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Briefing note

Pension Schemes Act 2021 – update on changes and expected timing

Whilst the Pension Schemes Act 2021 ('the Act') established a lot of important primary legislation, further secondary legislation and guidance was required to bring most aspects into force.

Read on for our quick guide to the changes – what we know so far, what happens next and expected timing.

Back in March, an indication of the DWP's implementation timetable was given by the Pensions Minister, Guy Opperman[i], and in the months since, various consultations, guidance and regulations have started to emerge. These begin to flesh out the all-important detail: how the provisions will apply in practice, and what compliance will look like. With some of the changes taking effect from this Autumn, we look below at what you should be watching out for and how you can start getting prepared.

New criminal sanctions, civil penalties and boosted information gathering powers: October 2021

What do we know?

The Act introduces new criminal offences for avoidance of employer debt and conduct risking accrued scheme benefits. It also paves the way for civil penalties of up to £1 million for serious breaches such as failure to comply with a contribution notice or the Notifiable Events rules, or knowingly or recklessly providing false or misleading information to the Pensions Regulator ('the Regulator') or trustees.

In March the Regulator began consulting on its approach to the investigation and prosecution of the new criminal offences. The draft policy[ii] provided examples of scenarios where prosecution would be considered, as well as how the 'reasonable excuse' test may be applied.

Regulations[iii] were laid before Parliament specifying the mandatory contents of the notice that the Regulator will be able to give to oblige a person of interest to submit to an interview. They also set out the fixed and escalating penalties that will apply on failure to comply with the Regulator's information-gathering powers (e.g. interview notices)—fixed penalties are £400 and escalating penalties can be up to £10,000 a day for a corporate entity and £200 for an individual.

What next?

The new offences, penalties and power will come into force on 1 October 2021.[iv] They are not retrospective; so, for example, the criminal offences will not apply to conduct occurring (or, in the case of a series of acts or a continuing failure, first occurring) before that date.

The Regulator sought views on whether its general approach and proposed strategy for selecting cases for investigation was clear and consistent with the underlying policy intent; and whether its examples were helpful to those seeking to understand what might constitute a reasonable excuse. Consultation closed on 22 April and the intention is presumably that the Regulator will publish final guidance in time to be effective from 1 October 2021.

Getting prepared

It will be some time before we find out precisely how the new powers will play out in practice. However, although these appear wide ranging, the Regulator has confirmed they will be aimed at punishing serious intentional or reckless conduct. It does not therefore expect the new powers to interfere with ordinary corporate activity.

Nevertheless, trustees and sponsors should tread carefully and watch out for court decisions and the exact form any sanctions and penalties take.

New grounds for contribution notices: October 2021

What do we know?

The Act introduces two new grounds on which the Regulator can issue contribution notices; where either an 'employer solvency test' or an 'employer resources test' are met.

This means that in future the Regulator will be able to require additional scheme funding from an employer or connected person if an act or omission reduces the debt recoverable by the pension scheme on a hypothetical insolvency, or materially reduces the employer's resources relative to any employer debt which might be triggered under pensions legislation.

Draft Regulations were published for consultation purposes on 18 March 2021 and remained open for comments until 29 April 2021. The DWP sought views on how a sponsoring employer's resources, and the effects of corporate activity thereon, would be quantified for the purposes of the new test.

The Regulator also published a consultation draft of related changes to Code of Practice No. 12 on 27 May 2021 to explain the circumstances in which it may expect to issue a contribution notice: the consultation period ended on 7 July 2021.

What next?

The new grounds for contribution notices become effective on 1 October 2021.[v] They cannot be applied to events occurring before that date.

The *Pensions Regulator (Employer Resources Test) Regulations 2021* have been laid before Parliament for approval and are set to come into force on 1 October 2021. In summary, the Government has concluded that profits before tax will be the relevant measure of the scheme sponsor's resources.[vi] Some tweaks have been made to the original proposals: for example, the final Regulations cater for the existence of charities and other organisations that are not trading for profit, by reading references to '*profits*' as meaning '*net income*' in relevant cases.

The Regulator will consider all comments before laying the final version of Code of Practice No. 12 before Parliament. This will be presented in the new 'single Code' format when it is finalised (the single Code itself is not currently expected before Spring 2022).

