

Considerations for trustees in light of new powers for the Pensions Regulator

The Pension Schemes Act 2021 significantly increases the Pensions Regulator's powers with the introduction of two new criminal offences, as well as new investigatory and interview powers. Trustees will increasingly need to monitor, analyse and engage with the sponsor on a wider range of business activities which may be in scope of the new contribution notices.

Trustees will need to engage early with the sponsor on any such activity and take advice where appropriate to avoid falling foul of the new regime as the penalties can be severe, including £1m fines and up to seven years in jail.

How might pension trustees respond in light of the new legislation?

When necessary, trustees will be expected to engage early with the scheme sponsor, to ensure that the pension scheme is considered as discussions take place on potential corporate activity. This may include discussions on appropriate mitigation for the scheme. Trustees will need to be able to show that they have asked the right questions, considered the sponsor's response (with appropriate advice where relevant) and documented their 'reasonable' decision making process. We anticipate that many trustees will wish to review their governance framework to ensure it meets these new requirements.

For those trustee boards engaging regularly with their sponsor and where there is a robust risk management framework in place (including agreement on appropriate scheme protections/contingencies), the trustees' response will likely reflect an evolution of their current approach rather than a step change. For other trustee boards the new legislation may introduce the need to consider the following:

- Review and extend (if required) existing governance processes to ensure trustees can be sure that they have identified and acted appropriately on corporate activity that might fall foul of the new requirements.
- Seek advice on the use of their own powers (eg contribution powers, wind-up powers, amendment powers and investment powers) in certain situations. Failure (or inaction) of trustees to use their powers appropriately could now be deemed an offence in certain circumstances.

- Ensure the sponsor regularly shares information with the trustees about relevant events. This could be achieved by putting in place a legally enforceable information sharing agreement with the sponsor, to supplement information provided on a more informal basis (e.g. monthly/quarterly updates from the CFO).
- Keep clear records of the process they have taken to identify significant events or scenarios; how they have considered implications for scheme members; how they have reached their conclusions on the impact of the event and if appropriate, sought mitigation for any detriment identified.
- Establish a strong framework for managing conflicts of interest – particularly where trustees also have company roles which may result in them having (or being perceived to have) knowledge of corporate activities which may impact the pension scheme. These trustees may be more at risk of the penalties, particularly for not acting on information when the Pensions Regulator may deem they should have.



Examples of corporate activity that trustees should monitor for

The main theme is events that may weaken the financial strength of the employer and hence the strength of the legal covenant that backs the scheme. This also includes a series of actions/events that together could add up to something more material, and include “inaction” as well as actions. The below is illustrative and not complete:

- Company transfers part of the balance sheet to another group entity, either UK or overseas
- Company pays more dividends than free cashflow, weakening the balance sheet
- Company sells part of its business and/or pays a special dividend
- Company restructures in a way that moves assets or business away from companies that support the pension scheme
- Company raises additional finance ranking ahead of the scheme
- Breach of banking covenants, or renegotiation of banking terms adversely impacting the pension scheme
- Downgrade of credit rating/fall in share price/profit warning

If trustees fail to identify, and take action if appropriate, in relation to any of the events listed above, then they could be at risk of the new penalties and powers.

How should trustees monitor?

Some of these events will be “notifiable events” for employers under an expanded notification regime for mandatory reporting to the Pensions Regulator. And some of these events are likely to be subject to the new ‘Statement of Intent’ requirements (that is, the employer must provide additional information to the trustees and the Regulator in good time before the event occurs). As a result of these new requirements trustees should expect to have earlier engagement with the sponsor when these activities are likely to happen.

However, some activities may fall outside these formal requirements and so trustees should not rely on these statutory mechanisms as the only means under which the sponsor shares information with them.

We therefore generally recommend that trustees should seek to agree an enhanced notification framework with their sponsor (and the wider Group) that covers all events that could potentially have a detrimental impact on the scheme. In this way, they will not only receive regular financial information from employers, they also have a framework whereby employers ‘report by exception’ as soon as possible should any potentially material events occur.

New interview and inspection powers

The new powers available to the Pensions Regulator will enable it to compel any person (including trustees, sponsor representatives and advisers) to attend an interview to discuss anything in relation to pensions. The Pensions Regulator will also have wider powers of inspection and it will be able to inspect records under certain circumstances. It is expected that the Pensions Regulator will not be shy in using these new powers - it has pressed hard for them for some years now and it has recently ramped up the usage of its formal information gathering powers.

Trustees should be aware of these extended powers and should keep clear records of their decision-making processes, supported with any advice received and minutes of meetings held. If summoned for interview, trustees should ensure that sufficient time is invested in preparing for the interview and in knowing what to expect. This will likely involve seeking advice to support preparations.



This note is an abbreviated summary of our current understanding of the Regulator's old and new powers and is not a complete treatment of the subject. Further clarity on the Regulator's use of its new powers should evolve with the publication of guidance in 2021. This note does not constitute advice, nor should it be taken as an authoritative statement of the law. For further help, please contact the partner who normally advises you.

January 2021

Want to find out more?

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