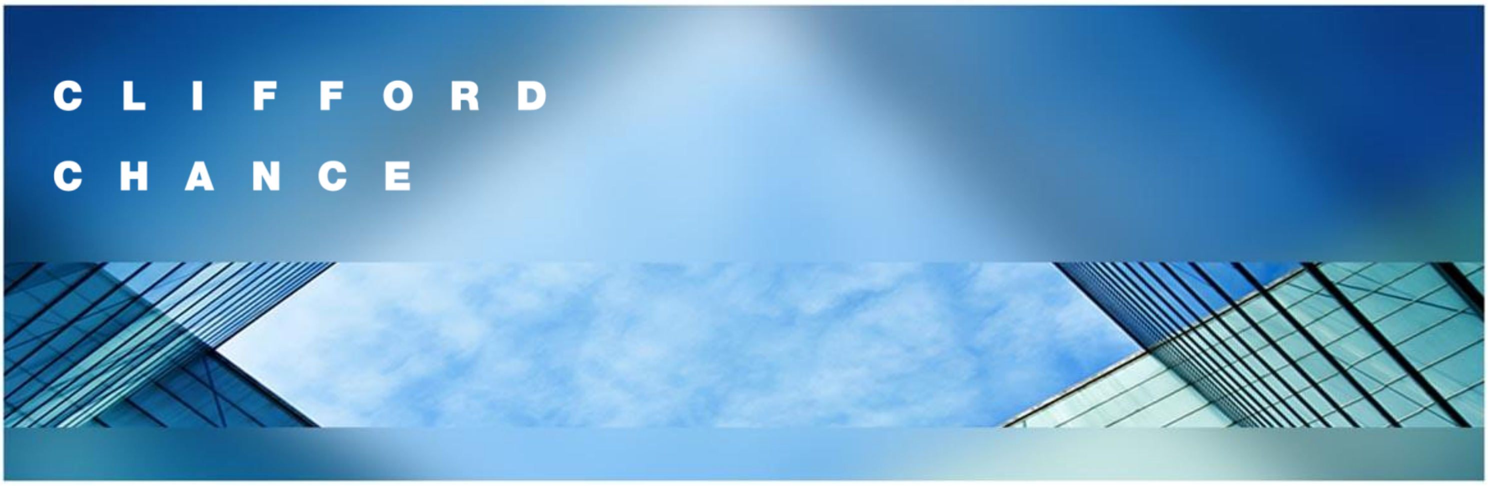

REGULATIONS MADE TO IMPLEMENT STRONGER POWERS OF THE PENSIONS REGULATOR

1. CRIMINAL OFFENCE POWERS TO BE BROUGHT INTO FORCE ON 1 OCTOBER 2021

Key issues

1. Criminal Offence Powers to be brought into force on 1 October 2021
2. DWP consults on two new notifiable events and notice and statement requirements

Commencement regulations[1] have been made which bring into force, on 1 October 2021, specific sections of the Pension Schemes Act 2021 (the "**PSA 21**") relating to the extended powers of the Pensions Regulator ("**tPR**") and the new criminal offences, including:

- *Sections 103 to 106*: changes to the contribution notice regime, including the introduction of the new employer insolvency and employer resources tests
- *Section 107*: new criminal offences for failure to comply with a contribution notice, avoidance of employer debt and conduct risking accrued scheme benefits with 7 year custodial sentences
- *Section 108*: expansion of 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 PSA 21)
- *Sections 110 to 114*: extended information gathering powers for tPR and penalties for non-compliance
- *Section 115*: £1million civil financial penalties

The commencement regulations also contain transitional and saving provisions in relation to the vast majority of these sections (including importantly the new criminal offences, financial penalties and contribution notice changes), with the effect that, broadly, they will not apply to conduct prior to 1 October 2021.

While there has been significant concern raised by industry around the breadth of the criminal powers in particular, tPR has confirmed the policy intent behind the powers as being to target "*more serious intentional or reckless conduct*" and some comfort may also be garnered from the fact that criminal prosecution must meet the threshold of being in the "*interests of justice and the public at large*". TPR is expected to issue revised guidance before 1 October 2021.

For further details of the key changes made by the PSA 21, including in respect of the new criminal offences, see our February 2021 client briefing. See our March 2021 client briefing for details of tPR's consultation on its Prosecution Policy in respect of its criminal sanction powers.

[1] The Pension Schemes Act 2021 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2021

2. DWP CONSULTS ON TWO NEW NOTIFIABLE EVENTS AND NOTICE AND STATEMENT REQUIREMENTS

On 8 September 2021, the Department of Work and Pensions ("**DWP**") published a consultation on draft regulations[2] to make changes to the notifiable events and declaration of intent regime (as introduced by the PSA 21) applicable in respect of defined benefit ("**DB**") pension schemes. The consultation closes on 27 October 2021 and tPR has indicated that the changes will come into force during 2022.

