



Highlights

The Pensions White Paper “Protecting Defined Benefit Pension Schemes” was published on Monday 19 March 2018. Although it is currently short on detail, so that all proposals will be subject to detailed further consultation, it proposes a significant increase in powers for the Pensions Regulator.

The key proposals are:

Increased Regulator powers in relation to corporate activity

The White Paper includes proposals to extend the Pensions Regulator’s powers that will impact on corporate activity for groups which operate a defined benefit pension scheme:

- Punitive fines will be introduced where corporate activity has detrimentally impacted a pension scheme.
- A new criminal offence will punish “wilful or grossly reckless behaviour” in relation to a pension scheme.
- There will be no mandatory clearance requirements, but some transactions will trigger a new requirement to prepare a “declaration of impacts” statement before the transaction takes place.
- There will be extended investigatory powers for the Pensions Regulator, including power to require any person to attend an interview and power to inspect records at parties’ premises (including unannounced raids).
- Most changes to the Pensions Regulator’s powers are expected to be laid before Parliament in the 2019-2020 Parliamentary session, but some powers could have retrospective effect from 19 March 2018.
- As a result, it will be more important than ever for corporate groups to ensure that the impact of corporate activity on their defined benefit pension schemes is carefully considered and appropriately mitigated.

Binding scheme funding code

- The Pensions Regulator’s code of practice on funding defined benefit will be amended following consultation, with a renewed focus on scheme funding objectives focusing on the longer term journey plan for the scheme.
- It will become a statutory requirement to comply with at least some aspects of the new code and the Regulator will be given new enforcement powers.
- There will be a new requirement for defined benefit schemes to appoint a chair of trustees and to produce a chair’s statement at each valuation.

Further consultation on consolidation of schemes

- There will be further consultation on potential further measures to assist with the consolidation of defined benefit pension schemes, including a legislative and authorisation framework for new forms of commercial consolidation vehicles (“superfunds”) and a new accreditation scheme to encourage existing forms of consolidation.

Introduction

The Government has finally published its much anticipated [White Paper](#) “Protecting Defined Benefit Pension Schemes” (Cm 9591). This follows on from the Government’s [Green Paper](#): “Security and Sustainability in Defined Benefit Pension Schemes” (Cm 9412) published in February 2017 (see our [Alert](#)), and a [report](#) on defined benefit schemes published in December 2016 by the House of Commons Work and Pensions Committee (see our [Alert](#)) following its [inquiry](#) into defined benefit pension schemes.

The White Paper sets out the Government’s plans in three key areas: extending the Pensions Regulator’s powers and generally increasing the obligations of groups sponsoring such pension schemes in the context of transactions, clarifying scheme funding requirements to improve the scheme funding process and looking at encouraging the consolidation of smaller schemes to enable employers to manage their defined benefit liabilities without the cost of having to buy out benefits. A number of the proposals reflect policies outlined in the Conservative Party’s 2017 election manifesto.

The Government will be carrying out consultation exercises in relation to most of the proposals in the Paper. We can expect more details to emerge as those consultation exercises take place.

Increased Regulator powers in relation to corporate activity

Much of the focus of the White Paper is on proposals to extend the Regulator’s current powers and the obligations of pension scheme sponsors in the context of transactions, both in terms of increased personal liability for individual directors of sponsoring employers (and others) and additional scrutiny and reporting requirements for corporate transactions.

Key proposals that will impact corporate activity include:

- A power for the Pensions Regulator to impose punitive fines where it exercises its moral hazard powers.
- A new criminal offence to punish the “wilful or grossly reckless behaviour” of directors and other connected persons in relation to a defined benefit pension scheme.
- A continued focus on using the director disqualification regime.
- No mandatory clearance but a new requirement for sponsoring employers or parent companies to make a “declaration of impacts” on the pension scheme for relevant corporate transactions.
- Further strengthening of the Pensions Regulator’s investigatory powers.

Although the legislation to introduce new powers for the Pensions Regulator is not likely to be laid before the 2019-2020 parliamentary sessions, some of these powers may have retrospective effect and will be coupled with immediate increased proactivity by the Pensions Regulator in seeking to use its existing powers. As a result, it will be more important than ever for employers to ensure that the impact of corporate activity on their defined benefit pension schemes is carefully considered and appropriately mitigated if necessary, and that such steps are properly documented, with the aim of both reducing the risk of future regulatory action being instigated and being in the best possible position to defend any such action if it arises.

Punitive fines

- The Pensions Regulator will have the power to impose punitive fines on the targets of a contribution notice where corporate activity has detrimentally impacted a pension scheme. These will extend to individual company directors.
- It is expected that the penalty will be “linked to” the issue of a contribution notice (which the Regulator may already issue to a person who has been party to an act or omission that had a material detrimental effect on the likelihood of accrued scheme benefits being received or prevented the recovery of all or part of an employer debt, and which requires its recipient to make a payment to the scheme). The White Paper does not include any further details of potential quantum but it is clear that the result is expected to be punitive. In its report on defined benefit pension schemes, the Select Committee had suggested that such a fine should serve as a “nuclear deterrent” and could be set at twice the amount payable under a contribution notice (which can be the full amount of the scheme’s deficit calculated on a buy-out basis).

- The Government will consider whether the new penalty regime should apply retrospectively - in particular in respect of acts or omissions after 19 March 2018 (i.e. the date of the White Paper). When the contribution notice regime was first introduced it was similarly retrospective, applying to acts or omissions from the date the proposed legislation was announced in 2004 rather than when the Pensions Act 2004 came into force in 2005.

