupulous employers"*  
TPR press release - 11 February 2021

The first offence could criminalise anyone who causes a "material detriment" to a DB scheme, which is an uncomfortably ambiguous test. Criminalising a test this broad will leave many involved with DB schemes uncertain what might be captured (e.g. will trustees with strong contribution powers be caught where they do not exercise those powers to require significant contributions from employers in certain circumstances? Could banks be caught merely for enforcing their loans?). The risk of practical action will often be low (and there may be defences based on general legal principles, depending on the circumstances), but there is a concern that it may make parties reluctant to deal with pension schemes and employers at all.

The second offence is less broad, but may yet have the result that in practice some legitimate activities taken by those associated with pension schemes will be caught within the remit of the offence. It will be for the courts to determine on the basis of an objective test whether the offender had a reasonable excuse for engaging in such conduct.

Comforting noises have been made by ministers regarding the non-retrospectivity of the new criminal sanctions which it is said will only apply where the act occurs, or in the case of a series of acts commences, after the powers come into force (although note this is not made clear on the face of the Act). TPR is expected to consult on guidance prior to the powers

coming into force which is hoped to bring clarity (unfortunately this lacks even the weight of a Code of Practice), but it remains to be seen what impact these changes will have on normal business habits.

## 2. EXTENSION OF CONTRIBUTION NOTICE POWERS

The Act sets out the two new grounds for imposing a CN:

<p><b><i>The "employer insolvency test":</i></b></p> <p>broadly, this may apply where TPR is of the opinion that, at the time of an act, (i) the pension scheme was in deficit; and (ii) if a section 75 debt had fallen due immediately after the act, this act or failure to act <i>"would have materially reduced the amount of the debt likely to be recovered by the scheme"</i>.</p>	<p><b><i>The "employer resources test":</i></b></p> <p>broadly, this may apply where TPR is of the opinion that an act or failure to act reduced the value of the resources of the employer and that reduction was material relative to the amount of the estimated section 75 debt in relation to the scheme.</p>
<p><b>Defence:</b> A statutory defence will be available to each of the new offences where a person gave due consideration to the extent to which the act/failure to act might materially reduce the amount of the debt/the value of the employer's resources relative to the debt (as applicable) and if they considered this might occur, they took all reasonable steps to eliminate or minimise the potential for the act/failure to have such an effect.</p> <p>And for the employer insolvency test, a statutory defence will apply if there is no actual deficit in the scheme at the relevant measurement date, notwithstanding any previous deficit.</p>	

### **Implications**

This extends the range of circumstances which can give rise to a CN being issued albeit, as now, TPR would need to be of the view it is "reasonable" to impose a CN. Despite the requirement for reasonableness, the new powers are clearly structured so as to provide TPR with more objective grounds for the imposition of CNs, in order to overcome some ambiguities within the existing tests.

A key difference to the existing regime is that the new tests potentially make it harder to fit within the statutory defence. For the employer resources test at least, the defence requires parties not to reduce the value of the employer's resources which, if it was possible, would mean the offence would not apply in the first place. It is possible therefore that we will see routes developed and papering mechanics created to provide for the topping up of resources to try and meet the rather circular requirements of the statutory defence.

## 3. CORPORATE TRANSACTION OVERSIGHT

The Government's response to its 2018 consultation on creating a "stronger Pensions Regulator" (see our [UK Pensions Briefing – February 2019](#) for details) confirmed its intention to introduce:

- two new employer-related notifiable events requiring TPR to be informed of: (i) 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 (ii) the granting of security on a debt to give it priority over debt to the scheme; and
- a requirement for an "appropriate person" (being the employer, its associates and connected persons and other prescribed persons) to prepare a 'declaration of intent' to be shared with trustees and TPR. This requirement will be triggered in respect of: (i) a sale of the controlling interest in a sponsoring employer (an existing notifiable event) and (ii) the two new notifiable events set out above.

