

What you need to know about the Pension Schemes Act 2021

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The new Pension Schemes Act gives the Pensions Regulator increased power to prosecute on behalf of scheme members who have been left shortchanged by the actions of a variety of people involved in a business. Simon Kew gauges how businesses should respond to the changes.

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Much was said about the Pension Schemes Bill. As it made its way through both Houses of Parliament, many sounded a note of caution regarding some elements – such as handing the power of criminal sanction to the Pensions Regulator (TPR). But after receiving Royal Assent in February, the Pension Schemes Act 2021 is now on the statute books.

Sound intention

The intention of the new Act is sound. Where a pension scheme has suffered material detriment, that needs to be mitigated. If not, TPR can

seek redress on behalf of the members by taking action – something that has been under increased focus in recent years.

However, the criminal offences will apply to any person and any act, or failure to act, where the person knew, or should have known, that there would be an increased likelihood that benefits will not be paid in full. Quite how this will play out is dependent on several factors. When referring to any person that could be directors, the wider group, staff, advisers, lenders or purchasers of all, or part, of a business. The only exception is an insolvency practitioner discharging their duties under an appointment. This, of course, is significantly wider than the current moral hazard legislation, which is restricted to targeting companies connected to the employer and their directors and shareholders.

A draft policy has been released by TPR, for consultation by industry stakeholders. The aim is to strengthen the authority of the regulator which goes some way towards appeasing concerns – such as, business as usual will unlikely be considered by the regulator as a criminal offence. As TPR has stated: “The intent of the new criminal offences is not to change commercial norms or accepted standards of corporate behaviour.” However, some uncertainty remains until it’s clear how the strengthened authority will be applied by TPR.

Case law

Given time, legal challenges will ultimately give case law to help shape the parameters and understanding around the practical application. For example, with the regulator’s moral hazard powers, clarity is provided through judgments in cases that were taken to court.

While pensions minister Guy Opperman has suggested these powers will not be retrospective, the effective date is yet to be confirmed. TPR has stated that it expects the new powers will be in place by late 2021 or

early 2022, although some incidents prior to the effective date may be considered as evidence in building a case.

Because of the new Pension Schemes Act, additional focus will inevitably fall on corporate transactions and the potential for a detrimental outcome for a pension scheme.

If a defined benefit scheme is likely to be adversely affected, mitigation must be put in place to offset that impact. If not, TPR may become involved.

In the draft policy in respect of the criminal sanctions, TPR has recently provided some examples of what it describes as a central act. For example, conduct risking accrued scheme benefits as opposed to an incidental one, but the criminal sanctions could apply in a much wider context than provided in the draft policy.

Criminal convictions

It should be noted that to successfully pursue a criminal conviction, the burden of proof sits with TPR and it would need to prove beyond reasonable doubt that the intention of the targeted act was to adversely impact the scheme. The target’s defence would be that they had a reasonable excuse for taking the action they did. As TPR states, “...in most instances, a professional person, acting in accordance with their professional duties, conduct, obligations and ethical standards applicable to the type of the advice being given, is likely to have a reasonable excuse”.

Understanding the regulator’s approach and methodology is hugely important when looking to restructure a business, raise finance or distribute profits as well as in negotiations with pension scheme trustees over contributions or security. Put simply, it helps to act in a way that complies with pensions legislation and guidance.

More clarity

Companies, pension scheme trustees and advisers on both sides are all looking for some clarity from the statutory instruments and TPR's guidance, later this year. That said, TPR's draft policy on how it intends to apply its new powers gives some comfort that it is not seeking to target standard business activity.

As with the introduction of the Pensions Act in 2004, there will naturally be some uncertainty as the new powers come into force. There may well also be an increase in clearance applications to the regulator, particularly around corporate transactions, although that process does not provide protection against criminal sanctions.

Protection will come from being informed on the legislation, the equitable treatment of the pension scheme and openly interacting with TPR when required.



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