

The new Pension Schemes Act 2021 (Act) became law on 11 February 2021. It brings with it many changes affecting pension scheme trustees, employers, potentially insolvency practitioners (pre-appointment), advisers and anyone else who is involved with the running of a pension scheme or the restructuring of an employer's group of companies.

Take a walk with us as we explain the key changes in the Act and suggest some action points for trustees and employers.



Introduction

The Act brings about change in the following areas:

- New powers for The Pensions Regulator (TPR), including in relation to:
 - Contribution notices
 - New criminal penalties
 - The notifiable events regime
 - Inspection and interview powers
 - Provision of false or misleading information to TPR or pension trustees
 - New civil penalties
- Scheme funding requirements
- Taking account of climate change risk in trustees' investment strategy
- Pensions dashboards
- The right to take a transfer value (prevention of pension scams)
- The introduction of collective money purchase pension schemes (formerly referred to as collective defined contribution schemes)
- Provisions relating to the operation of compensation from the Pension Protection Fund (PPF)

In this communication, we focus primarily on those areas requiring you to take action.

New Powers for TPR

Action Required

Contribution Notices

Two New Tests

The Act introduces two new grounds on which TPR can issue a contribution notice in relation to a defined benefit (DB) pension scheme. These are where the “employer insolvency test” or the “employer resources test” is met. These new tests sit alongside the existing material detriment test.

The **employer insolvency test** will be met if TPR is of the opinion of both of the following:

- Immediately after an event occurred, the value of a scheme’s assets is less than the value of its liabilities.
- If a section 75 debt had fallen due from the employer immediately after the event, the act or failure to act would have materially reduced the amount of the debt likely to be recovered by the scheme.

For the purposes of this test, the value of a scheme’s assets and liabilities and the estimated amount of any section 75 debt (had one fallen due) will be whatever TPR estimates them to be.

The **employer resources test** will be met if TPR is of the opinion of both of the following:

- An act or failure to act reduced the value of resources of the employer.
- The reduction was a material reduction relative to the estimated section 75 debt in the scheme if a debt had fallen due immediately before the act or failure to act occurred.

As is the case with the employer insolvency test, the value of a scheme’s assets and liabilities and the amount of any estimated section 75 debt (had one fallen due) will be whatever TPR estimates them to be. What constitutes an employer’s resources, and the value of those resources, will be set out in regulations.

Is There a Defence to the New Tests?

In both cases, a defence will be available. Generally speaking, this will be where the target of the contribution notice can show that they considered the potential impact of the act or failure to act on the pension scheme and that they either reasonably considered there would be no impact, or they took steps to mitigate against the potential impact. In relation to the employer insolvency test only, there is an additional defence that the scheme’s liabilities were not less than its assets at the time of the event.

Calculation of the Amount Demanded by a Contribution Notice

When deciding how much to demand under a contribution notice, TPR will look at the shortfall in the scheme’s funding position. TPR can demand an amount equal to the full section 75 deficit in the scheme. Previously, the relevant time for calculating the shortfall was the point in time at which the event occurred. This has now changed. TPR will consider the shortfall in the scheme at the year-end immediately before making the determination. This is so that TPR is able to capture any increase in the scheme deficit since the event occurred.

New Penalties for Failing to Comply With a Contribution Notice

Failure to comply with a contribution notice is now a criminal offence, carrying an unlimited fine. Alternatively, TPR will be able to levy a civil fine up to a maximum amount of £1 million.

Comment

It is worth noting that the new tests are incorporated into the Pensions Act 2004 in such a way that would mean the six-year look-back period would be available to TPR even though the Act is not expressly retrospective.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none">• Be prepared for employers to be more likely to seek clearance for future transactions, resulting in greater trustee involvement	<ul style="list-style-type: none">• Bear in mind these two new tests when undertaking future transactions• Consider whether any events in the last six years might be caught by these tests – take advice where necessary• Keep the scheme’s trustees informed of any proposed transactions that might impact the pension scheme and consider entering into a formal information sharing agreement (and confidentiality agreements, if required) with the trustees

New Criminal Penalties

The Act introduces two new offences in relation to DB schemes:

- Avoidance of an employer debt
- Conduct risking accrued scheme benefits

Both of these offences carry the risk of a criminal penalty of an unlimited fine and/or imprisonment of up to seven years. Alternatively, TPR could use its civil fining powers and fine a person committing one of these offences up to £1 million.