The new 'declaration of intent' regime (as trailed by the government in 2018 but referred to in the Act as an "accompanying statement") is captured through changes to the existing notifiable events requirements. Much of the detail has been left to regulations, but as a minimum the statement must explain the nature of the event, what the adverse effects on the pension

scheme (if any) are and the steps taken in mitigation and describe any communication with the trustees or managers about the event.

The Act also provides that regulations may require notice to be given (to TPR and the trustees) a prescribed period of time in advance of the relevant event or material changes to the event. Employers and their associates/connected parties (e.g. large shareholders, group companies and individual directors) are likely to be subject to a much more onerous and prescriptive information sharing regime in relation to certain corporate activity.

A civil penalty of up to £1m applies for each of the following:

- non-compliance with the notifiable events regime;
- failure to comply with the 'declaration of intent' regime;
- 'knowingly or recklessly' providing TPR with false or misleading information in purported compliance with certain requirements (e.g. in purported compliance with the notifiable events regime (as expanded by the Act)); and
- 'knowingly or recklessly' providing the trustees or managers of a scheme with false or misleading information in the circumstances set out in the Act.

#### **4. CHANGES TO SCHEME FUNDING**

Trustees will be required to determine, review and (if necessary) revise, a "funding and investment strategy" for ensuring benefits can be provided over "the long term". This strategy must be set out in a written "statement of strategy", which must also cover supplementary matters (e.g. the opinion of the trustees as to the success of implementation of the strategy and the risks associated with it and how they will mitigate them). The strategy must specify the funding level the trustees or managers intend the scheme to have achieved as at the relevant date(s) and the investments the trustees or managers intend the scheme to hold on such date(s).

The legislative requirements will be complimented by TPR's new DB Funding Code of Practice (see our [UK: Pensions Update – March 2020 for further details](#)). TPR's second consultation is expected later in 2021.

Key points to note continue to be:

- Much of the detail around this requirement (e.g. the level of detail required in the strategy, time periods, the factors to be taken into account when reviewing a strategy and requiring trustees to send a copy to TPR) is to be included in regulations. There has been comment to the effect that this may operate to constrain much of the flexibility that currently exists for trustees/employers when determining funding and investment strategies for their schemes, but as yet those flexibilities remain on the face of the legislation.
- A scheme's technical provisions will be required to be calculated in a way that is consistent with the statement of strategy. (However, it remains to be seen how this will interact with the existing principles for calculating technical provisions under the scheme funding legislation, and to what extent the underlying regulations will change).
- Employer agreement is required to the funding and investment strategy, as set out in the statement of strategy. There has been some comment that, while the Statement of Investment Principles will remain the purview of trustees, this may give employers some greater influence than they have currently.
- TPR may exercise its powers under section 231 of the Pensions Act 2004 to give a direction requiring trustees to revise their scheme's funding and investment strategy.

## 5. CLIMATE-RELATED DISCLOSURES

The Act introduces powers enabling the government to introduce new regulations which will implement proposals requiring trustees to assess and report on the financial risks of climate change within their investment portfolios, as consulted on by the Department for Work and Pensions between August and October last year (see our [UK: Pensions Update – September 2020](#)).

The Act does not change the basic principle that these risks must normally only be considered in the context of serving the financial interests of members. Trustees can and should ensure that financially material issues are properly taken into account (given their impact on members) but (subject to extremely limited exceptions) cannot take account of these factors independently of members' financial interests.

The government is currently consulting on the content of the new draft regulations and statutory guidance that would enact the government's policy proposals, which is proposed to come into force on 1 October 2021.

