

On the horizon

A stronger pensions regulator for the future?

The UK pensions industry stands at a real crossroads, and 2019 is likely to be a year of change in the way retirement benefits are structured, provided and developed.

While Parliament moves from one vote to the next in the Brexit saga, developments in the pensions world have still managed to hit the headlines. This month's publication of the Government's response to last year's consultation on further protections for Defined Benefit schemes and a stronger Pensions Regulator prompted plenty of press coverage on the jail terms which have been proposed for "reckless bosses" who mismanage pension funds.

Following on from the high-profile cases of BHS and Carillion, it is clear that the DWP is serious about ensuring the Pensions Regulator (tPR) is equipped with additional, stronger, powers to take action where there are issues with the way a pension scheme is treated by its sponsor. A fair amount of detail is still to be fleshed out, with further consultation anticipated, and we do not yet have a clear timeframe for the introduction of these changes. However, the consultation response gives us a clear sense of the direction of travel for future pension regulation.

The proposed changes will certainly have an impact on future corporate activity and its interaction with a group's defined benefit pension scheme, as well as playing a key role in determining the balance of power between tPR, the scheme's trustees and the sponsoring employer(s).

In particular, two new notifiable events will be introduced. Employers will have to notify tPR of: any sale of a "material proportion" of its business where that employer is responsible for at least 20% of the scheme's liabilities; and any granting of security which causes a particular debt to have priority over the pension scheme. Further consultation on the detail will be forthcoming. In any event, these are two key aspects affecting employer covenant in respect of which trustees should already be "on the lookout" – and ideally addressed through a formal information sharing protocol with the employer. Notifiable events are all well and good, but they have less value when they are reported after the fact and will not necessarily capture wider corporate activity which has a similar impact to the specific events set down by the anticipated regulations.

Another key development is the "Declaration of Intent". This will place sponsoring employers and its wider corporate group under an obligation to issue a statement to scheme trustees (to be shared with tPR) in respect of the sale of a controlling interest in a sponsoring employer, or any transaction which is one of the two new notifiable events referred to above. The Declaration will need to explain the transaction, confirm that the trustees have been consulted, and set out how any detriment to the scheme will be mitigated. Further detail is due on the timing of when

such Declarations have to be made, particularly when having regard to commercial sensitivities which would be associated with any such activity.

In practice, a combination of effective covenant monitoring and "early warning" triggers which are agreed between the employer and trustees should mean that where corporate activity may have an impact on the scheme, active engagement is already taking place. The Eversheds Sutherland pensions team regularly advise on the frameworks for exchange and disclosure of information by the corporate group; and this is clearly an area where there will be greater regulatory focus.

The headline-grabber is of course the new penalties and offences. These include a new criminal offence of "wilful or reckless" behaviour in relation to a scheme, which could lead to up to 7 years in prison or unlimited fines. Also a new civil penalty of up to £1m can apply, including where there is failure to comply with a financial support direction or the new notification requirements. Such consequences may help to focus the minds of the corporate decision-makers, but the burden of proof on tPR and risk of legal challenge to its approach and powers should it seek to enforce such higher penalties should not be underestimated.

Significantly, tPR will also be granted wider inspection powers and an interview power, which could override an adviser's duty of confidentiality to their clients (although legal professional privilege would continue to apply). Whether this means a future with a more interventionist tPR remains to be seen, but it would certainly be reasonable to expect that any steps taken to go behind a duty of confidentiality will be met with strong challenges by the parties involved.

Now approaching its 14th birthday, like many teenagers, tPR will clearly be keen to have more control and power. However, with limited Parliamentary time to pass all the legislation needed for the proposals, it seems they will (like so many teenagers) just have to wait!



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