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Our approach to the investigation and prosecution of the new criminal offences

The Pensions Regulator

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Response from the Pensions Management Institute to TPR consultation: 'Our approach to the investigation and prosecution of the new criminal offences'

Introduction

PMI is the professional body which supports and develops those who work in the pensions industry. PMI offers a range of qualifications designed to meet the requirements of those who manage workplace pension schemes or who provide professional services to them. Our members (currently some 6,000) include pensions managers, lawyers, actuaries, consultants, administrators and others. Their experience is therefore wide ranging and has contributed to the thinking expressed in this response. Due to the wide range of professional disciplines represented, our members represent a cross-section of the pensions industry as a whole.

PMI is focused on supporting its members to enable them to perform their jobs to the highest professional standards, and thereby benefit members of retirement benefit arrangements for which they are responsible.

We trust that the feedback in the following pages proves helpful.

1. Given that the offences have now been set in law, is our overall approach consistent with the policy intent?

We support the work being done by The Pensions Regulator (TPR) and others in seeking to address serious intentional and reckless behaviour and improving standards of governance and conduct in relation to pension schemes.

We are grateful for TPR's confirmation that it does not intend for its guidance to change commercial norms or accepted standards of corporate behaviour in the UK (i.e. consistent with the government's policy intent). However, we are concerned that the current drafting of TPR policy does not achieve this aim. In particular, we do not believe it addresses the concerns raised by the industry during the development of the law, in relation to the broad and ill-defined scope of the new powers, and the circumstances when they will apply. We believe that this will have the impact of altering or reducing normal commercial activity.

We appreciate that TPR has no power to change the drafting of the law, but we do believe that there is a room to provide significant additional clarity and certainty to the industry, by setting out additional examples and parameters in respect of circumstances in which TPR may use its powers.

We appreciate that TPR comments that it is not the only prosecuting authority in respect of the offences. We believe because of this there are added grounds for additional examples to be provided. Amongst other things, we believe that greater detail in respect of the interaction between the criminal penalties and the civil sanctions including in sections 58C and 58D would be of assistance.

We would also welcome a de minimis rule to be adopted by TPR tobring some clarity to the use of the concept of "materiality" that has been frequently used in the offences. This would reduce uncertainty for those advising on this in practice. For example, that a reduction of resources below a certain percentage (or where a larger reduction still leaves resources that are significantly greater than the size of the pension scheme) would not be considered to be subject to the new powers.

2. Is the policy clear on our overall approach to the new offences? If not, how could we make it clearer, without constricting the powers?

As regards the defence for a material detriment that an individual/company gave due consideration to whether or not the intended act or failure to act would cause material detriment, and reasonably concluded that it would not, we note that this defence is only available if TPR is satisfied that the relevant conditions are met. This may pose a difficulty in practice without substantial guidance, as a person and/or their advisers may be uncertain as to what circumstances and evidence would likely give rise to TPR being satisfied. Again, therefore we believe that this is an area where substantial guidance will be important.

Similarly, we believe that the concept of what is incidental for the purposes of a reasonable excuse would benefit from substantial additional guidance and examples.

We appreciate that TPR has the ability to choose between civil and criminal penalties for offences. However, we believe that there is a strong argument that TPR should set out to any person investigated whether or not that investigation is to be for civil or criminal grounds and that any one investigation shouldnot give rise to the potential for being used for either of a civil or criminal action. Reasons for this include the underlying uncertainty that this would pose for any person subject to an investigation and in particular would cause difficulty having regard to thedifferent procedural protections and processes in criminal and civil matters. For example, if an investigation is to be brought for criminal matters, then a defendant may choose to rely upon the various protections against self-incrimination.

We note that the limitation period for issuing a Contribution Notice is within six years of the date of the act or failure, whereas there is no limitation period applicable to the criminal powers. The prevailing threat of criminal sanctions would make it difficult for individuals/companies to plan on a 6-year basis. This may act as a bar to commercial conduct, and we would welcome the introduction of guidance that clarifies that only extreme behaviour (with examples) would attract the unlimited period.

