

The Pensions Regulator's new, stronger powers

A practical checklist for
a new world of decision-making
and governance standards

June 2021

The Pensions Schemes Act 2021 received Royal Assent in February and it introduces significantly wider powers for The Pensions Regulator (TPR).

These include broadening of the existing moral hazard powers as well as new criminal sanctions that can carry an unlimited fine or 7 years imprisonment. These new powers are expected to come into force in Autumn 2021.



The intent of the new criminal offences is not to change commercial norms or accepted standards of corporate behaviour. Rather, it is to tackle the more serious examples of intentional or reckless conduct that puts members' savings at risk; and strengthen the deterrent and punishment for that behaviour.

The Pensions Regulator

XPS believe that preparation for these new powers, which come into force gradually over the forthcoming months, is key. The strength of the sanctions and the scope of the powers is so wide that schemes and sponsors inevitably need to look at their decision-making processes and governance frameworks. The risk of investigation and potential prosecution should not be ignored and the potential costs and management time of a regulatory investigation are significant even if no sanctions are upheld.

We have therefore produced a checklist of the key areas that we believe will help prepare you for the new powers. This includes trying to minimise the chances of the powers applying in the first place, but also having a robust framework in place to identify relevant events, evaluate them and document your decisions.



We believe preparation for these powers is vital to ensure events can be identified early enough to enable a full decision-making process and to manage the risk, costs and management time involved if an investigation was to take place.

Rob Wallace
Partner, Head of Governance



Our 4 step approach helps you to prepare for the new powers.



Protection

Understand the new powers and have key elements of governance framework in place



Identification

Have processes in place to identify when a relevant event might occur



Evaluation

Have steps in place to evaluate the impact of any relevant event on the pension scheme



Documentation

Ensure a robust audit trail is in place to document advice received and decisions made

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Recap on The Pension Regulator's new powers

1. Gathering information

The Act introduces additional notifiable events. The exact details of the new events are due to be released later this year, however they are expected to include:

- The sale of a material part of an employer's business or assets; and
- The granting of security on a debt in priority to the pension scheme.

In addition, a 'statement of intent' must be provided to TPR to give advance notice of certain notifiable events.

2. Moral hazard

The Act introduces two additional circumstances in which TPR can issue a contribution notice. These are when TPR considers there has been an act or failure to act that:

- has resulted in an underfunded pension scheme recovering a lower amount of section 75 debt had the employer become insolvent immediately after the act (or failure to act). (**The Employer Insolvency Test**)
- has materially reduced the resources of the employer relative to the estimated section 75 debt at the time of the act (or failure to act). (**The Employer Resources Test**)

3. Enforcement actions

The Act introduces a number of new criminal and civil offences, some of which are potentially very broad in scope (i.e. they could cover a wide range of actions and could target employers, trustees and advisers).

Penalties are severe with up to seven years imprisonment and unlimited fines for a criminal conviction, or fines of up to £1 million for a civil sanction.

The new criminal offences include:

- The avoidance of an employer debt;
- Conduct risking members' accrued benefits; or
- Failing to comply with a contribution notice.

The following checklist highlights the key areas under each of the headings of our four step approach to identify actions employers and trustees can take to prepare themselves for these powers.





1. Protection

“Trustees should annually assess knowledge, understanding and skills and evaluate the decisions made over the past year.”

The Pensions Regulator, Guidance on ‘Trustee Training and Improving Your Knowledge’

A. Knowledge & Understanding

Completed
Yes To do

1. Have you received training on the new powers and how to defend against them?
2. Have the trustees assessed their effectiveness, and their knowledge and understanding, in the last 12 months?
3. Do you have a training plan in place, and a log setting out what training has been undertaken?

“You must be aware of possible conflicts within your scheme. You should make sure you have a conflicts of interest policy in place that maps out your approach to managing conflicts if they arise. The conflicts of interest policy should be reviewed by a legal adviser from time to time, to pick up scheme-specific issues. You should also identify and document conflicts of interest in a register.”

The Pensions Regulator, Guidance on ‘Managing Conflicts of Interest’

B. Conflicts of Interest

Completed
Yes To do

1. Do you have a conflicts of interest policy in place?
2. Has your conflicts policy been reviewed by your legal adviser in the last 12 months?
3. Do you have a conflicts of interest register for trustees, advisers and other related parties?
4. Do you have a standing item at the start of each agenda to review, and declare, any new conflicts?

“Having a business plan will enable you to plan ahead and improve your ability to comply with legal requirements at all times.”

The Pensions Regulator, Guidance on ‘Clear Purpose and Strategy’

C. Business Plan

Completed
Yes To do

1. Do you have a business plan in place that includes strategic goals and interim objectives?
2. Do you regularly monitor progress towards the objectives?
3. Do you regularly review the business plan to ensure it remains fit for purpose?

“It may be possible to obtain indemnity from the employer or insurance to cover you in case of a breach of trust. You should seek advice about either and who should or may pay for it.”

The Pensions Regulator, Guidance on ‘Your Liability’

D. Indemnity provisions

Completed
Yes To do

1. Do you understand the indemnity provisions within your scheme’s rules?
2. Do you have indemnity insurance in place for your scheme?
3. Do you understand what the indemnity insurance covers and the cover limits? E.g. does it cover costs arising from regulatory investigations?
4. Do the current indemnity insurance policy and any other provisions remain fit for purpose in light of the new powers?

“You should have clear contractual terms (where appropriate), terms of reference, tables of accountabilities and delegated responsibilities, and service level agreements. This will help everyone understand what their role is and ensure the efficient flow of information between key players.”

