EVERSHEDS SUTHERLAND

Guiding you through the complexities

Guide to the Pension Schemes Act 2021: Criminal offences

Practical solutions for trustees and sponsors

October 2021

What we cover

This guide looks at the key changes that the Pension Schemes Act 2021 introduces and the new obligations that it will impose on trustees and sponsors. In each section, we look at what the new legislation requires and then set out some practical steps that trustees and sponsors should be considering now.

The Act became law on 11 February 2021 and the provisions are gradually being brought into force, with most of the key criminal offences and sanctions having come into force on 1 October 2021. Additional detail in relation to most areas has been provided in regulations, draft regulations and statutory guidance. However, there are still some areas, such as the new funding requirements and the dashboards, where more information is required and draft regulations have yet to be issued.

We have updated this guide to take account of the detail which is already available to help trustees and sponsors see what's coming over the horizon and understand what they will need to do to comply with the new requirements. We plan to update this guide regularly as further regulations and statutory guidance are issued.

Click to access our Pension Schemes Act 2021 guides to criminal offences; Pensions Regulator new powers; scheme funding; transfers; dashboards; climate change; and collective money purchase schemes.

If you need any further help, please ask your usual Eversheds Sutherland pensions contact, or speak to one of the team listed at the back of this guide.

***Note**: This guide is intended to provide an overview of the issues covered only. It is not intended to provide legal advice and cannot be relied upon. Trustees and employers who have any concerns about the issues raised should seek their own legal advice.*

Criminal offences

There are a number of new criminal offences in the Act. It is not the first time that the Pensions Regulator (**the Regulator**) has been able to pursue criminal penalties for breaches of pensions legislation and trustees and sponsors should not be unduly alarmed, but they should make sure that they know what the new offences are.

These came into force for the most part on 1 October 2021.

New offences

The Act contains a number of new criminal offences.

Offence	Who can commit it?	Sanctions
Intentionally reducing or compromising a **section 75 employer debt** or preventing such a debt becoming due or being fully recovered	Any person – including employers, trustees and professional advisers (except insolvency practitioners)	Up to 7 years in prison and/or an unlimited fine
Putting **accrued benefits at risk** where it was, or should have been, known the relevant actions would be materially detrimental to the likelihood of benefits being received	Any person – including employers, trustees and professional advisers (except insolvency practitioners)	Up to 7 years in prison and/or an unlimited fine
Failing to comply with a **contribution notice**	An employer or anyone connected or associated with an employer	Unlimited fine
Knowingly or recklessly providing the Regulator with **materially false or misleading information under the notifiable events** regime	Any person who provides the Regulator with incorrect information	Up to 2 years in prison and a fine calculated on statutory scales (or a civil fine of up to £1 million)
Knowingly or recklessly providing the Regulator with **materially false or misleading information in a statement of funding and investment strategy** under the new scheme funding requirements	Any person who provides the Regulator with incorrect information	Up to 2 years in prison and a fine calculated on statutory scales (or a civil fine of up to £1 million)

Application of new offences

Most attention has centred around the first two offences which are extremely wide. They can both apply to "any person". This includes not only trustees and employers but potentially directors, investors and professional advisers. The only exception is where an individual is acting as an insolvency practitioner. The Regulator has provided guidance on its approach to the investigation and prosecution of these in its criminal offences policy (**the Offences Policy**).

There are also concerns about the range of activities that the first two offences might apply to. For example, it has been suggested that the first offence (compromising a section 75 debt) could apply to parties who enter into an apportionment arrangement in accordance with the Employer Debt Regulations, though there is some comfort around this point in the Offences Policy. The second offence (putting accrued benefits at risk) is breathtakingly wide in its ambit and could catch much standard corporate and banking activity and potentially prejudice corporate restructurings, transactions and rescues. However, the Offences Policy says that the Regulator does not intend to prosecute behaviour which it considers to be ordinary commercial activity.

It is worth noting in the context of the last two offences dealing with the provision of information, that they appear to be aimed at deliberately providing inaccurate information rather than a failure to provide information at all. Nevertheless, particularly in the context of the funding and investment strategy statement (see scheme funding section below), trustees will need to be particularly careful to ensure that the correct information is included.

Reasonable excuse defence

There is a defence to the first three offences where the relevant person had a "reasonable excuse" for the act concerned.

During the passage of the Act through Parliament, the concerns set out above about the potential breadth of the new offences were raised. The government's consistent response was that they are aimed at the most serious conduct which puts pension schemes at risk – along the line of what was seen in BHS. They were not aimed at normal corporate activity. However, they declined to make any amendments to the scope of the offences because they took the view that the existence of a "reasonable excuse" defence (even though there is no statutory definition of this) was sufficient to protect the normal conduct of business.

The Regulator's Offences Policy looks at what will amount to a reasonable excuse and this is likely to be the key document that those involved with pension schemes will look to for reassurance about what is or is not likely to be a target for the Regulator.

Each case will depend on its facts but the Regulator points to three factors that could be significant:

- was the detrimental impact an "incidental consequence" of the act or omission?
- does any mitigation adequately offset the loss?
- if not, is there a viable alternative that would have avoided or reduced the detrimental impact?

