ASSOCIATION OF CONSULTING ACTUARIES

Association of Consulting Actuaries Limited · First Floor (129) · 40 Gracechurch Street · London · EC3V 0BT
Tel: +44 (0)20 3102 6761 · Email: acahelp@aca.org.uk · Web: www.aca.org.uk

6 December 2021

PSA21policies@tpr.gov.uk

The Pensions Regulator
Napier House
Trafalgar Place
Brighton
BN1 4DW

Dear Sirs

Our approach to the new powers introduced by the Pension Schemes Act 2021 and their interaction with our existing powers

I am writing on behalf of the Association of Consulting Actuaries in response to the above consultation. Our thoughts are set out in the Appendix to this letter.

The Act has given substantial new powers to the Regulator and, as such, your proposed policy documents are important reading. As you will see, we feel that it would be useful if some more work could be done on a number of aspects of the various policies. We also suggest you consider producing a "quick read" document, setting out the key messages, which will be particularly helpful for lay trustees.

We hope that you find the contents of this letter of assistance. We would be happy to discuss them further if that is helpful. In that event, please contact me on 01372 733763 or at peter.williams@aon.com.

Yours faithfully

Peter Williams
Chairman, Pension Schemes Committee
On behalf of the Association of Consulting Actuaries Limited

1. Is the complete package of policies sufficiently clear about our overall approach to the new powers? If not, is there any additional policy/guidance that you would find useful?

No.

Please see our comments under your detailed questions below.

Overlapping powers policy

2. Is the policy clear on the factors we will take into account when we have a choice of which power to use?

No.

We found this policy document difficult to follow. It does contain some useful information, such as the table setting out situations where both regulatory and criminal powers may be available, but it seems to also spend time describing the various new and existing powers available to the Regulator and when they may be used, in non-overlapping powers situations.

It may be better to prepare another document that describes the key powers that the Regulator has (from various Acts of Parliament) and go on to explain your policy in relation to the use of each of these powers – e.g. Contribution Notices are used to provide a remedy, while financial penalties and criminal proceedings are directed towards punishment for serious behaviour and can act as a deterrent. The overlapping powers policy document could then limit itself to examining your policy where you have more than one power available, calling on examples to illustrate where you would choose to use one power rather than another. You should also consider producing a “quick read” document, setting out the key messages, which will be particularly helpful for lay trustees.

We are not sure of the positioning of the three sections dealing with breaches. Are they intended only to relate to the overlapping powers? In addition, the first paragraph under the heading “Breaches of legislation (excluding employer-related investments)” seems misplaced. Perhaps it should be the first paragraph under “Prosecution”?

3. Are the examples useful in illustrating what we will take into account when considering which power to use? Are there any other examples that you would find useful?

Yes.

The examples provide a useful insight into how your new powers might be applied. We do have a concern over your third example, Adviser F, who fails to provide information in a timely manner. If you were to levy a financial penalty for delay and partial submission of the requested information, it seems from your proposed scales under the monetary penalty powers policy, that the lowest it could fall is in the £100,000 - £400,000 band, with a starting mid-point of £250,000.

Even allowing for the highest set of mitigating factors, it could not be less than £100,000. That does seem to be high for cases of low culpability and low harm.

It would be helpful to include examples of the steps trustees could subsequently take to assist the Regulator and how such mitigating action might feed through to reduce the fine that would otherwise have been imposed.

This policy would also be an opportunity to include specific examples concerning sole trustees. This is an emerging area of potentially high risk. TPR's examples could include consideration of the intent behind particular actions and the impact of the governance structure supporting the sole trustee.

4. Do you have any other feedback about the overlapping powers policy?

No.

Monetary penalty powers policy

5. Is the policy clear on the approach we will use when calculating the fine amount?

Yes.

Non-payment of Contribution Notices

You state that failure to pay a Contribution Notice attracts a penalty of 20% of the Contribution Notice value, capped at £1m, with the 20% cut to 10%, capped at £0.5m if payment is received before the Determinations Panel hearing to consider the imposition of a penalty. However, you have not explained why you have set the penalty at the level you have (although we appreciate that, as a "financial penalty" introduced by the Pension Schemes Act 2021 it cannot exceed £1m). Why, for example, have you not chosen to apply an interest-related penalty? We are not disputing the penalty level, but it would be useful for you to explain your reasoning. Is there a similar penalty scale elsewhere in financial services law for non-compliance?

You have also not explored when you will reach for this non-payment power. Subject to the reasonable excuse argument, is it likely to be triggered whenever the amount set out in the Contribution Notice has not been paid by the date set out in the Notice?

We assume that if the fine is not forthcoming you will likely take the matter to Court to enforce payment. If so, should you mention this?

Avoidance of employer debt or conduct risking accrued scheme benefits

We support the concept of a scale derived by reference to the level of culpability of those involved, and the degree of harm to the scheme and saver outcomes. We also support a banding decision by reference not only to the number but also the level of the culpability / harm features. Having a placement in the band decision by reference to aggravating and mitigating factors also appears reasonable. As noted above, the low end of the range is rather high for low culpability/low harm scenarios.

