FYI® Alert

For Your Information®

Volume 2021

Issue 09

16 March 2021

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Prosecuting the new criminal offences in the Pension Schemes Act 2021

The Pensions Regulator is consulting on its draft policy on the prosecution of two of the new criminal offences introduced by the Pension Schemes Act 2021 (the Act). The consultation runs until 22 April 2021 and the offences are expected to come into force in the autumn.

Background

The Act strengthens the criminal and civil sanctions regime by introducing three new criminal offences in respect of defined benefit pension schemes, the first and second of which could see a prison sentence of up to seven years:

- avoidance of an employer debt (under section 75 of the Pensions Act 1995);
- conduct risking accrued benefits; and
- failure to comply with a contribution notice.

The draft policy provides guidance on the Regulator's intended approach to the investigation and prosecution of the first two of these new offences.

The Regulator will be guided by the government's intention that these two offences are aimed at addressing the more serious or reckless conduct that was already within the scope of its contribution notice (CN) powers (or would be in scope if the person was connected with the scheme employer). Accordingly, its approach to prosecutions will be closely linked to its current CN powers in that it will expect to consider a case for prosecution in broadly the same circumstances as where it is considering issuing a CN.

Ironically perhaps, those with low resources are more likely to be prosecuted as a deterrent than those where the issue of a CN would achieve a higher recovery.

The new offences

Both offences can be committed by anyone other than a duly appointed insolvency practitioner. (Although CNs can only be issued to a sponsoring employer or someone connected or associated with a sponsoring employer, there is no such limit on the criminal offences which may be committed by "any person".)

Avoidance of an employer debt

A person commits this offence if they:

- prevent the scheme from recovering all or part of the debt that is due from an employer; or
- prevent that debt becoming due; or
- compromise or otherwise settle that debt; or
- reduce the amount of that debt which would otherwise become due and they intended their actions to have this effect.

Conduct risking accrued benefits

This applies to anyone who:

- acts or engages in a course of conduct that detrimentally affects, in a material way, the likelihood of accrued scheme benefits being received; and
- knew (or ought to have known) what they were doing would have that effect.

The material detriment test is similar to that which applies for the imposition of a CN. Accordingly, the Regulator will take the same approach to this test as it does on a CN; guidance and a code of practice already published in relation to CNs are thus relevant here. The Regulator would not expect to prosecute anyone who could establish a statutory defence to a material detriment CN if it were issued.

In considering what the person ought to have known, the Regulator will only focus on the position at the time of the act and not based on knowledge of what might have happened since.

Reasonable excuse

In both cases the accused has a defence if they have a reasonable excuse for their act or failure to act. While the prosecutor must prove the absence of a reasonable excuse beyond all reasonable doubt, the accused must raise the defence and provide facts to substantiate it.

What amounts to a reasonable excuse will be fact specific in any case but there are three factors which will be significant on this issue.

- Whether the detrimental impact on the scheme/likelihood of full scheme benefits being received was an incidental consequence of the act or omission, as opposed to a fundamentally necessary step to achieve the person's purpose.
- The adequacy of any mitigation provided to offset the detrimental impact.
- Where no, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact.

As well as providing examples for each of the above scenarios the Regulator gives a number of additional factors which may have a bearing on whether it prosecutes:

- How much communication and consultation with the trustees took place before the act.
- Whether the person complied with any statutory duty to notify the Regulator of certain events affecting the scheme.
- Where the Regulator engaged in the matter, the extent of openness and timeliness of communication with the Regulator.

Secondary liability

As is common in criminal offences, a person who helps or encourages someone to commit an offence can also be prosecuted. Again, no offence will be committed by them if they have a reasonable excuse, even if the principal is found guilty. The Regulator recognises a professional person, acting in accordance with their professional duties, conduct, obligations and ethical standards, is likely to have a reasonable excuse. The applicable duties, obligations and standards, will ordinarily depend on the professional discipline and oversight of the appropriate regulatory body.

The Regulator gives four examples where it may look to prosecute advisers who helped or encouraged an act which risked accrued benefits.

- A legal adviser who helps an employer to lay a trail of false evidence designed to both hide the employer’s true intention for their actions and/or form the basis for a reasonable excuse defence.
- An investment manager who encourages a scheme to change their current appropriate investment strategy to one that significantly increases downside risk with little corresponding upside, in order to earn a performance fee. This change results in a higher level of risk to the likelihood of members receiving accrued scheme benefits.
- An actuary engaged by the employer who provides advice on whether the funding test for a flexible apportionment arrangement is met, in the full knowledge that they don’t have the requisite expertise to provide such advice, and that their regulatory body does not regulate the giving of such advice. They also expect the trustees to rely on it, when there is high probability that the replacement employer could not support the scheme in the way the test examines, thereby reducing the likelihood of members receiving full benefits.
- An accountant who knowingly assists in a material misstatement of the employer’s accounts in the knowledge these will be relied on to support a going concern status in an upcoming sales process which caused material detriment.

Selecting cases for investigation and prosecution

The Regulator, mindful of the policy intention, will look at whether:

- the primary purpose of the conduct is the abandonment of the scheme without providing appropriate mitigation;
- significant financial gains have been unreasonably made to the detriment of the scheme;
- there has been some other unfairness in the treatment of the scheme; and/or
- the trustees, the Regulator and/or the PPF have been misled or not appropriately informed.

In considering a prosecution against a person the Regulator will look at:

- their relationship, duties and proximity to the employer, the scheme, and the act or failure to act,
- the extent of their involvement or influence, and
- any direct or indirect benefit(s) the person receives or is entitled to by reason of the act or failure to act.

Examples of cases they have previously seen which might warrant prosecution include:

- The sale of an employer without replacing an existing parental guarantee over the employer's section 75 debt, resulting in the loss of the guarantee (in circumstances where the trustees were not told about the sale in advance).
- The purchase of an employer with no further investment into its business, subsequent mismanagement of the company, and extraction of value before the company went into administration.
- The stripping of an employer's assets, resulting in a substantial weakening of the support for the scheme.
- Taking steps to bring about the unnecessary insolvency of the scheme employer with the intention of buying the employer's business without the scheme.

Comment

The wide way in which the Act has framed these offences had worried not only employers, but trustees, including independent trustees, and scheme advisers. It was hoped that detailed guidance from the Regulator would allay some of these fears and, while the draft policy is welcome, there are still clearly a lot of grey areas. Although the Regulator is expected to confine its activity to those with significant decision-making powers, there is still the ability to take action against others, such as the actuaries, auditors and investment managers that are mentioned in the examples.

It should be acknowledged that the Regulator is not the only body able to prosecute these offences and its policy is not necessarily mirrored by the government or the Director of Public Prosecutions in England and Wales (or their equivalents in Scotland and Northern Ireland).

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