The Regulator recognises that a party (such as a lender deciding whether to advance additional funds) can have regard to its own interests.

Overall, the examples of potentially acceptable reasonable excuses in the Offences Policy are useful but significant areas of uncertainty remain, including around the payment of dividends.

The legal burden will be on the prosecution to prove the absence of a reasonable excuse but the Regulator will expect those it investigates to provide clear and contemporaneous evidence of what might amount to a reasonable excuse. This highlights the importance of getting written advice and keeping a careful audit trail of decisions.

There is no advance Regulator clearance process in relation to the new offences, as there is for contribution notices and financial support directions. Nonetheless, the circumstances described in the clearance application could be part of the basis of a "reasonable excuse" defence.

When is prosecution likely?

Factors that may have a bearing on whether the Regulator pursues a prosecution include the extent of communication with trustees before the act took place, whether the statutory duty to notify the Regulator about the event has been complied with and the openness and timeliness of communication with it.

Other factors that the Regulator says could point towards prosecution are more vague – they include where significant financial gains have been made to the detriment of the scheme or there is "some other unfairness" in the treatment of the scheme.

The Regulator has published three draft policies explaining its proposed approach in cases where both regulatory and criminal powers apply. The draft "overlapping powers policy" suggests it will prioritise regulatory proceedings seeking a contribution notice over criminal sanctions. The Regulator expects to finalise these policies early in the new year.

The new offences can also be used by the Secretary of State or the Director of Public Prosecutions (or equivalent in Scotland and Northern Ireland). They could potentially adopt a different approach to the Regulator in terms of what merits investigation and prosecution. There may be some developments in terms of future co-operation between prosecuting bodies but these have not yet been confirmed. And it is ultimately up to the courts to decide on the interpretation of the law – a court's view might differ from the Regulator's policy.

Retrospectivity

The commencement order that brings most of the Regulator's new powers into force says, broadly, that acts or failures to act that took place (or a series of acts that began) before 1 October 2021 will not be subject to the new criminal sanctions. This echoes what the Pensions Minister said in a written statement in 2020.

This provides helpful reassurance as regards criminal sanctions being imposed in relation to past events but the Regulator's Offences Policy notes that facts pre-dating 1 October 2021 may be relevant to their investigations, for example if they indicate someone's intention. Similarly, those being investigated may rely on such facts in their defence.

Practical implications of changes

Awareness

Ensure that trustees and sponsors are aware of the new penalties and where they are likely to apply. Be particularly alert for activities that might come within the first two offences and whether there is a "reasonable excuse" for carrying them out.

Processes

Ensure that trustees and sponsors are fully up to speed with their obligations under the new notifiable events regime (which is yet to be finalised but is scheduled to come into force on 6 April 2022) and understand what information needs to be provided to the Regulator and when. Make sure appropriate processes are in place to comply with these obligations.

Guidance

Read the Regulator's Offences Policy, which looks at how it intends to operate its new powers, including the circumstances in which it intends to prosecute the first two offences and what "reasonable excuse" means – see our speedbrief for more details. The Offences Policy is helpful but significant areas of uncertainty remain.

Planning and audit trail

Ensure that the impact of corporate activity (including sales, borrowing, dividends, share buybacks, inter-company financing and other forms of covenant leakage) and anything relating to section 75 debts, is considered carefully in advance by all of those involved. Take written advice and keep an audit trail of decisions – documents may be required to form the basis of a reasonable excuse defence in years to come.

Indemnities and insurance

Note that criminal penalties are likely to be outside the scope of any existing indemnities or insurance but cover may be provided for criminal defence costs. Check existing policies.

Training

Arrange training as necessary.

Contacts

Francois Barker
Head of Pensions

M: +44 782 534 1131
francoisbarker@
eversheds-sutherland.com

Stuart Earle
Head of Cardiff Pensions

M: +44 791 721 2908
stuartearle@
eversheds-sutherland.com

Jeremy Goodwin
Head of London Pensions

M: +44 792 057 6544
jeremygoodwin@
eversheds-sutherland.com

Emma King
Head of Birmingham Pensions

M: +44 777 633 7293
emmaking@
eversheds-sutherland.com

Ele Lovering
Head of Manchester Pensions

M: +44 797 981 4678
elenorlovering@
eversheds-sutherland.com

Anthea Whitton
Head of Leeds Pensions

M: +44 738 754 4088
antheawhitton@
eversheds-sutherland.com

Mark Latimour
Co-Head, Pensions Investment and Insurance

M: +44 746 835 1619
marklatimour@
eversheds-sutherland.com

Simon Daniel
Partner

M: +44 792 026 5132
simondaniel@
eversheds-sutherland.com

Michael Jones
Partner

M: +44 774 833 3757
michaelejones@
eversheds-sutherland.com

Sarah Swift
Partner

M: +44 781 666 1211
sarahswift@
eversheds-sutherland.com

Karen Mumgaard
Senior Professional Support Lawyer

T: +44 20 7919 0745
karenmumgaard@
eversheds-sutherland.com

eversheds-sutherland.com

BIR_PROP2\9291790\2