Who Can Be Caught by These Offences?

Controversially, anybody involved with the running of a DB pension scheme or the operation of a scheme employer could be caught by these two new offences if they do not have a reasonable excuse for their actions. The offences are not limited to those who are connected or associated with a scheme employer, in the way that a contribution notice is.

A Bit More Information About the Offences

Both offences do what they say on the tin.

To be more specific, the offence of **avoidance of an employer debt** includes any act or failure to act intended to prevent the recovery of the whole or any part of a section 75 debt, including preventing such a debt from becoming due or compromising the amount of the debt or reducing the amount of a debt that would otherwise become due. The reference to a section 75 debt includes any contingent amount.

The offence of **conduct risking accrued scheme benefits** includes any act or failure to act that detrimentally affects in a material way the likelihood of accrued scheme benefits being received where the person knew or ought to have known that such a course of action would be likely to have that effect.

Comment

While the offence of avoidance of an employer debt could be said to be fault based because there must be an intention to avoid a section 75 debt, the offence of conduct risking accrued scheme benefits is not fault based. There does not have to be any intention to risk accrued scheme benefits, the person just had to know – or ought to have known – that the action they took would have had the prohibited result. This will, no doubt, put actions taken by pension trustees and their professional advisers (as well as employers and their advisers) under the spotlight in a way that has never been the case previously.

There is nothing in the legislation that specifically makes the offences retrospective and TPR has said previously that it has no intention to use these powers retrospectively.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none"> • Update risk registers • Consider training for the trustee board on these new offences • Consider whether any actions being contemplated might constitute conduct risking accrued scheme benefits – take advice if appropriate • Consider whether any inaction might constitute conduct risking accrued scheme benefits, such as not taking covenant advice on a regular basis • Have a standing agenda item to specifically consider whether any proposed actions at a trustee meeting might constitute “conduct risking accrued scheme benefits” • Make sure scheme administrators have these new offences on their radar • Check whether any indemnities from the scheme employer to the trustees would cover these new penalties • Check insurance policies – would they cover criminal sanctions (usually unlikely) and a civil penalty of up to £1 million, and what procedural steps does the policy require? • Consider seeking some (or greater) indemnity cover from the scheme employers • Watch out for TPR’s guidance on how it intends to police these offences 	<ul style="list-style-type: none"> • Make sure that all officers/employees who take decisions on behalf of the company are aware of these new criminal offences • Consider training for senior management on these new offences • Check whether directors and officers indemnity insurance covers these offences (it is unlikely to cover the criminal sanctions, but might cover the civil penalties) • Check the employer’s own insurance policies in relation to regulatory fines and what procedural steps they require • Be prepared for trustees to seek greater indemnity cover in relation to their potentially increased exposure • Trustees may be unwilling to continue acting with the increased risks – consider whether it would be in the best interests of all to put in place a sole professional trustee, which has its own appropriate indemnity insurance cover • Watch out for TPR’s guidance on how it intends to police these offences

Notifiable Events Regime and Accompanying Statement

The DB scheme notifiable events regime has been tightened up, with greater penalties being made available to TPR and the introduction of a type of new “super” notifiable event.

Penalties for Non-Compliance

Where a person (generally speaking, the employer or trustee) fails to take reasonable steps to ensure compliance with the notifiable events regime, TPR will now be able to issue a fine of up to £1 million. Additionally, any person who knowingly or recklessly provides false information to TPR in connection with a notifiable event will now be guilty of an offence, risking an unlimited fine and up to two years in prison.