3. Is the policy clear on how cases will be selected for investigation? If not, how could we make it clearer?

We believe that TPR's draft policy could be further added to in order to alleviate the concerns that have already been raised by the industry.

We note that TPR's powers under sections 58A and 58B are extremely wide, as these criminal offences can be committed by anyone other than aninsolvency practitioner appointed and acting within the scope of that appointment (whereas a Contribution Notice can only be issued to someone who is the employer or was associated with or connected to the employer). Likewise, the related civil penalties under 58C and 58D have the same general wide application.

We acknowledge the absence of a clearance regime or an equivalent provision applicable to the criminal offences. We are concerned that there is no opportunity to seek protection and would like TPR to recognise the level of comfort that this would bring. We assume that this has not been explicitly offered because of the criminal aspects to the offences.

TPR states that it would "not usually expect to prosecute anyone under section 58B who could establish a statutory defence to a material detriment Contribution Notice under section 38B". It would be beneficial if this was further amplified with additional guidance. We would assume that for any protection on a particular set of facts, clearance on a Contribution Notice would be taken to extend to the other offences as well, but it would be helpful if this could be explicitly confirmed.

We consider some of the examples of cases to be selected for investigation could give rise to concern. The reference to a legal adviser who "helps an employer to lay a trail of false evidence" suggests that legal privilege will be breached by TPRb(or that they will expect it to be waived). It would be helpful for the policy to address how the concept of legal privilege will interact withTPR's investigative powers, particularly as the policy states that TPR expects those being investigated to "put forward suitable and sufficient evidence for their actions".

In respect of your actuarial example, it would be helpful if TPR could give further clarity to which element(s) of the example would give rise to a possible case for prosecution: (i) the lack of "requisite expertise"; (ii) that "their regulatory body does not regulate the giving of such advice"; (iii) that the "actuary expects the schemetrustees to rely on" their advice (even though the trustee is not their client); and/or (iv) that the advice relates to a flexible apportionment arrangement. If the offence is under (i), (ii) and/or (iii), it would be helpful if TPR explicitly confirms that the regime for existing debt apportionment mechanisms will continue to be available to employers and trustees without amendment.

4. Are the examples useful in illustrating the factors that we will take into account when considering whether a potential defendant has a reasonable excuse to act or fail to act? Are there any other examples you would consider helpful?

We support the underlying principles of TPR's draft policy in that it isseeking to reduce extreme behaviour and not change commercial norms.

In the main the examples that TPR uses to support its policy are at the extreme end of what is obviously mal practice. However, it is the pleth or a of more common place actions that are of much more interest and concern to industry participants, and which we believe could cause changes in commercial norms, in the absence of clearer guidance.

If TPR wishes to avoid this outcome, it would be helpful to have more examples that are more borderline/nuanced in their presentation. As an example, TPR could set out a list of everyday occurrences that have the potential to be considered appropriate for prosecution. The PMI would be pleased to work with TPR to make suggestions of activities which our members would welcome clear guidance on.

It would also be beneficial to obtain greater clarity about activities and behaviours TPR would view as acceptable. We are concerned that there is currently not enough clarity around the subjective elements of the offences and that this in turn is not helpful to practitioners, sponsors and trustees in navigating normal commercialpractice. There is the chance that if individuals do not understand how they will be measured against the new offences, they may seek advice on everything and that this could lead to all corporate transactions becoming more expensive (or not being completed).

We also foresee risks that future innovation in this sector is stifled, that sponsors of open DB schemes feel compelled to close their arrangements and/or that the practice of granting of additional security from group/parent companies will greatly diminish; all to the potential disadvantage of scheme members.

We are now looking for clear guidance from TPR on how it plans to implement and use its new powers.

5. Do you have any other feedback?

N/A