The Pensions Regulator, Guidance on ‘Clear Roles and Responsibilities’

E. Terms of reference

Completed
Yes To do

1. Do you have terms of reference for the chair of trustees and for any sub-committees?
2. Do you have in place all of the necessary advisers, and have formally documented contractual terms?
3. Do you have an accountability matrix which sets out delegation of decision-making?



Many schemes will already have the above elements in place as part of their governance framework, but it’s important to consider whether these remain fit for purpose in light of the new powers.

Helen Billing
Consultant



2. Identification

“Trustees should negotiate a robust information sharing protocol with the employer... you will need information such as financial performance, prospective changes to the capital structure of the employer group, [and] other corporate events that could affect the financial strength or ultimate control of the employer.”

The Pensions Regulator, Guidance on ‘Managing DB Benefits’

A. Information Sharing

Completed
Yes To do

1. Do you have an information sharing protocol in place between the trustees and the sponsor?
2. Is the information sharing protocol legally enforceable?
3. Have you reviewed the information to be shared under the information sharing protocol and does it remain fit for purpose?

“As a trustee you should be aware of the notifiable events regime which provides an early warning of possible insolvency or underfunding.”

The Pensions Regulator, Code of Practice on ‘Notifiable Events’

B. Compliance Checklist

Completed
Yes To do

1. Do you have a compliance checklist in place to ensure you identify any notifiable events?
2. Do you regularly review your compliance checklist?
3. Have you put on your agenda to review the compliance checklist early in 2022 when the new notifiable events will come into force?

“Trustees should regularly and proportionately monitor the employer covenant, including a review of key business performance indicators and corporate events which may materially impact the employer covenant. As a minimum an annual review of the employer’s performance and other areas which have changed significantly (or may be expected to do so) should be conducted.”

The Pensions Regulator, Guidance on ‘Assessing and Monitoring the Employer Covenant’

C. Covenant monitoring

Completed
Yes To do

1. Do you take independent covenant advice? If not, have you documented your reasons for this?
2. Do you know the current strength of your sponsor covenant?
3. Do you monitor the covenant on a regular basis dependent on covenant strength (for example quarterly, half yearly or annually)?
4. Do you monitor key performance indicators and have defined thresholds to identify any ‘red flags’ with contingency plans?



3. Evaluation

“The trust deed and rules, together with pensions legislation, tell you what your powers are as a trustee, and the procedures you must follow. They are important documents and, therefore, you must be familiar with them and with the other documents governing your scheme.”

The Pensions Regulator, Guidance on ‘Trustees’ Duties and Powers’

A. Documentation of Powers

Completed
Yes To do

1. Are you aware of what the balance of powers is under the Trust Deed and Rules (i.e. what decisions can be made by each party either unilaterally or with the consent of others)?
2. Do you have a document setting out the balance of powers which is easily accessible?
3. Do you understand what powers trustees and sponsors have under legislation?

“As a trustee of a defined benefit scheme you should be ready for any employer event that could cause concern to pension scheme members.”

The Pensions Regulator, Guidance on ‘Managing DB Benefits’

B. Assessing the impact of an event

Completed
Yes To do

1. Do you have advisers in place to help you assess a corporate event?
2. Have you thought through the steps you will take to evaluate relevant activity should it arise, including consideration of the relevant defence criteria?
3. Do you have the skills to carry out an effective negotiation?
4. Do you have a plan in place as to how you will inform and educate members?

“You should implement an approach which integrates the management of risks in relation to employer covenant, investment and funding. You should understand the risks across all these strands, how they interact with one another and define acceptable parameters for each within which you will seek to manage the scheme.”

The Pensions Regulator, Guidance on ‘Managing DB Benefits’

C. Integrated Risk Management (‘IRM’) Plan

Completed
Yes To do

1. Do you have a documented long term strategy and IRM plan which is regularly reviewed?
2. Do you have contingency plans in place to mitigate key risks?
3. Do you have a risk register that is regularly reviewed?



4. Documentation

“Minutes should be taken at every meeting, paying particular attention to any decisions made, the reasons behind them, and any action points that need to be taken away.”

The Pensions Regulator, Guidance on ‘Meetings and Decision Making’

A. Decision-making and audit trail

Completed
Yes To do

1. Are you aware of the process around decision-making set out in your Trust Deed and Rules? E.g. how many trustees must be present for a formal decision?
2. Do you have a process which links decisions made with advice received? E.g. a depository?
3. Are minutes taken for every trustee and sub-committee meeting?
4. Are the minutes reviewed by both trustee and advisers for content and clarity?
5. Are minutes and other correspondence stored electronically, in a central place which both trustees and other relevant parties can access?



Regardless of where the legal burden lies, The Pensions Regulator would still expect you to put forward sufficient evidence of what might amount to a ‘reasonable excuse’ were you to be investigated. Therefore, capturing all advice received and decisions made is key to helping trustees and employers provide this evidence and establish a defence against the powers.

Elen Watson
Partner, Head of Covenant



About us

XPS Pensions Group is the largest pure pensions consultancy in the UK, specialising in actuarial, covenant, investment consulting and administration. The XPS Pensions Group business combines expertise, insight and technology to address the needs of more than 1,500 pension schemes and their sponsoring employers on an ongoing and project basis. We undertake pensions administration for over 920,000 members and provide advisory services to schemes of all sizes including 36 with over £1bn of assets.

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This paper has been prepared to inform trustees and employers about new powers introduced by the Pension Schemes Act 2021.

This communication is based on our understanding of the position as at the date shown. It should not be relied upon for detailed advice or taken as an authoritative statement of the law.

Nothing in this paper should be read as providing legal opinion or advice.