“Super” Notifiable Events

The Act enables TPR to impose more structure around certain types of notifiable events (we refer to them here as “super” notifiable events), where an accompanying statement (originally referred to by the government as a “declaration of intent”) will also be required. The employer or a person connected or associated with the employer would be responsible for notifying TPR of a “super” notifiable event. The exact notifiable events, which are intended to be caught by these “super” notifiable event provisions, will be detailed in an amendment to the notifiable events framework. It is likely that they will include the two notifiable events that the government confirmed (in its response to consultation on protecting defined benefits) that it would introduce. These are:

- Where there is the sale of a material proportion of the business or assets of a scheme employer that has funding responsibility for at least 20% of the scheme’s liabilities.
- The granting of priority security on a debt.

It is also likely that the sale of a controlling interest in a sponsoring employer (which is an existing notifiable event) will be elevated to “super” notifiable status.

Accompanying Statement

The format of the accompanying statement to these “super” notifiable events will be set out in regulations, but expect the following information to be required:

- A description of the notifiable event.
- An explanation of any adverse effect it might have on the pension scheme.
- The steps that have been taken to mitigate against that adverse effect.
- A description of any communications with the trustees.

It will also be necessary to provide the trustees with a copy of the accompanying statement.

Timing

Regulations will contain more detail about the timing of when notification must be made to TPR for these “super” notifiable events and accompanying statements. It is likely, however, that these will be required to be submitted **before** a transaction completes.

Comment

This is likely to bring DB pension schemes much more to the fore in corporate transactions. Penalties will also apply where a person fails to comply with the new provisions for “super” notifiable events and/or the accompanying statement without reasonable excuse. TPR will be able to issue a fine of up to £1 million. Additionally, any person who knowingly or recklessly provides false information to TPR in this regard will be guilty of an offence, risking an unlimited fine and up to two years in prison.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none"> • Become familiar with the new notifiable events regime and watch out for the amended regulations • Consider training for the trustee board on the new notifiable events regime • Update the trustees’ notifiable events framework • Update risk registers • Consider requesting a formal information sharing agreement with the employer (or updating the existing one), as a means of minimising the risk of a notifiable event being missed • If you do not already do so, have a standing agenda item at trustee meetings to specifically consider whether any proposed or recent actions are a notifiable event • Check whether any indemnities from the scheme employer to the trustees would cover a civil penalty of up to £1 million • Check insurance policies – would they cover the increased civil penalty and what procedural steps does the policy require? • Consider seeking some (or greater) indemnity cover from the scheme employers 	<ul style="list-style-type: none"> • Make sure that all officers/employees who take decisions on behalf of the company are aware of the changes to the notifiable events regime • Consider training for senior management on the new notifiable events regime • Consider putting in place a formal information sharing agreement with the trustees (or updating the existing one), as a means of minimising the risk of a notifiable event being missed • Include a standing agenda item at directors’ meetings to consider whether any proposed transactions would constitute a notifiable event and/or trigger the requirement for an accompanying statement • If making use of the new easements for companies under the Corporate Insolvency and Governance Act, consider whether they will constitute a notifiable event and/or trigger the requirements for an accompanying statement – take pensions advice as well as insolvency advice • Check the employer’s own insurance policies in relation to regulatory fines and what procedural steps they require • Check whether directors and officers indemnity insurance covers the new penalties that TPR could impose • Be prepared for trustees to seek greater indemnity cover in relation to their potentially increased exposure

Inspection and Interview Powers

TPR has been granted enhanced inspection and interview powers to support its existing information gathering powers under section 72 of the Pensions Act 2004. It will be easier for TPR to require anyone connected with the running of a pension scheme, or a scheme employer, to attend for interview. Failure to attend for interview will be a criminal offence carrying a maximum penalty of up to £5,000. TPR could, instead, issue a fixed penalty notice of up to £50,000 or an escalating penalty notice with a daily rate of up to £10,000.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none"> • Consider appropriate training and putting in place a legal privilege protocol • Make sure that any person likely to take receipt of a section 72 notice or any other communication from TPR understands the importance of passing on the request to the appropriate person in a timely manner, and take advice • If asked to attend for interview, take advice 	<ul style="list-style-type: none"> • Consider appropriate training and putting in place a legal privilege protocol • Make sure that any person likely to take receipt of a section 72 notice or any other communication from TPR understands the importance of passing on the request to the appropriate person in a timely manner, and take advice • If asked to attend for interview, take advice