Information gathering

(Notifiable events regime failures (including statements of intent) and false information to trustees and/or the Regulator)

Notifiable events regime failures seem to us to potentially be very different to situations where *"a person has knowingly or recklessly provided false or misleading information"*. We suggest that you should deal with them separately. For example, the *"breach of regulatory requirement with minimal harm to the scheme"* categorisation jars with being reckless etc, although we can see it working appropriately with a number of notifiable events failures.

We also have some concern over the appropriateness of the £0 to £100,000 band for *"breach of regulatory requirement with minimal harm to the scheme"*. This suggests that, for example, the starting point for a failure to notify a "notifiable event", or not to notify within the expected timescale, is £50,000 – whether it is a scheme-related or employer-related event. This does appear to be too high. Are you intending that, in future, the trustees of a scheme with a deficit at its last PPF section 179 valuation, failing to notify the Regulator of every instance when a transfer value of more than £1.5m was paid, will suffer a £50,000 penalty for each breach?

Turning to the provision of false or misleading information, because the person must have done this knowingly or recklessly, we are not sure whether potentially banding by culpability works. We are also not sure whether the Step 2 aggravating and mitigating factors concept works either.

6. Have we identified the relevant factors for assessing culpability and harm as well as the aggravating and mitigating factors? If not, what other factors do you think might be relevant?

Yes

Avoidance of employer debt or conduct risking accrued scheme benefits

You appear to have given a useful list of example features of culpability and harm. Your example factors for placement within the band also seem reasonable.

Information gathering

See our comments above.

7. Do you have any other feedback about the high fines policy?

Additional clarity would be welcome on the approach that will be taken where more than one person is potentially subject to a fine in respect of the same issue (e.g. is a fine per individual or per body corporate) – this should include considering any potential difference in treatment of directors of trustee companies, individual trustees and professional trustees and professional sole trustees.

8. Is the policy clear on the options available to us and in which circumstances they may be used?

Yes.

Information to be gathered

You have provided a useful list of the sort of information that may be requested showing the breadth of your potential investigations. Under the heading of "relevant correspondence" and "relevant advice" it would be useful to have some further insight, given our understanding that you may request all e-mail correspondence relating to a topic between certain dates. This, as you will appreciate, can prove to be very time consuming to gather, although we appreciate why you may feel the need to request it in certain situations.

We are not familiar with the Regulation of Investigatory Powers Act 2000 and we suspect your intended audience will also be in the same position. It would be useful to draw out some key points from this Act that are relevant to the way in which you will gather information, or any situations where you would potentially undertake covert surveillance.

Voluntary requests

It would be useful if you could give more detail on the circumstances in which you will seek information voluntarily; for example, would this be your normal way of operating, only reaching for your statutory powers when circumstances dictate? And what is the situation for someone approached with a request to disclose information on a voluntary basis? It would be helpful to clarify if they could be at risk of breaching client confidentiality if they provide information where there is no legal obligation to do so.

You mention "voluntary interviews". Do these operate in a different manner to the statutory interviews and if so, what are the differences? Are they akin to voluntary interviews by the police? For example, we assume that an individual can decline the request, or can attend but decline to answer certain questions. You also say, shortly after mentioning voluntary interviews, that you will give reasonable notice if you require attendance at an interview. This doesn't sound very voluntary – we presume this should say 'request' (or similar) rather than 'require'.

Section 72A interviews

We note that the new section 72A(1) of the Pensions Act 2004 requires an individual, invited by you, to attend an interview and to answer questions and provide explanations. The new section 77(1A) provides that if, without reasonable excuse, they neglect or refuse to attend, or to answer questions or provide explanations, they are guilty of an offence However, it is not clear to us how that works in the context of the potential use of your criminal powers. Presumably, an individual would not have to answer questions that potentially incriminate themselves (and failure to answer against this background would not in itself be an offence)?

We also have some difficulty in understanding the existing section 310 of the Pensions Act 2004. Section 310(1) seems to say that any statements given in accordance with an "information requirement" (which includes those given under section 72A) are normally admissible in any proceedings. This seems to be contrary to your statement in the guidance that you are not permitted to use the answers given against the individual in criminal proceedings etc. In relation to this we don't know what Section 310(2) is saying. We suggest it would be useful in your guidance to provide an explanation of Section 310 rather than simply reference it.

Inspections – section 73 of PA04

It would be helpful for the policy to cover use of inspection powers for individuals (including advisers) who are working from home and any particular procedures the Regulator would adopt before carrying out an inspection of a person's home.

9. Is the policy clear on the consequences for non-compliance with our information gathering powers?

No.

We note the significant range of enforcement options available in the event of there being insufficient co-operation. However, other than cross-referencing the overlapping powers policy, this part of the policy document seems to limit itself to setting out these enforcement options, which are detailed in legislation, without explaining the circumstances in which you would call on them.

10. Do you have any other feedback about the information gathering policy?

No.

Disclaimer

Produced by the Association of Consulting Actuaries Limited December 2021