

# Pension Schemes Act 2021 powers demand robust governance



## What you **need to know**

- The Pension Schemes Act 2021 (the Act) introduces new moral hazard powers, criminal and civil sanctions and information gathering powers for The Pensions Regulator (TPR). It also adds new notification obligations on employers.
- The Government has stated that the new powers will be in force in autumn 2021, and new notification obligations are expected to follow, following consultation by the end of 2021, in 2022.
- The new criminal and civil sanctions could cover a wide range of actions and could target employers, trustees and advisers. For example, one new sanction is for conduct that materially impacts the likelihood of members receiving their benefits.
- Penalties are severe, with up to seven years in prison for a criminal conviction or a £1 million fine for a civil sanction.
- The Act does provide defences for some sanctions. TPR is also expected to consult on guidance on its new powers, and in particular the 'reasonable excuse' defence highlighted below, over the summer.
- A strong governance and risk management framework may help defend against the powers by identifying events that could be captured, and allowing assessment and mitigation of the impact of such events.



## **Actions** you can take

- **Carry out training on the detail of the new powers** in light of their scope and the range of parties that could be caught by the powers.
- **Review governance processes, including conflicts management and decision-making processes**, to ensure events that may be covered by the new powers are identified, managed and notified (if relevant).
- **Review or put in place information sharing agreements** between trustees and employers to ensure any relevant event is identified and managed in a timely and proportionate manner.
- **Consider impact on trustee and director insurances and indemnities**, and amend if possible.

Defence	Relevant new power	What may help with the defence
<b>Automatic statutory defence:</b> requiring advance due consideration of no material impact or provision of appropriate mitigation	New contribution notice (CN) powers	<ul style="list-style-type: none"> <li>- Processes to identify and, if relevant, notify any covered event or action <input type="checkbox"/></li> <li>- Robust conflict management plans <input type="checkbox"/></li> <li>- Regular information sharing between employer and trustees and appropriate covenant monitoring <input type="checkbox"/></li> </ul>
<b>Reasonable excuse:</b> regulatory guidance is expected on the detail of what this means	Avoidance of employer debt; conduct risking benefits; failing to comply with a CN and failing to attend or answer questions in a TPR interview	<ul style="list-style-type: none"> <li>- Documented analysis to show the impact on members and any mitigation <input type="checkbox"/></li> <li>- Record of purpose of action and rationale for decision making <input type="checkbox"/></li> <li>- Up to date integrated risk management plan <input type="checkbox"/></li> <li>- Taking legal advice ahead of material actions <input type="checkbox"/></li> </ul>

# The finer detail: New powers and obligations in the Act

## Moral hazard powers – new contribution notice (CN) circumstances

### Employer solvency test

Subject to it being reasonable, TPR can issue a CN if a scheme has a section 75 debt (buyout deficit) and any theoretical debt the scheme would have recovered on insolvency has been materially reduced by an act or failure to act.

### Employer resources test

Subject to it being reasonable, TPR can issue a CN if an act or failure to act materially reduced the value of an employer's resources relative to the section 75 debt.

## New criminal and civil sanctions

### Avoidance of employer pension debt

This includes: preventing a debt becoming due; preventing the recovery of all or part of the debt; compromising the debt; or reducing the amount due.

**Criminal penalty:** Up to 7 years' imprisonment or unlimited fine | **Civil penalty:** Fine up to £1m

### Conduct risking accrued benefits

Sanctions can be applied to a person who acts or engages in a course of conduct that detrimentally affects in a material way the likelihood of accrued benefits being received.

**Criminal penalty:** Up to 7 years' imprisonment or unlimited fine | **Civil penalty:** Fine up to £1m

### Failing to comply with a CN

To reinforce compliance with moral hazard powers, TPR will be able to use criminal or civil sanctions against a party that does not comply with a CN.

**Criminal penalty:** Unlimited fine | **Civil penalty:** Fine up to £1m

### Not answering TPR questions

In a significant strengthening of information gathering powers, TPR will be able to sanction a person for failing to attend or answer a question in an interview with TPR in exercise of its powers. The Act also extends the circumstances in which TPR may interview a person.

**Criminal penalty:** Fine | **Civil penalty:** Fixed or escalating penalty

### Providing false or misleading information to TPR

A wide range of circumstances are covered, including the new employer statement of intent on notifiable events (see below); individuals providing required notification on events to TPR; trustees submitting the forthcoming funding and investment strategy statement and any person during an interview.

**Criminal penalty:** (where false or misleading information was knowingly or recklessly provided) up to 2 years' imprisonment or unlimited fine | **Civil penalty:** Fine up to £1m

### Providing false or misleading information to trustees

Applies where a person provides false or misleading information to the trustees or managers of a scheme in specific circumstances or if the person could reasonably be expected to know it would be used in running the scheme.

**Civil penalty:** Fine up to £1m

## Notification obligations

### New requirements

Two new employer notifiable events are expected to be introduced: sale of a material part of an employer's business or assets; or giving debt priority over a pension scheme. Some notifiable events will now also require an accompanying statement on the impact of the event (termed a 'statement of intent').

For further information, please get in touch with Rob Wallace or speak to your usual XPS Pensions contact.



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