Provision of False or Misleading Information to TPR or Pension Trustees

Provision of Information to TPR

A new section 80A, inserted into the Pensions Act 2004, gives TPR power to issue fines of up to £1 million to a person who has knowingly or recklessly provided information **to TPR** that is false or misleading where the information is provided in certain specified circumstances, including the pension scheme return and notifiable events regime. The fine will also be available where the person providing the information intends, or could be reasonably expected to know, that TPR would use the information for the purpose of carrying out its functions.

Provision of Information to Pension Trustees

Likewise, a new section 80B, inserted into the Pensions Act 2004, gives TPR power to issue fines of up to £1 million to a person who has knowingly or recklessly provided information that is false or misleading **to the trustees** of a DB pension scheme in various specified circumstances with a catch-all that the fine will also be available to TPR where the person intends, or could be reasonably expected to know, that the information would be used by the trustees in their capacity as trustees.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none"> • Update risk registers • Arrange for special information, such as a notifiable event, to be checked by a second person for accuracy before it is submitted to TPR • Check whether any indemnities from the scheme employer to the trustees would cover a civil penalty of up to £1 million • Check insurance policies – would they cover the civil penalty? • Consider seeking some (or greater) indemnity cover from the scheme employers 	<ul style="list-style-type: none"> • Make sure that all officers/employees who provide information to TPR and/or the trustees are aware of these new penalties • Put in place a peer review system, so that any information provided to TPR or pension trustees is sense checked by a second person to make sure it is accurate • Check the employer's own insurance policies in relation to regulatory fines • Check whether directors and officers indemnity insurance covers the new penalties that TPR could impose • Be prepared for trustees to seek greater indemnity cover in relation to their potentially increased exposure • Consider whether to enter into a formal information sharing agreement with trustees (and confidentiality agreements) in order to improve the flow of information and minimise the risk of penalties

A Bit More About the New Civil Penalties

TPR can now issue a fine of up to £1 million under the Act, in certain specified circumstances (which we have outlined in this communication). However, that is not the end of the story. The Act enables the issue of further regulations increasing the maximum level of the fine.

It is worth noting that where the circumstances exist that would allow TPR to impose a fine on a company, TPR could instead impose the fine on a director, secretary or other officer involved in the decision-making process. This new provision is another way in which TPR will be able to pierce the corporate veil (as is currently the case with contribution notices). Such a concept would have been unthinkable 20 years ago.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none"> • Consider trustee training on those areas of the Act attracting the higher civil penalties • Check whether any indemnities from the scheme employer to the trustees would cover a civil penalty of up to £1 million • Check insurance policies – would they cover the increased civil penalty? • Consider seeking some (or greater) indemnity cover from the scheme employers 	<ul style="list-style-type: none"> • Consider training for the management team on those areas of the Act attracting the higher civil penalties • Check the employer’s own insurance policies in relation to regulatory fines • Check whether directors and officers indemnity insurance covers the new penalties that TPR could impose • Be prepared for trustees to seek greater indemnity cover in relation to their potentially increased exposure

Scheme Funding Requirements

Action Required

The Act imposes a new duty on trustees of DB schemes to determine and keep under review a funding and investment strategy. The strategy will have to specify the funding level which the trustees intend the scheme to have achieved and detail the investments the trustees intend the scheme to hold at specific dates. The trustees will set out this information in a written statement of strategy, part 2 of which will take the form of an implementation report. Employer agreement will be required to the trustees’ funding and investment strategy (although any amendments to the implementation report will only require consultation with the employer). The scheme’s technical provisions will need to be consistent with the trustees’ funding and investment strategy. Further details will be contained in regulations.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none"> • Open a dialogue with the employer • Unusually, the employer’s agreement is required to the strategy – take legal advice on the extent to which this applies • Prepare a funding and investment strategy • Ensure that the scheme’s technical provisions are consistent with the funding and investment strategy • Include as a standing agenda item at trustee meetings a review of the funding and investment strategy • Take actuarial, investment and legal advice 	<ul style="list-style-type: none"> • Open a dialogue with the trustees about the funding and investment strategy • Unusually, the employer’s agreement is required to the strategy – take legal advice on the extent to which this applies