New criminal offence for individual directors

- The White Paper confirms that the Government will legislate to introduce a new criminal offence to punish “wilful or grossly reckless behaviour... in relation to a defined benefit pension scheme”, which will apply to directors and other connected persons.
- No further information is provided as to how such an offence would be framed, including how it would relate to the Pensions Regulator’s existing moral hazard powers or to the proposed punitive fines (see above) or what the penalties would be if a director is found guilty of this new offence.

Focus on director disqualification

- The Government intends to “build on” the existing regime for the disqualification of directors. In particular, the Pensions Regulator will continue to pass evidence it has gathered in its investigation to the Insolvency Service so that the latter can assess whether to take action to disqualify directors as a result of “mismanagement or systematic avoidance of pensions obligations”. However, it is not also being suggested that the legislation governing the disqualification regime will be amended to expressly refer to pension obligations.

Declaration of impacts and other measures to support or operate in place of voluntary Pensions Regulator clearance

- Despite the recommendation in the Select Committee report, the Government is not proposing to introduce a “mandatory clearance” regime. Instead, it sets out a number of measures to build on the Pensions Regulator’s existing voluntary clearance regime.
- The Government will legislate to introduce a requirement for companies to make a statement confirming that they have appropriately considered the impact of a “relevant business transaction” on their defined benefit pension scheme. The purpose of a “declaration of impacts” statement is to enable scheme trustees to better engage with the Pensions Regulator if the scheme is put at risk by such transactions.
- Statements will need to be made prior to the transaction taking place and be prepared “in consultation with” the scheme trustees. The statement will need to set out what mitigation action is proposed to address any detrimental impact on the pension scheme.
- Not all transactions will trigger this requirement. “Relevant business transactions” will only include those which pose the highest potential risk to the pension scheme, “such as the sale or takeover of the sponsoring employer”. It is not clear whether material distributions or financings will be included, but it seems probable that they will be.
- There will also be a review of the current notifiable events framework to consider whether more transactions should require mandatory notification to the Pensions Regulator and whether notification should be required in advance of decisions being taken (currently, some of the key notifiable events such as the sale of a participating employer in a pension scheme, or compromise of a debt to the scheme, only apply when the decision is made to take that step).

Further strengthening of TPR investigatory powers

- The Government will legislate to widen the (already very broad) powers of the Pensions Regulator to require disclosure of information, and to introduce new civil penalties in addition to existing criminal sanctions for failure to comply with disclosure requirements.
- The Regulator will have a new power to inspect records, documents and electronic devices at relevant parties' premises. There would be advance notice of an inspection, unless that would "work against the purpose of the inspection" – i.e. unannounced raids will be possible.
- There will also be a new standalone power to require any relevant person to attend an interview with the Pensions Regulator to explain any facts, events or circumstances relevant to an investigation by the Pensions Regulator. This will extend to professional advisers.

Changes to the scheme funding regime

- The White Paper sets out a number of proposals to strengthen the scheme funding regime, including a consultation on changes to the Pensions Regulator's Code of Practice on funding defined benefit schemes. Significantly, there will be a new statutory requirement to comply with at least some aspects of the new Code of Practice and new powers of enforcement for the Pensions Regulator to exercise in the event of failure to comply with the Code.
- Some of the changes appear to be aimed at giving more specificity to current legal requirements. In particular, the current scheme funding legislation requires that the actuarial assumptions used in valuing scheme liabilities be chosen "prudently" and that a deficit recovery plan be "appropriate" for the scheme in question. However, both the legislation and the current version of the Code lack clear definitions of "prudent" and "appropriate". The consultation will focus on how prudence can be demonstrated when assessing scheme liabilities and what factors are appropriate when considering recovery plans.
- The Government justifies this proposal by explaining that it is concerned that trustees and employers are not taking a long term view when setting the scheme's statutory funding objective, whether that long term objective is to continue the scheme with employer support, run-off the scheme with minimal call on the sponsoring employer, buy out the benefits within a set timeframe or consolidate the scheme through a merger or bulk transfer. The Government has therefore proposed that the revised Code should include appropriate guidance for trustees and sponsoring employers on setting the statutory funding objective in line with their long term objective for the scheme and the specific circumstances of the scheme.
- There will be a new legislative requirement to require the board of trustees of a defined benefit scheme to appoint a chair and for that chair to report key funding decisions in a statement that would be submitted to the Regulator with the actuarial valuation. This approach resembles that taken in relation to defined contribution (*DC*) occupational pension schemes, for each of which a chair's statement is already required in relation to certain matters (including the investment strategy, charges and scheme governance). However, while for DC schemes the chair's statement is made available to scheme members, it is not clear whether the chair's statement in relation to funding for defined benefit schemes would also be made available to members.

Consolidation of schemes

- The White Paper includes a lengthy section on encouraging the consolidation of schemes, in order to bring about greater economies of scale, better investment opportunities and higher quality governance for smaller schemes. This was first discussed in the Green Paper. However, the Paper does not put forward any policy decisions.

- Instead, as consolidation raises a number of issues that need further consideration, the White Paper sets out a number of areas on which the Government will consult this year in relation to consolidating schemes. These include proposals for a legislative framework and an authorisation regime for new forms of commercial consolidation vehicles (which may include some allowance for non-insurance risk transfers) and a new accreditation regime to encourage existing forms of consolidation.

If you would like us to meet with you to discuss how any of the issues in the White Paper could affect your business or your scheme, please speak to your regular contact or call or email any of us listed below.



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