Getting prepared

Sponsors will need to understand their obligations in respect of corporate activity ahead of changes. They should be seeking advice, documenting decisions carefully and engaging early with their trustees to reduce regulatory risk. Reasons for acting in the way that they did should be clearly recorded especially if there is a risk of a negative impact on the pension scheme.

Extended notifiable events regime: 2022

What do we know?

The Act extends duties on employers to provide information to the Regulator about proposed corporate transactions.

Draft Regulations[vii] were published for consultation purposes on 8 September 2021. As expected, they introduce two new 'granting security' and 'intended sale' notifiable events, and set out what sorts of security granting is relevant, and what a 'material proportion' of a business or its assets is (a quarter of, respectively, its annual revenue or the gross value of its assets, either in isolation or cumulatively with other sales within a year).

Additional notification '*when the main terms of the relevant event have been proposed*' will need to be accompanied by a statement (widely referred to as a 'declaration of intent') that describes the event, the impact on the scheme and the employer's ability to support it, what action is being taken to mitigate detrimental effects, and any communication with the trustees.

The Regulator will have a new power to impose a financial penalty of up to £1 million for breaches of the notifiable events legislation.

What next?

The consultation exercise runs until 27 October 2021, with a response expected within 12 weeks. One version of the draft Regulations indicates that they would come into force on 6 April 2022, which is consonant with the Regulator's corporate plan. A revised Code of Practice and accompanying guidance from the Regulator will follow.

Getting prepared

Whilst we wait for confirmation of the final details, sponsors and trustees should reflect on information sharing protocols and agreements. Getting the right monitoring information in place is a good starting point. In due course training on the revised notifiable events code of practice and associated guidance should be undertaken to ensure both sponsors and trustees know their obligations.

Scheme funding regime changes: Late 2022/Early 2023

What do we know?

The Act paves the way for changes to the scheme-specific funding regime and will be accompanied by a new defined benefit funding Code of Practice. Trustees will be required to set down a long-term funding and investment strategy, calculate technical provisions consistently with it, and produce a 'statement of strategy' describing their approach and reflecting upon their implementation endeavours, the risks involved, and their decision-making.

The Regulator held a first-stage consultation on a revised version of *Code of Practice No. 3: Funding Defined Benefits* last year, and published an interim response on 14 January 2021. It proposes a move towards 'fast track' and 'bespoke' compliance routes. An actuarial valuation will either need to demonstrate compliance with minimum standards, or trustees will have to explain why it is reasonable for them to take a different approach.

What next?

Draft funding regulations should be published for consultation '*later this year*'. The Regulator expects to begin the second stage of consultation, which will include a draft Code, '*towards the end of the year*', after the government's consultation on regulations, anticipating that it will come into force in late 2022 or early 2023. In the interim, scheme valuations carried out in 2021 and 2022 will be done under the existing Code.

Getting prepared

Consider how these changes will impact the next valuation. Although we await further technical detail, the consultation so far, together with the Regulator's latest Annual Funding Statement, gives a good indication of the direction of travel and allows some benchmarking of funding plans. Whilst some schemes will already have long-term plans in place, there are advantages in taking early steps to comply if this isn't the case.

New governance and reporting requirements on climate change[viii]: from 1 October 2021 onwards for the largest schemes and master trusts

What do we know?

The Act contains regulation-making power that can be used to bring in new reporting and governance requirements and gives legal recognition to climate change in the most comprehensive way to date.

Climate-risk governance regulations were laid before Parliament in draft on 8 June 2021, alongside statutory guidance. They were approved in July and come into force on 1 October 2021, requiring trustees of larger occupational pension schemes to assess their exposure to climate-change risk, and publish their findings, in line with the recommendations of the Task Force on Climate-related Financial Disclosures.

In July, guidance was also launched for consultation by the Regulator.[ix] The guidance describes what trustees will need to do and report on in order to comply with the new legislation. It also includes the publication of an appendix to the Regulator's monetary penalties policy (MPP), in which it outlines its approach to the imposition of penalties for non-compliance.

What next?

From 1 October 2021, these new requirements will apply to schemes with £5 billion or more in assets (and authorised master trusts and CDC schemes). This will then be rolled out to schemes with £1 billion or more in assets one year later. The government plans to consider extending their scope further in 2023.

