PENSIONS IN 30 PODCASTS

07 THE PENSIONS REGULATOR - powers to protect pension schemes

Key Points

- The Pensions Regulator's (TPR) anti-avoidance powers include contribution notices and financial support directions.
- They can be used if employers fail to support a scheme, cause material detriment to the chances of a person receiving benefits or the employer is insufficiently resourced or is a service company.
- Advance clearance is possible for specific transactions.
- TPR regularly publishes reports on the considerations it gives to the exercise of its powers and functions.

Main Sources

- Sections 38 to 51 of the Pensions Act 2004
- www.thepensionsregulator.gov.uk

Introduction

TPR's anti-avoidance powers (also called their "moral hazard" powers) are of two types:

- Contribution Notices
- Financial Support Directions ("FSDs")

and, although the tests are slightly different for Contribution Notices and FSDs (see below) they can be brought into play if:

- employers have failed to provide support for a scheme;
- employers have caused a material detriment to the chances of a person receiving their accrued benefits; and
- the employer is insufficiently resourced or a service company, and another company in the same group is sufficiently resourced, and TPR requires support to be put in place for the scheme.

The power to issue Contribution Notices and FSDs is exercisable by the Determinations Panel of the Regulator. There is a reasonableness test in all cases.

In cases of both Contribution Notices and FSDs, TPR can give advance clearance confirming that it will not seek to issue a Contribution Notice or a FSD in relation to specific transactions. TPR regularly publishes reports on the considerations it gives to the exercise of its powers and functions, including Contribution Notices and FSDs.

Contribution Notices

Contribution Notices can be issued to the employer or employers of a defined benefit scheme or persons associated or connected with them, including individuals. The definition of "connected" is wide and needs careful examination in some cases.

A Contribution Notice can be issued if TPR considers that an act or deliberate failure to act has occurred during the 6 year period ending with the giving of the warning notice in respect of the Contribution Notice and that it is "materially detrimental" to the possibility of accrued benefits being received by a person who is a member of a scheme.

TPR may also issue a Contribution Notice where it decides that the main purpose, or one of the main purposes, of an act or failure to act during the 6 year period ending with the giving of the warning notice in respect of the Contribution Notice was either:

- to prevent the recovery of all or part of a debt on the employer under Section 75 of the Pensions Act 1995; or
- to prevent that debt becoming due, to compromise or otherwise settle that debt or to reduce the amount of the debt.

A Contribution Notice can only be issued by TPR if it considers that it is reasonable to do so taking into account:

- the degree of involvement of the person in the act or failure to act;
- the person's relationship with the employer or whether the person had control of the employer;
- any connection or involvement of the person with the scheme;
- whether the act or failure to act was a notifiable event and there was a failure to notify that event;
- all of the purposes of the act or failure to act including whether the intention was to prevent or limit the loss of employment;
- the person's financial circumstances; and
- the value of any benefits the person received directly or indirectly from the employer or under the scheme.

Failure to pay the sum due under a Contribution Notice will lead to a debt being treated as due to the trustees of the scheme or the Pension Protection Fund (if applicable).

Financial Support Directions

FSDs can be issued if in the 2 years preceding the giving of a warning notice in respect of the FSD, the employer (meaning a scheme's statutory employer) is insufficiently resourced or is a service company. If so, TPR can require some form of financial support to be put in place for the scheme by issuing a FSD.

Insufficiently Resourced

An employer will be deemed to be insufficiently resourced if its resources are valued at less than 50% of the estimated debt on the employer under Section 75 Pensions Act 1995 and:

- there is a connected or associated employer whose assets, when added to those of the employer, are at least equal to 50% of that debt; or
- the aggregate value of resources of two or more persons associated or connected with that employer (and each other) when added to the resources of the employer are at least equal to 50% of the debt on the employer.

Service Company

An employer will be deemed to be a service company if it is part of a group and it derives its turnover solely or principally from charging for providing the services of its employees to other group companies.

Before issuing an FSD, TPR must determine that it is reasonable to do so taking into account:

- the potential recipient's relationship with the employer;
- the value of any benefits received by the potential recipient whether directly or indirectly;
- any connection or involvement of the potential recipient has had with the scheme; and

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- the potential recipient's financial circumstances.

An FSD can be issued to:

- the employer or other participating employers participating in relation to the scheme;
- an individual associated with the employer (who is an individual), unless the only association arose from employment; and
- the company that was connected with or associated with the employer.

An FSD can take a number of forms including:

- all members of the group becoming jointly and severally liable for the pension liabilities of the scheme;
- a holding company becoming liable for the pension liabilities of the scheme; and
- the provision of additional financial resources to the scheme (such as a direction to put in place a guarantee or some other contingent asset).

Failure to comply with an FSD will lead to TPR issuing a non-compliance Contribution Notice having taken into account whether the potential recipient has taken reasonable steps to secure compliance with the FSD and the relationship between the recipient and the other companies or individuals that were party to the financial support arrangements put in place under the FSD. In the event of insolvency, an FSD is a "provable" debt which ranks equally with other secured creditors.

The DWP has recently consulted on whether members need further protection delivered by a stronger more proactive TPR and whether trustees should be given enhanced powers. Suggestions consulted on include:

- requirements for compulsory proactive clearance of corporate transactions;
- fines for transactions having detrimental effects on schemes;
- new information gathering powers; and
- a requirement for consultation with trustees if an employer plans to pay dividends and its scheme is underfunded.

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