

Pension Schemes Act 2021

Introduction: Many of the provisions of the Pensions Schemes Act 2021 (“PSA21”) came into force from 1st October. This updated special newsletter highlights the key requirements, **which all Trustees, Sponsoring Employers and their advisers should be aware of.**

New Powers for TPR: For some time, TPR has stated that it intends to be ‘clearer, quicker, and tougher’ and PSA 21 strengthens its arsenal of powers considerably.

Criminal Offences and Punishments

Criminal Offence	Penalty	Persons covered
1. Avoidance of an employer debt (i.e., S75 buy-out debt) or preventing the debt becoming due or fully recovered	Up to 7 years in prison and/or an unlimited fine.	Employers, trustees, and professional advisers. Insolvency Practitioners are exempt.
2. Conduct that puts the accrued benefits of scheme members at risk – where it was known (or should have been known) that the actions would be materially detrimental	Up to 7 years in prison and/or an unlimited fine.	Employers, trustees, and professional advisers. Insolvency Practitioners are exempt.
3. Failure to comply with a Contribution Notice	Unlimited Fine	Employers, or anyone connected or associated with an employer
4. Providing TPR with false or misleading information under the Notifiable Events regime, either knowingly or recklessly	Up to 2 years in prison and a fine calculated on statutory scales	Any person who provides TPR with incorrect information.
5. Providing TPR with false or misleading information in a statement of funding and investment strategy under the new scheme funding requirements.	Up to 2 years in prison and a fine calculated on statutory scales.	Any person who provides TPR with incorrect information.

TPR has published its criminal offences policy, (covering Criminal Offences 1 and 2 above) which can be found here:

<https://www.thepensionsregulator.gov.uk/en/document-library/strategy-and-policy/criminal-offences-policy>

It includes **examples** of what could trigger action and what could form a reasonable excuse.

As an alternative to the criminal sanctions shown above, TPR will also be able to impose a **civil penalty of up to £1million**. It is possible that high civil penalties will be used more frequently given that it would avoid Court costs and the higher burden of proof needed for criminal proceedings.

Commentators have indicated that it is not clear how TPR might view some corporate activity, such as payment of dividends or moving cash funds around within a group of companies.

Sponsors will need to give careful consideration to fairly standard activities and the potential impact on their DB pension scheme, taking advice where necessary and keeping the scheme Trustees informed of activities.

Directors of the company, pension trustees, advisers and any person who helps or encourages another person to commit the offence are within the scope of the new offences.

TPR will be able to establish the offence if the person, or persons, carrying out the act (or failure to act) did not have a 'reasonable excuse'. TPR has said it will take a principles-based approach to determining whether there was 'reasonable excuse'. It is likely that the circumstances, time constraints, experience and skills will be relevant. TPR will also consider:

- The extent to which the detriment was an incidental consequence of the act or omission.
- Any mitigation provided to offset the detrimental impact.
- Whether there was a viable alternative which would have avoided the detrimental impact.

TPR will also have the power impose a **civil penalty of up to £1million** as an alternative to the criminal penalties shown above, where a person 'knowingly or recklessly' provides TPR, or the Trustees, with information that is materially false or misleading.

TPR will be looking for signs of Scheme abandonment or where significant financial gains have been made to the detriment of the Scheme. TPR will look at whether there was mitigation provided to the Scheme for the detrimental act (or failure to act), or whether there was a viable alternative that could have reduced the detriment. TPR will consider whether there was advance consultation with the Trustees and compliance with statutory duties (for example the duty to report 'Notifiable Events')

TPR has already confirmed that the new offences will not be retrospective. However, evidence which pre-dates the commencement of the offences may be relevant to TPRs investigations after that date.

New Contribution Notice Tests

TPR's power to impose a 'Contribution Notice' has been extended by the introduction of two new tests:

1. **Employer Insolvency Test** – This will be met if, at the time of the Scheme Sponsor's act (or failure to act) the Scheme was in deficit and **had a statutory employer debt fallen due**, the act (or failure to act) would have materially reduced the amount of the debt likely to be recovered. Sponsors should note that the company does not have to be in insolvency for this to apply. TPR will look at the act (or failure to act) and see what effect it would have had on the amount of S75 (buy-out) debt recoverable by the Scheme **if the company had been insolvent at that date**.
2. **Employer Resources Test** – This will be met if TPR considers that the Scheme Sponsor's act (or failure to act) **reduced the value of the resources of the employer** which was material relative to the estimated S75 (buy-out) debt in relation to the Scheme.

