ALLEN & OVERY

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Pensions: what's new this week

Welcome to your weekly update from the Allen & Overy Pensions team, bringing you up to speed on all the latest legal and regulatory developments in the world of occupational pensions.

Pension Schemes Bill | FCA announces ESG, green finance changes

Pension Schemes Bill

A Pension Schemes Bill has been introduced in Parliament – this follows the announcement in the Queen's Speech. The proposed changes include:

- Strengthening the Pensions Regulator's (TPR) powers and the existing sanctions regime – this includes introducing new criminal offences and information-gathering powers, and increased civil penalties – see further below.
- Updates to the DB funding regime (separately, TPR is expected to issue its DB funding code consultation early next year):
  - A duty for trustees to set (and review and revise) a funding and investment strategy which will specify the intended funding level at specified future dates, and planned investments.
  - A new requirement for a 'DB Chair's statement', that is, a statement signed by the chair on the funding and investment strategy (including its implementation, the mitigation of any associated risks and 'lessons learned') – the commentary on the funding and investment strategy will be subject to consultation with the employer.
  - Changes to the statutory funding objective (to reflect the funding and investment strategy) and to specify matters in relation to recovery plans in regulations.
- Restrictions on statutory transfer rights, to help combat pension scams by imposing additional conditions, for example relating to the member's employment or place of residence.
- A new framework to support pensions dashboards, including provision for regulations to require trustees to supply data to a dashboard (see WNTW, 8 April 2019).
- A new framework for collective DC schemes, including an authorisation and supervision regime – the government set out its planned approach for these schemes earlier this year (see WNTW, 25 March 2019).

Changes to TPR's powers and sanctions

The government has made some changes to its proposals, made earlier this year (see our previous briefing). The Bill includes the following changes:

- The government had previously proposed two offences: failure to comply with a Contribution Notice (CN), and wilful or reckless behaviour in relation to a pension scheme. The latter offence is expressed in the Bill as two new offences, namely: avoidance of employer debt (that is, conduct that prevents the recovery of an employer debt in whole or in part, or prevents the debt becoming due) and conduct risking accrued scheme benefits (that is, conduct that has a material detrimental effect on the likelihood of accrued scheme benefits being received) – both are subject to knowledge requirements being met and the lack of any reasonable excuse. All three offences may also be dealt with by a civil penalty (see below).
- The Bill introduces a new civil penalty regime (with fines of up to GBP1 million, although this cap can be raised). These penalties will also be available, for example, in relation to a failure to provide a declaration of intent (see below), for knowingly or recklessly providing false or misleading information to TPR or to trustees, and for breaches of the notifiable events framework (so higher penalties may apply for these breaches in future).
- CN regime: alongside other technical changes, the Bill introduces two new tests which could trigger the issue of a CN: the 'employer insolvency test' (which looks at whether an act or failure would have materially reduced the amount of the employer debt likely to be recovered by the scheme) and the 'employer resources test' (which looks at whether an act or failure materially reduced the value of the employer's resources). The Bill includes provision for a defence for each new test.
- Declaration of intent: the Bill contains a new duty to notify TPR and the trustees, and to provide a statement, about certain matters – this will form the basis of the proposed 'declaration of intent' on transactions, with the details to be set out in regulations. The Bill's impact assessment indicates that the in-scope transactions will be:
    - sale of controlling interest in a scheme employer (existing notifiable event);
    - sale of the business or assets of a sponsoring employer (new notifiable event) – the proposal was that this would apply where the sale related to a material proportion of the business/assets of a scheme employer with funding responsibility for at least 20% of the scheme's liabilities, but the documents published do not currently state this; and
    - granting of security in priority to the scheme on a debt to give it priority over debt to the scheme (new notifiable event).

Comment

The Bill covers many changes previously announced by the government. However, an obvious omission is the failure to provide for the regulation of DB 'superfunds'. The government's response to its consultation on this has not yet been published (see 'DB superfunds: a new option for legacy pension liabilities?'). The Bill currently does not include any changes in relation to the statutory conversion process for guaranteed minimum pensions, or the auto-enrolment framework.

The Second Reading speech is due to take place on 30 October 2019, subject to other political uncertainties. We will provide further updates on the progress of the Bill in due course.

FCA announces ESG, green finance changes

The Financial Conduct Authority (FCA) has published an update on its proposals in relation to climate-related disclosures, and on changes requiring Independent Governance Committees (IGCs) to oversee and report on firms' environmental, social and governance (ESG) and stewardship policies. This follows an FCA discussion paper published last year (see WNTW, 22 October 2018) and a consultation on rules for IGCs earlier this year (see WNTW, 23 April 2019).

The FCA has confirmed that it:

- intends to publish the IGC rule changes in late 2019;

- will shortly publish a response to its discussion paper on encouraging effective stewardship (see WNTW, 4 February 2019);
- will carry out further work in relation to 'greenwashing' (including challenging firms where the FCA identifies that this is potentially occurring); and
- will consult in early 2020 on disclosure of climate change risks – this will include clarification of existing obligations, as well as new rules for certain issuers to make climate-related disclosures in line with the Task Force on Climate-related Financial Disclosures. It is expected that similar rules will be applied to pension schemes as 'large investors'.

The FCA's actions are part of a broader picture on ESG issues for pension schemes – you can read more about these in our briefing 'ESG, stewardship and transparency in pension scheme investing'.

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