With its guidance consultation ending on 31 August, watch out for more from the Regulator as it finalises its regulatory and enforcement approaches to the new requirements.

Getting prepared

Trustees of affected schemes will have to undertake a substantial amount of work in order to comply with the new requirements and should consider formulating an action plan for how they will do this. All trustees are encouraged to consider climate change within their IRM framework given the potential impact on funding assumptions, investment strategy and sponsor covenant.

Pensions dashboards: 2023

What do we know?

The Act lays out the statutory framework for 'pensions dashboards' that will allow members to view details of all their pension arrangements via a single online portal (and obliging the Money and Pensions Service to provide one such pensions dashboard service). Trustees and managers of occupational pension schemes will be required to submit prescribed scheme information to these dashboards.

The Pensions Dashboards Programme (PDP) (a team assembled by the MaPS) anticipates that schemes will first be compelled to provide data in 2023, and published a technical data-standards guide[x] in December 2020 which is designed to ensure that schemes know how to prepare their data for onboarding.

What next?

Publication of proposed regulations for pensions dashboards is pencilled in for '*later this year*', with the intention of laying them before Parliament in 2022 so that '*Delivery remains on track for 2023*'.

After a tender process, the PDP has recently selected Capgemini to supply the central digital architecture to underpin the online data platforms. This allows the dashboard to move into its develop and test phase.

Getting prepared

Trustees should keep themselves informed of progress, particularly the groundwork being laid by the PDP, and consider any scope to review or audit scheme information currently held.

Changes to transfer value rights: early Autumn 2021

What do we know?

The Act contained the power to add additional restrictions to a member's statutory right to transfer benefits to another pension scheme.

Draft regulations[xi] were published on 14 May 2021. These set out new conditions that will need to be met in the case of transfers to certain types of scheme such as the provision of evidence of their employment or place of residence, or their having obtained guidance. The government hopes that the changes will reduce pension scams.

What next?

Consultation ended on 10 June 2021. Commencement is expected 'from early autumn' (again, this probably means October).

Getting prepared

Trustees will need to review administrative processes for the new requirements. They should also ensure that existing due diligence complies with the Regulator's expectations and consider whether they want to sign up to the Regulator's scams pledge.[xii]

With all this change on the horizon, understanding the potential implications and building this into future work plans is a good first step. Please contact your usual Hymans Robertson consultant if you would like to discuss these issues further.

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i. HC Deb, 2 March 2021, cWS, <questions-statements.parliament.uk/written-statements/detail/2021-03-02/hcws816>.

ii. *Consultation:* <www.thepensionsregulator.gov.uk/en/document-library/consultations/consultation-on-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences>.

Draft policy: <www.thepensionsregulator.gov.uk/en/document-library/consultations/consultation-on-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences/draft-policy-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences>

iii. *Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021 (SI 2021 No. 754)*

iv. The *Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021* (SI 2021 No. 950).

v. SI 2021 No. 950.

vi. *Government Response to the Consultation on Strengthening the Pensions Regulator's Powers: Contribution Notices and Information Gathering Powers Regulations 2021* (June 2021) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/997431/government-response-strengthening-the-pensions-regulators-powers-contribution-notices-and-information-gathering-powers-regulations-2021.pdf>.

vii. https://www.gov.uk/government/consultations/strengthening-the-pensions-regulators-powers-notifiable-events-amendments-regulations-2021

viii. For more on understanding and reporting on climate change risk read our briefing note https://www.hymans.co.uk/insights/research-and-publications/publication/tcfd-supporting-clients-in-understanding-and-reporting-on-climate-change-risk/

ix. https://www.thepensionsregulator.gov.uk/en/document-library/consultations/climate-change-guidance

x. https://www.pensionsdashboardsprogramme.org.uk/wp-content/uploads/2020/12/PDP-data-standards-guide.pdf

xi. https://www.gov.uk/government/consultations/pension-scams-empowering-trustees-and-protecting-members/pension-scams-empowering-trustees-and-protecting-members-consultation

xii. https://www.thepensionsregulator.gov.uk/en/pension-scams/pledge-to-combat-pension-scams

London | Birmingham | Glasgow | Edinburgh

T 020 7082 6000 | www.hymans.co.uk