UK PENSIONS REGULATOR POWERS AND THE PENSION SCHEMES ACT 2021 – GETTING TOUGH

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The Pension Schemes Act 2021 will enhance the UK Pensions Regulator's powers to protect defined benefit pension plans from being weakened by corporate activity. Secondary legislation, consultation and updated guidance is needed before the new powers are brought into force and will set out in more detail how the new powers will operate.

CHANGE:	IMPACT:
New notification requirements: ▪ Companies must give a statement to the Regulator and pension trustees outlining the impact of a transaction on the pension scheme. ▪ Companies must notify transactions to the Regulator in a wider range of circumstances and at an earlier stage than at present.	▪ Expect earlier engagement with trustee boards and greater consultation with them, and more interaction with the Regulator.
Easier for the Pensions Regulator to impose obligations via a contribution notice ▪ A contribution notice imposes pension obligations on other group companies. ▪ Regulator may issue a contribution notice based on a reduction in a company's assets.	▪ Increases DB pension risk on transactions - there may be more clearance applications to the Regulator. ▪ Purchasers may be more reluctant to acquire DB pension plans. ▪ Directors must assess the new tests before taking corporate actions which could weaken employer support for a DB pension plan, e.g. paying out dividends or creating additional security.
Tougher enforcement powers for the Regulator ▪ New criminal offences relating to pension plans. ▪ Maximum 7 year custodial sentence and/or an unlimited fine ▪ Punitive (civil) fines of up to £1 million for serious breaches of pensions legislation.	▪ In cases where pensions concerns have been properly addressed, the risk of criminal penalties being imposed is likely be low - these powers, whilst severe, are aimed at serious misconduct. ▪ The potential for personal consequences may, however, lead directors and others involved in making business decisions which impact DB schemes to take a more conservative approach to pension plan risk.

WHY THE CHANGES?

The UK Pensions Regulator has, since 2005, had the power to impose substantial financial penalties on parties to a transaction - and other group companies and potentially directors and others - where the transaction materially weakens employer support for a defined benefit (DB) pension plan.

These powers have been rarely used and recent corporate collapses (e.g., BHS, Carillion) have convinced the Government of the need to bolster them and to punish individuals who put DB pension benefits at risk. These changes will accompany the "clearer, quicker, tougher" approach to DB regulation that the Regulator is now adopting.

FURTHER DETAIL ON THE CHANGES

New notification requirements:

The new statement of intent must include a description of the event, any negative consequences for the pension plan, any steps being taken to address those consequences, and details of engagement with the trustees. The timing of the statement, and further detail as to its content, have been left to regulations.

The Government has also announced that it will introduce two new notifiable events by way of regulations:

- the sale of a material proportion of the business, or assets, of a company which has funding responsibility for at least 20% of a DB pension plan's liabilities; and
- the granting of security on a debt to give it priority over debt owed to a DB pension plan.

Easier for the Pensions Regulator to impose obligations via a contribution notice:

Under existing legislation, the Regulator may impose a contribution notice only where an act materially prejudices members' benefits. This has proved to be a hard test for the Regulator to satisfy. The new tests (particularly the employer resources test) make it easier for the Regulator to issue a contribution notice.

- The "employer insolvency" test assumes that immediately after a corporate act, the employer suffers a hypothetical insolvency event triggering a statutory pensions debt (i.e. the deficit in the pension plan on a buy-out basis) and empowers the Regulator to impose a contribution notice if the act materially reduced the amount of the debt which the plan would recover in that situation.
- The "employer resources" test will be met where an act results in a material reduction in the employer's resources relative to the amount of the estimated statutory pensions debt. It could, for example, catch a sizeable dividend paid out by an employer which is still comfortably able to pay its statutory pensions debt after the dividend.

Whilst the new tests widen the grounds for imposing a contribution notice, the Regulator must still establish that it is reasonable to impose a contribution notice.

Concern has been raised that the Regulator may be able to impose these tests retrospectively using the 6 year look-back power in the existing legislation. Whilst it would, in principle, be possible for the Regulator to rely on this power, it would face a number of hurdles in doing so.

Tougher enforcement powers for the Regulator:

The offence of "conduct risking accrued scheme benefits" is satisfied if a person knew or ought to have known that the act would materially prejudice benefits without reasonable excuse. The deemed knowledge element of "ought to have known" could be particularly wide-ranging and much may depend on what constitutes a "reasonable excuse".

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