The draft regulations set out the two new notifiable events which were previously consulted on in 2018 as part of the government's proposals to create a stronger Pensions Regulator (see our 11 July 2018 briefing for further background). The draft regulations also remove one existing notifiable event, as well as specifying when a "*notice and statement*" (previously referred to as a declaration of intent / accompanying statement) will need to be provided to tPR and trustees.

New Notifiable Events

Notifiable Event	Description
The intended sale of a material proportion of the business or assets of a scheme employer	"*Material proportion*" means a proportion that accounts for more than 25% of either the employer's consolidated revenues or its gross assets. Revenues / assets for these purposes are either those recorded in the most recent annual accounts, or, where the employer is not required to file annual accounts, its accounting records. The 25% threshold also includes other disposals decided upon or completed in the 12 months prior to the date of the notifiable event so as to catch several smaller transactions which cumulatively exceed the threshold. *The 2018 consultation had suggested that this test would only catch sales involving a scheme employer who had funding responsibility for at least 20% of the scheme's liabilities. However, this element was removed on the basis that it may be too complex to operate (the event therefore applies to all scheme employers).*
The intended granting or extending of a relevant security by a scheme employer over its assets such that this debt would get priority over the scheme on an employer insolvency	"*Relevant security*" means security (which includes fixed and floating charges over assets of the employer / wider employer group and an all assets floating charge which gives the charge-holder the right to appoint an administrator) granted or extended by the employer, or one or more subsidiaries of the employer. This does not include refinancing of existing debt, security for specific chattels or financing for company vehicles.

These notifiable events will be triggered when a "*decision in principle*" has been taken. This is defined as "*a decision prior to any negotiations or agreements being entered into with another party*" i.e. it applies from the point at which the employer has made a decision to go ahead with the applicable event.

The existing notifiable event regarding the relinquishment of control of an employer company by its controlling company is being amended so that it is also triggered when a "*decision in principle*" has been taken. Note that currently there is a tPR Direction which provides that there is no requirement to notify this event if certain conditions (including the scheme being fully funded on a Pension Protection Fund basis) are met. It is unclear if any changes will be made to this position; there's currently no indication that the new notifiable events will enjoy similar exceptions.

Other changes made by the regulations include:

- they remove the existing notifiable event of wrongful trading on the basis that it is ineffective as a notifiable event and in practice tPR has not received a notification of such an event to date; and
- the PSA 21 introduces a notification requirement to tPR in respect of a "*material change*" in the notifiable event or the expected effects of the notifiable event; the regulations define a "*material change*" as being a change in the "*main terms*" of the intended sale, the intended granting or extension of security or the relinquishing control, or a change in the steps taken to mitigate any adverse effects of the event.

[2] The Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021

Notice and Statement Requirements

When do the requirements apply?

The draft regulations require a "*notice and statement*" to be given to tPR and trustees when the "*main terms*" of one of the following events have been proposed (note that when the main terms have been proposed is not covered by the regulations although the DWP is seeking feedback as to whether it is the appropriate point for the notice and statement to be issued):

- the intended sale by the employer of a material proportion of its business or assets (as per the first new notifiable event above);
- the intended granting or extending of a relevant security by the employer over its assets giving it priority over scheme debt (as per the second new notifiable event above);
- where the employer is a company, the intended relinquishing of control by a controlling company of the employing company; or where the controlling company relinquishes such control without a decision to do so having being taken, the relinquishment of control of the employer company by the controlling company (as per the existing notifiable event).

What does the statement have to cover?

The statement must indicate the impact on the pension scheme of the transaction and what action is being taken to mitigate any detrimental effects. The information that must be contained in the statement includes:

- a description of the event, including the main terms proposed
- a description of any adverse effects of the event on the pension scheme
- a description of any adverse effects of the event on the employer's ability to meet its legal obligations to support the scheme
- a description of any steps taken to mitigate those adverse effects
- a description of any communication with the trustees of the eligible scheme about the event

The above changes are designed to increase tPR's and trustees' oversight of corporate transactions and business activity where a DB scheme is involved, but it remains unclear from the consultation what engagement there is expected to be with tPR in the period between informing tPR of the notifiable event and issuing the notice and statement. The consultation states that intention is to balance the desirability of tPR and the trustee having the relevant information as early in the transaction as possible, "*with the acknowledgement that full details of the transaction and any mitigation in respect of the scheme may not be available until nearer the end of the process*". In practice, these changes may well have significant implications for transaction certainty and timing.

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