TPR has stated that it does not anticipate that the new requirements or criminal and civil sanctions will be a hindrance to normal corporate activity. Many sponsors may be concerned that 'business as usual' may be caught within the scope of these new tests. TPR must demonstrate that it is 'reasonable' for it to impose a Contribution Notice. TPR has issued an updated version of its Clearance guidance.

Examples of activity which could be relevant to the new CN tests include, **payment of dividends, removal of sponsor or guarantor support, increase in debt or granting of security on debt which weakens the pension scheme's position as a creditor.**

TPR has published some 'code related guidance' on how Contribution Notices might be considered in practice. This can be found here: <https://www.thepensionsregulator.gov.uk/en/document-library/consultations/code-of-practice-12-consultation/draft-code-12-guidance> This guidance includes examples that are likely to be materially detrimental as well as some that are unlikely to be materially detrimental.

Information-gathering powers strengthened

TPR will also have wider powers to inspect premises and to require Trustees, sponsoring employers, professional advisers, and others to attend an interview. TPR will have the power to issue **fixed penalties** where someone has not complied with its new powers. TPR will also be able to issue escalating **daily penalties of up to £10,000** for continued non-compliance. TPR will be able to request documents such as trustee minutes, board resolutions and minutes, correspondence, and advice.

New Events to be Reported to TPR: Trustees and Sponsoring Employers should be aware of the 'Notifiable Events' that must be reported already to TPR in certain circumstances. To this list will be added the following new events:

- **Sale of all, or a material proportion, of the business or assets of a sponsoring employer** which has funding responsibility for at least 20% of a DB scheme's liabilities:
- **Granting of a security on a debt** that takes priority over a DB scheme.

A 'material proportion' of the business of the employer is defined as one that accounts for more than 25% of its annual revenue. Likewise, a 'material proportion' of the assets of the employer will be one that accounts for more than 25% of the gross value of its assets.

An employer will be required to report a decision in principle to grant or extend a relevant security (comprising of 25% or more of its revenue or gross assets) where it would result in the secured creditor ranking above the DB pension scheme.

Where the sponsoring employer must make a report to TPR, **it must include** a statement to confirm how any detriment to the pension scheme is to be mitigated and what communication the employer has had with the Trustees. This statement has been referred to as a '**Declaration of Intent**'.

The new notifiable events will require a two-stage procedure. Firstly, there will be an initial notification where a 'decision in principle' has been taken, followed by a second notice with Declaration of Intent where the 'main terms have been proposed'.

These changes are expected to come into force in **2022**.

New Requirement for Trustee and Employer to set a Long-Term Funding and Investment Strategy: Trustees must produce a funding and investment strategy which sets out the funding level they intend the scheme to achieve and the investments they intend to hold at a date to be determined in line with the regulations. The Scheme's Technical Provisions must then be calculated in a manner that is consistent with this strategy.

Trustees must prepare a 'Statement of Strategy', signed by the Chair; and the Sponsoring Employer's agreement to the Strategy must be obtained. The Trustees must also consult the Sponsor on other issues related to the Strategy:

- The Trustees option on whether the Strategy is being successfully implemented and any steps they propose to remedy any diversions from the Strategy.
- The risks in implementing the Strategy and how the Trustees intend to mitigate or manage them.
- The Trustees views on any decisions they have taken in the past that have an impact on the Strategy.

Restriction on Member's Rights to a Statutory Transfer: To protect Scheme members from losing their pensions to scams, further regulations will be issued that prevent Trustees from making a statutory transfer unless certain conditions are met. It is expected that the member wishing to transfer will, in certain circumstances, must provide information about employment or place of residence in connection with a receiving scheme.

This may help Trustees who have had to comply with statutory transfer requests, even when they believed there was some risk to the member. However, as we know, scammers are quick to adapt, and future scams are unlikely to look like those of the past. In more recent times, many members have lost their pension savings by moving to a legitimate pensions' vehicle, but then investing their money in incredibly risky, often unregulated, assets.

Pension Dashboards: The Act contains provisions to enable pensions dashboards, which many Schemes will already be considering. Mandatory compliance is expected to be phased in from 2023 with the largest DC schemes being included first.