



Notices and directions

The Pensions Regulator's new powers

Proposals for extending the Pensions Regulator's (TPR) powers to issue contribution notices (CNs) and financial support directions (FSDs) published in April are largely unchanged in their final form. But the public consultation has led to some curbs on them.

Material detriment

- The headline is an additional ground for issuing a CN – where an act is materially detrimental to the pension scheme's ability to pay benefits. But TPR's power to use this new ground is constrained by:
 - a code of practice that TPR will issue, and
 - a new statutory defence.
- TPR will hold a public consultation on a draft code of practice. To avoid uncertainty while the code is prepared, TPR has already set out the circumstances in which it will consider issuing a material detriment CN. See **Code of practice**.
- To use the statutory defence a person must show they acted reasonably:
 - did they consider in advance whether their proposed action might be materially detrimental to the scheme and, if it might be, did they take all reasonable steps to mitigate its effect, and
 - in all the circumstances, was it reasonable to go ahead?

TPR will publish guidance on how it sees the new defence working.

Code of practice

- The code of practice will say that these are the circumstances in which a material detriment CN might issue:
 - transferring a scheme out of the UK jurisdictions,
 - transferring the employer out of the UK jurisdictions if this entails a material reduction in employer support for the scheme, or in legal protection for it,
 - removing or substantially reducing employer support for a scheme,
 - transferring liabilities to another scheme that does

not have sufficient employer support or is inadequately funded, and

- business models that are designed to benefit the employer (or someone else) financially and fail to take adequate account of members' interests or the risks they face.

Good faith defence

- The "good faith" defence for CNs is removed. In practice, TPR has found that the evidential threshold for proving bad faith is so high that it inhibits regulatory action.
- In a partial replacement, TPR must apply a wider reasonableness test before issuing any CN: were the intended recipient's actions reasonable in all the circumstances?

Bulk transfers

- If TPR could have issued a CN in relation to the scheme making a bulk transfer, it can issue one in favour of the receiving scheme. This allows financial support to follow transferred members. A "bulk transfer" means a transfer for two or more people.
- There is a corresponding change in relation to FSDs.

Financial support directions

- The threshold for whether a scheme's sponsor is "insufficiently resourced" is lowered. The relative financial strength of the sponsor can be tested by comparing it with whole group rather than just one other company. This corrects an oddity in the original legislation.

Series of acts

- TPR can take a series of acts as the basis for a CN where no single act on its own would count. The government says this is a clarification because the legislation was always intended to allow it.

Pensions Bill makes changes

- Contrary to the original proposals, the changes are being made through primary legislation in the form of the Pensions Bill currently going through Parliament. This makes for greater certainty for employers and trustees because it means that the new powers have had to be more clearly defined and that they are unlikely to change at short notice in future.
- The changes will not become law until the Pensions Bill becomes an Act (perhaps in November). When they become law, a number of the changes will have backdated effect.

Effective dates

- As anticipated, in general the changes will have effect in relation to events occurring on or after 14 April 2008 when the government made the original proposals.
- But other dates apply to series of acts. For a material detriment CN, acts can only be cumulated if at least one of them occurs on or after 14 April 2008. For other purposes, acts can only be cumulated if one of them occurs on or after the Bill becomes an Act.

Clearance

- Clearance remains available.

Comment

The main reason for these changes is the government's concern that the new and largely unregulated non-insured buy-out vehicles could represent major risks to scheme members and to the PPF and levy payers. In principle, one option would have been for the government to outlaw them. But having welcomed them as new ways of managing pensions risk, it is looking for a way to regulate them. It tried to define the differing business models behind them in a way that would distinguish them from employers running pension schemes in the ordinary way, but was unable to do so. So it has fallen back on extending existing anti-avoidance powers.

TPR believes that the changes will not affect responsible employers. That may be the case in the long run but the possibility of CNs based on material detriment will create uncertainty in the short term. TPR is already a rarity among regulatory bodies in being able to pierce the corporate veil and make one group company pay for the obligations of another. Now its powers to do this are going to be substantially wider.

"Material detriment" is broadly defined and, unlike the existing grounds for a CN, is about the effects of actions rather than the intention behind them. This is a significant shift. Employers need to keep the wider ground in mind when planning any corporate activity.

Yet while there will be uncertainty and clearance applications will rise, the new power is less of a wild card than it might have been. As a result of moves in Parliament and comments during the public consultation, the power is better defined than originally proposed and there will be a statutory code of practice to direct the way TPR uses it.

The question in the short run is whether any chilling effect is on the intended target of the non-insured buy-out market, or on general corporate activity.

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