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The Pensions Regulator consults on its use of new powers

The Pension Schemes Act 2021 has given The Pensions Regulator a number of new powers.

At the same time as it finalised its policy relating to its criminal powers, the Regulator has issued a consultation on its proposed approach for dealing with cases where it has overlapping powers, where it is imposing fines, and where it is gathering information in connection with these new powers.

A common consideration when something adverse occurs in a pension scheme is 'how will the Regulator react?' Most sponsors and trustees should never have to worry about these powers but it is useful to understand what action the Regulator is now empowered to take.

The consultation runs until 22 December 2021.

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Background to the consultation

This consultation focuses on three draft policies which explain the Regulator's approach to its:

- Overlapping powers – where the Regulator has the options to pursue both criminal and/or regulatory powers in respect of the same set of circumstances.
- Monetary penalty powers – new penalty powers to impose high fines for information gathering and avoidance related scenarios.
- Information gathering powers – the use of section 72 notices, interviews and inspections in the context of enforcement cases, including the Regulator's approach to the new fixed and escalating penalty powers for non-compliance.

The consultation itself is little more than a set of questions in respect of the proposed policy document issued alongside it and is unlikely to have a material impact on the above policies.

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Overlapping powers policy

Where both regulatory and criminal powers are available to the Regulator, its approach will depend on the facts of each case, the issues identified, and the likely resulting impact and outcomes of each route. The draft policy includes examples of where both regulatory and criminal powers may be available to the Regulator, along with some brief case studies.

Any overlap between civil powers exercisable in the High Court and the Regulator's regulatory and criminal powers is not covered in this policy.

In overlapping situations, the Regulator may be able to issue a statutory notice, impose a financial penalty, or bring a prosecution. Statutory notices seek to secure an action or outcome or provide a remedy. Financial penalties and prosecutions are designed to punish non-compliance and encourage future compliance by both the target and others in the pensions industry.

Where a breach can be remedied, the Regulator is likely to issue an improvement notice or compliance notice, and only escalate to more serious penalties if this approach does not work. If the impact of remedying the breach is limited, a financial penalty is more likely. More serious cases of dishonesty, or repeated non-compliance, would increase the likelihood of criminal proceedings.

Where criminal proceedings are issued, the Regulator may also take regulatory action to ensure a breach is remedied. Where the Regulator commences criminal proceedings, it will not issue a regulatory financial penalty for the same acts.

The Regulator has always viewed non-cooperation with it as unacceptable. Any attempt to obstruct an investigation is likely to result in the issuing of criminal proceedings or heavy financial penalties.

Where there is evidence of avoidance of a statutory employer debt, or conduct risking accrued scheme benefits, the Regulator's prime objective will be protecting members and the PPF and so it is likely to prioritise a contribution notice. However, criminal proceedings may be issued in addition to, or instead of, a contribution notice.

Monetary penalty powers policy

The Regulator has the power to issue financial penalties.

Where a person fails to pay following a contribution notice, the penalty will be directly linked to the amount of the contribution notice. It will generally be fixed at 20% of the contribution notice value, capped at £1m. There will be a 10% reduction of the contribution notice value capped at £500k where payment is made before the Determination Panel hearing to consider the imposition of a penalty.

For avoidance of an employer debt, conduct risking accrued benefits, breaches of the notifiable events regime, or knowingly or recklessly providing false or misleading information to the Regulator or the trustees, the penalty will depend on a person's culpability and the harm caused. The draft policy sets out examples of culpability and harm done, as well as mitigating and aggravating features, with appropriate penalty bands of up to £1m.

Information gathering powers policy

How the Regulator can gather information

The Regulator may require information, documentation or an explanation from trustees, employers, or third parties including advisers to either party. What it asks for will depend on the powers it is considering using and the specific circumstances of the investigation.

The Regulator may often start by seeking assistance on a voluntary basis and giving a reasonable time for a response based on the amount and complexity of information requested, the accessibility of that information, and the statutory time limits for potential use of its powers.

Where the Regulator moves straight to enforcement action using one of its statutory powers, it will make this clear to those involved. If a statutory information notice is issued, a reasonable time will be allowed for compliance, as well as any statutory time limit. Where the target needs more time, this should be requested as soon as possible, and before the deadline for compliance passes.

Legal professional privilege applies, which means a person does not have to supply documentation passing between themselves and a lawyer in contemplation of possible litigation. (They can of course choose to do so if they wish.)

Where an interview notice is issued in non-criminal investigations, a reasonable amount of time for compliance will usually be given, in addition to any statutory timeframe.

Inspecting premises

The Regulator will only use its powers to enter and inspect relevant premises, when investigating possible breaches of the law or in an avoidance investigation, when it is reasonable and proportionate to do so. Advance notice will normally be provided ahead of an inspection, unless it is felt information or documents could be altered or destroyed. Failure to comply may lead to penalties and/or a criminal prosecution.

In other cases, the Regulator may go to court for a warrant to access and inspect premises. Where a warrant is issued, reasonable force may be used to execute it and enter and search premises.

Penalty notices

Fixed penalty notices of £400 payable in 28 days may be issued in cases where there is a failure to produce information or arrange/attend an interview. Preventing/hindering a Regulator's inspection can also lead to a fixed penalty notice.

Escalating penalties may be applied if the person continues to fail to comply. These accrue at a daily rate and a different rate is applicable depending on whether the person involved is an individual. Failure to pay an escalating penalty can result in a criminal action.

Comment

This consultation is unlikely to result in the Regulator changing any of its draft policies in a material way and serves more as advanced notice of what is coming.

Anyone asked to provide information on a "voluntary basis" should be mindful of the consequences of not co-operating with the Regulator. It is also important to keep the Regulator informed and be open

with it, as it is far less likely to use its toughest powers against those who are being transparent in their dealings with it.

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