Taking Account of Climate Change Risk in Trustees' Investment Strategy

Action Required

The Act will allow Parliament to make regulations requiring trustees to ensure effective pension scheme governance is in place in relation to the effects of climate change. Draft regulations have already been published for consultation, which would require trustees of occupational pension schemes that are in scope to meet the climate change governance requirements that underpin the 11 recommendations of the Taskforce on Climate-related Financial Disclosures, and to report on how they have done so. The government is also consulting on draft statutory guidance to accompany the regulations.

Actions for Trustees	Actions for Employers
<ul style="list-style-type: none"> Assume the regulations requiring effective governance in relation to the effects of climate change will be finalised quickly Assess whether the scheme will be in scope of the regulations (does it have relevant assets of over £1 billion or is it an authorised master trust?) Start implementing appropriate governance measures to take account of climate change risk in investments – trustees may wish to do this whether or not their scheme will be subject to the mandatory requirements Consider trustee training in order to comply with the requirement that trustees of schemes in scope must have knowledge and understanding of the principles relating to the identification, assessment and management of risks to occupational pension schemes arising from the effects of climate change Take both investment and legal advice on the requirements 	<ul style="list-style-type: none"> Find out what measures the trustees intend to take in relation to climate change risks and opportunities – measures that are misaligned with the company's own measures could cause reputational damage. Mitigating action might be required

Pensions Dashboards

Action Required in Due Course

The Act introduces statutory requirements facilitating the operation of pensions dashboards, through which the public will be able to access information about their pension arrangements (including state pension) and trustees/providers will supply that information. Most of the detail for the operation of dashboards will be contained in regulations. The Money and Pensions Service will operate a pensions dashboard. Commercial providers will also be able to operate a dashboard, provided they meet all of the necessary criteria to be a qualifying dashboard. Regulations will require trustees to comply with requests for the provision of certain specified information to the dashboards, and in a specified format.

Action for Trustees

- Consider the new data standards published by the Pensions Dashboards Programme to identify any data gaps that need filling in order to ensure that the trustees will be ready to provide the right information to the dashboards at the right time

The Right to Take a Transfer Value

Action Required in Due Course

The Act introduces a new limitation, which means a member of an occupational or personal scheme may not exercise their transfer rights unless additional restrictions set out in regulations are complied with regarding the member's employment or place of residence. In particular, a member may need to demonstrate an employment link in relation to an occupational pension scheme to which they wish to take a transfer. These changes are to aid in the combat of pension scams.

Action for Trustees

- Watch out for the new regulations and take advice if unclear on the new requirements

Collective Money Purchase Pension Schemes

No Action Required

The Act creates a new framework for establishing and administering collective money purchase (CMP) pension schemes (formerly referred to as CDC schemes), which will operate in a similar way to defined contribution schemes. However, instead of owning an individual member "pot", contributions made by and in respect of the member go into a collective fund. The investment and longevity risks are borne by the whole membership rather than individual members or the employer.

When the member elects to draw their pension, this will be based on their share of the collective fund; it will increase or decrease according to changes in investment performance and other risk factors. While the CMP pension scheme will have a target level of pension for members this will not be guaranteed and the value of a member's pension could go up or down.

If you would like to discuss any of the issues set out in this communication, please get in touch with your usual firm contact or any of the contacts below.



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Provisions Relating to the Operation of Compensation From the Pension Protection Fund (PPF)

No Action Required

In *Beaton v Board of the PPF*, it was held that a member's transferred-in benefits were not attributable to pensionable service with their new employer and were not to be aggregated for compensation cap purposes. The PPF compensation legislation was subsequently amended in response to this, to provide that a member's transferred-in benefits are to be treated as attributable to pensionable service with their new employer for the purpose of calculating the PPF compensation cap. The Act makes that amendment retrospective.



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