

Exposures under the Pensions Schemes Act 2021 for auditors and accountants

Published 21 July 2021

The introduction of broad new criminal sanctions and civil fines in the Pensions Act 2021 (PSA) exposes a wide range of persons involved in pension schemes.

Auditors are becoming accustomed to having the media and regulator focus on them following a corporate collapse. The time, resources and therefore costs required to deal with the questions and investigations that inevitably arise are a significant burden on firms and individuals. The new powers under the PSA in connection with pensions schemes are part of this evolving picture and should not be over looked.

Furthermore, they go well beyond the realms of audit into the broad range of financial professional advice on pensions given by accountants and actuaries

Background

In the UK, there are approximately 5,300 businesses funding defined-benefit pension schemes. Those schemes have a combined total of 11 million members and surviving spouses. The estimated total collective funding shortfall of the UK's corporate defined benefit pension schemes was £120bn in January 2021.

When Arcadia went into administration at the end of 2020, it alone left two pensions schemes with around 10,000 members and an estimated funding shortfall of £350m.

The UK government has expressed concern about the commercial circumstances surrounding large-scale UK corporate collapses in recent years and the many and varied ramifications of the demise of a large corporation. In a pension context, a corporate collapse creates unemployment and results in a significant burden of funding the benefits the occupational pensions scheme offered to existing and future pensioners. In order to tackle this the government is pressing ahead with a programme of legislative measures designed to reform corporate governance and to beef up the sanctions available to tackle the conduct of directors and officers, and their professional advisors who are considered to have contributed to these recent corporate collapses.

From an audit and corporate governance perspective, we have seen a relentless focus which is driving changes to standards, regulation and the structure of audit firms. Another of these measures, the PSA, received Royal Assent on 11 February 2021. There was little fanfare. However, the PSA introduced new investigatory powers for the Pensions Regulator and created new criminal offences concerning the management of occupational pension schemes, which significantly increase the potential liabilities for a wide range of individuals. This includes not only the directors and officers of companies operating occupational pension schemes and the trustees of those schemes, but also importantly the professional advisers to those companies.

The offences can be committed by individuals and companies and carry a maximum penalty of seven years imprisonment or an unlimited fine. They also have the potential for civil fines (which carry a lower burden of proof) of up to £1 million. They should not therefore, despite the absence of fanfare, be overlooked or underestimated^[1].

Offence of avoidance of employer debt

Section 75 of the Pensions Act 1995 provides a mechanism by which participating employers have to fund the employer debt. The new criminal offence of 'avoidance of employer debt' provides that a person commits an offence if they intentionally, and without reasonable excuse, do an act which prevents an employer debt from becoming due, from being recovered or otherwise compromises or reduces the amount of the debt that would become due. The breadth of this provision is significant; it could potentially cover a corporate restructuring and even standard debt arrangements by trustees.

Offence of 'risking accrued scheme benefits'

The new criminal offence of 'risking accrued scheme benefits' may be committed where a person, without reasonable excuse does an act, fails to act or engages in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received.

The offence can be committed where the person 'ought to have known' that their actions would have the detrimental

impact. It is not therefore necessary that the person intends to achieve the adverse result by their conduct. Common corporate activities such as borrowing for capital or restructuring to avoid financial collapse could all be caught by this provision.

Advisors beware

The Pensions Regulator has had criminal offences in its regulatory tool kit for many years. However, those offences are largely focussed on the interaction of companies and trustees with the Pensions Regulator. The new offences criminalise conduct capable of adversely affecting scheme assets and benefits. They therefore substantially ramp up the Pensions Regulator's firepower in order to sanction commercial behaviour which has, until now, been an accepted part of the UK corporate landscape.

It is widely accepted that the companies and trustees will need more advice and for that advice to be well documented. This is an opportunity for professional advisers but a risk too, especially when things get challenged with the benefit of hindsight following a corporate collapse. Not only are the advisers exposed directly, they also face the possibility of claims for the fines and costs of others if their advice, or its documentation, is deemed inadequate.

In addition, the offences are committed by reference to the conduct of individuals and the impact of that conduct on an occupational pension scheme. There is no limit to the potential range of people who may commit these offences. They may, for example, be committed by an accountant advising on, and implementing, a corporate transaction which impacts upon company assets and the ability of the company thereby to make contributions required of it to a pension scheme. The party purchasing a company operating an occupational pension scheme should also be on notice for any terms of the transaction which are capable of adversely affecting scheme assets and benefits.

As the risks for auditors and accountants increase, a proper understanding of the exposure, good internal procedures and risk management, excellent documentation and proper file management are all vital to a firm's ability to navigate and thrive in the increasingly regulated environment. As is the need to have good insurance cover, good brokers and a good working relationship with your insurers.

^[1] The offences will be brought into force by regulations which will be implemented at a future date to be determined.

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