## 6. OTHER CHANGES

Parties will need to be aware of other changes made by the Act including:

<b>Collective money purchase schemes</b>	Interest in collective money purchase schemes appears low in practice (Royal Mail's desire to implement one appearing to be the major legislative driver). They are similar to normal occupational trust-based DC schemes but members bear investment and longevity risks at a collective level as their money purchase "pot" is invested collectively with others and when they take their pension, it will be based on their share of the collective fund – they also have a target level of pension based on salary and years of service but it is not a promise – just a target.  Under the framework introduced by the Act, these arrangements will be authorised and supervised in a very similar way to master trusts.
<b>Transfer scams</b>	To protect member transfers from scams, members of an occupational or personal scheme may not exercise their transfer rights unless additional restrictions set out in regulations are met, including regarding the member's employment or place of residence. Additional requirements are also likely to be put in place regarding the provision of suitable evidence by members about these factors.
<b>Pensions dashboards</b>	The Act paves the way for new statutory obligations on trustees of occupational schemes to provide information to any qualifying dashboards. The details will be prescribed by regulations but may include information about members' benefits and also about the constitution, administration and financing of the scheme. TPR will be granted powers to enforce compliance with these obligations through the provision of compliance, third-party and penalty notices.
<b>Pension Protection Fund compensation</b>	The Act retrospectively amends PPF compensation legislation with respect to the operation of the PPF compensation cap where members have a fixed pension transfer credit – it is not of general application and the provisions are likely to be brought into force in short order.

**ANNEX**

<b>New offence</b>	<b>In force?</b>	<b>Are detailed regulations needed?<sup>1</sup></b>	<b>Other information (e.g. steps expected before coming into force)</b>
<b>Changes to the notifiable events regime</b>	No	Yes	Regulations are needed on the detail of the 'declaration of intent' regime and to make the changes to the list of notifiable events.  The regulations have not yet been published (and timing is unknown).  TPR's Code of Practice on Notifiable Events will also need to be revised.
<b>Extension of the Contribution Notice regime</b>	No	Yes	Regulations are needed to clarify the detail of the employer resources test.  The regulations have not yet been published (but suggestion is the new powers may come into force in autumn 2021).  A TPR Code of Practice on the new tests is required (or TPR may revise its existing Code on the material detriment test).
<b>New criminal offences with 7 year custodial sentences</b>	No	No	It is not yet known when these provisions will be brought into force.  TPR's guidance is due to be finalised prior to the new provisions coming into force, and a consultation on the draft guidance is expected shortly.
<b>Extended information-gathering powers</b>	No	No	It has been suggested that the new powers may come into force in autumn 2021.
<b>£1M civil financial penalties and other new offences</b>	No	No	It is not yet known when these provisions will be brought into force.  It is hoped TPR's guidance will be finalised prior to the new provisions coming into force, and a consultation on the draft guidance is expected shortly.
<b>Changes to scheme funding legislation</b>	No	Yes	Regulations are needed on the detail of the 'statement of strategy'.  The regulations have not yet been published (and timing is unknown).  TPR's second consultation on its DB Funding Code of Practice is expected later in 2021.
<b>Climate related disclosures</b>	No	Yes	Regulations are needed on the detail of the requirements to promote effective governance of schemes with respect to the effect of climate change.  Draft regulations and statutory guidance were published for consultation on 27 January 2021 (closing on 10 March 2021).  Proposed to come into force on 1 October 2021.

<sup>1</sup> That is, are detailed regulations needed beyond those required by the Secretary of State to bring the provisions into force.

New offence	In force?	Are detailed regulations needed? <sup>1</sup>	Other information (e.g. steps expected before coming into force)
<b>Right to a cash equivalent transfer value</b>	No	Yes	<p>Regulations are needed on the new conditions on trustees making statutory transfers.</p> <p>The regulations have not yet been published (and timing is unknown).</p>
<b>Collective Money Purchase Schemes</b>	No	Yes	<p>Regulations are needed to detail the framework for how collective money purchase schemes will work.</p> <p>Illustrative regulations were published during parliamentary debate but are subject to change (and timing is unknown).</p> <p>TPR will also need to publish its authorisation criteria.</p>
<b>Establishment of Pension Dashboards</b>	No	Yes	<p>Regulations are needed to detail the framework for how pension dashboards will work.</p> <p>Timing is unclear and likely to be slow – it has been suggested targeting voluntary participation from 2022 and schemes and providers being mandated to connect to a dashboard from 2023.</p>

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