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Client Alert
Commentary

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A More Aggressive UK Pensions Regulator?

The Regulator's expanded powers, effective 1 October 2021, reinforce the need for all relevant parties to give proper consideration to the effect of corporate transactions, refinancings, restructurings and other activity on UK defined benefit pension plans.

The UK Pensions Regulator's (the Regulator) statutory moral hazard powers are to be materially expanded by the UK government with effect from 1 October 2021. This is expected to result in the Regulator taking a more interventionist and proactive approach in relation to any corporate activity which is or could be detrimental to a UK defined benefit pension plan.

What is changing?

The Regulator's existing power to issue a contribution notice (CN) can currently only be used when there is an act or omission by a UK defined benefit sponsoring plan employer or any person who is (or has in the last six years been) connected to that employer for the purposes of the relevant legislation which has — as one of its main purposes — the avoidance of employer debt or which is materially detrimental to the likelihood of a member of a pension plan receiving his or her accrued benefits. This power has been expanded by the UK government to include situations in which there has been an act or failure to act: (i) which has resulted in a "material reduction" in the value of the resources of a UK defined benefit pension sponsoring plan employer; or (ii) when at the time of the act/failure to act, the relevant pension plan had a deficit in circumstances where, if a statutory debt had fallen due to the plan immediately after that time, the act/failure to act would have "materially reduced the amount of the debt likely to be recovered" by the plan. There will be a statutory defence in both scenarios where a person gave "due consideration" to the impact of a relevant act or omission and took "all reasonable steps to eliminate or minimise" any relevant negative impact on the pension plan.

The Regulator has also been given new criminal powers (and a related civil sanction) by the UK government that apply to "any person" (the Criminal Powers). This brings into the scope of these powers parties who would, as a default legal position, not fall within scope of the Regulator's existing moral hazard powers — e.g., third-party lenders, shareholders of less than one third of the voting power in a UK defined benefit pension plan sponsoring employer, third-party purchasers of assets, professional advisers, and in all cases, their directors, principals, officers and employees.

The Criminal Powers will apply in circumstances in which any person acts or engages in a course of conduct (or a failure to carry out a relevant act or course of conduct) which: (i) is intended to prevent the

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recovery of a statutory debt to a pension plan or otherwise prevent such a debt becoming due, compromise or settle such a debt, or reduce the amount of such a debt and the person acted without reasonable excuse; or (ii) detrimentally affects in a material way the likelihood of accrued plan benefits being received, provided the person knew or ought to have known that the act or course of conduct would have that effect and did not act with reasonable excuse. Sanctions will be imprisonment for up to seven years and an unlimited fine, or for mirror civil offences, a fine of up to £1,000,000.

The Regulator will also be given expanded investigatory powers, including additional interview and premises search powers.

The existing statutory notifiable events will be expanded (although this is not expected to take place until April 2022). This expansion will require details about a share deal or an asset deal involving a sponsoring plan employer or the granting of security in priority to a pension plan to be notified to the Regulator "as soon as reasonably practicable", including a description of: (i) any adverse effects of the transaction/event on the relevant pension plan; (ii) any steps taken to mitigate those adverse effects; and (iii) any communication with the trustees of the relevant plan about the transaction/event.

What does this mean in practice?

The Regulator's expanded powers will likely result in the Regulator taking a more robust approach to any corporate activity which could be perceived as being detrimental to a UK defined benefit pension plan. The expanded notifiable events regime will likely give the Regulator (and pension trustees) more negotiating power in any relevant corporate transaction, refinancing, restructuring, or other activity.

The Criminal Powers will require third-party lenders, third-party purchasers of assets, and other people who have generally been outside of the scope of the Regulator's moral hazard powers to give due consideration to any issues or risks, since they will now be in scope of the Criminal Powers. While the Regulator said in a consultation document about the Criminal Powers in March 2021 that it does not expect the introduction of these powers to materially affect the types of transactions it is concerned about and the government stated in parliament that it does not intend for the new powers to "interfere with routine business activities", banks and potential purchasers of assets are already focusing far more on a group's defined benefit pension plan than before. Companies which operate such plans are also seeking legal advice earlier and more frequently than before, for example when considering payment of dividends or taking other "ordinary course" actions.

The expanded powers reinforce the need for any person involved in a corporate transaction, restructuring, refinancing or other corporate activity to give proper consideration to the effect of the relevant corporate activity on the applicable pension plan and where relevant, to ensure that appropriate mitigation is provided to the plan for any detriment.

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