

# Sixty second summary

## Protecting DB schemes: a stronger Pensions Regulator

As promised in March's White Paper<sup>1</sup>, the Government has come forward with proposals to enhance the Pensions Regulator's ability to intervene in favour of defined benefit pension schemes.<sup>2</sup> They include measures intended to ensure that it is made aware of planned transactions at an earlier stage, and has an arsenal of new and improved weapons to deploy if things go wrong.

### Notifiable events

Scheme employers and trustees are already obliged to notify the Regulator about the occurrence of certain specified events. The Government proposes to add to the list of events to be reported by employers, so that it includes

- sale of a material part of the business or assets of any employer that bears the responsibility for funding at least twenty per cent of a scheme's liabilities;
- any grant of security that gives the creditor priority over the scheme;
- certain changes to the board of directors or senior management (appointment of a chief restructuring/transformation officer; appointments made to safeguard the interests of external parties; and changes to at least two of certain roles—chairman, chief executive officer, and chief financial officer—within a six-month period);
- seeking independent advice as a prelude to potential insolvency or restructuring; and
- deferral, amendment or waiver (as well as breach) of the employer's banking covenant.

Sale of a controlling interest in, or the business or assets of, a scheme sponsor, and the granting of security in priority to scheme debt would have to be notified when agreement in principle has been reached, rather than after completion. The Government proposes to remove the obligation to report wrongful trading, on the grounds that it is rare for wrongfully trading employers to make the fact public. An updated version of the Pensions Regulator's *Code of Practice No. 2: Notifiable Events* would give guidance on some aspects of the proposed changes.

### Declaration of intent

Sale of a controlling interest in, or the business or assets of, an employer, and the granting of security in priority to scheme debt would also give rise to an obligation to make a '*declaration of intent*', before completion of the transaction. It would be addressed to the trustees, with a copy sent to the Regulator, and would cover

- the details of the plans;
- confirmation that the trustees have been consulted and whether or not they endorsed them; and
- how any detrimental effect on the scheme will be alleviated.

### Clearance

The law allows for the parties to a proposed transaction to apply to the Regulator for a '*clearance statement*' that gives them binding assurances that, in so far as the facts as described are correct, it will not issue contribution notices or financial support directions against them. The Regulator is to revise its guidance to be clearer about

- the '*material detriment test*' (by which the Regulator determines whether an act or deliberate omission was materially detrimental to the likelihood of members receiving their benefits—one of the ways in which an employer or its associates

<sup>11</sup> *Protecting Defined Benefit Pension Schemes* (Cm 9591), March 2018

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/693655/protecting-defined-benefit-pension-schemes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/693655/protecting-defined-benefit-pension-schemes.pdf) .

<sup>2</sup> *Protecting Defined Benefit Pension Schemes: A Stronger Pensions Regulator*

[assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/719779/protecting-defined-benefit-pension-schemes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719779/protecting-defined-benefit-pension-schemes.pdf).

- can put themselves at risk of being targeted for a contribution notice);
- the sorts of events that are apt for clearance, and how they apply in relation to financial support directions (which, unlike contribution notices, are not ‘fault-based’, in the sense of being dependent upon the commission or omission of an act); and
- the clearance process, including the stage at which applications ought to be made.

## Sanctions

In its 2017 manifesto, the Government mooted the idea of a new criminal offence for company directors who deliberately or recklessly endanger the ability of a pension scheme to meet its obligations.<sup>3</sup> The suggestion was carried through to this year’s White Paper. Under the latest proposals, criminal sanctions would apply not only to ‘*wilful or grossly reckless behaviour in relation to a defined benefit pension scheme*’, but also to non-compliance with a contribution notice or the notifiable-events obligations (the latter extending to trustees). Intended to punish ‘*the most serious cases of wrongdoing*’, the new crimes would carry the possibility of unlimited fines or imprisonment (or both).

Additionally, the Government plans to empower the Regulator to impose civil fines of up to £1million in some cases. The examples given include failure to comply with the revised notifiable-events framework and the new declaration of intent, as well as ‘*elements of the DB funding code*’.

## Contributions notices & financial support directions

The Government also plans to enhance the Regulator’s powers to issue contribution notices and financial support directions. In the case of contribution notices, that would involve

- a closer relationship between the amount demanded and the extent of the loss or risk to the scheme;
- allowing the maximum that can be demanded (the debt on the employer) to be calculated around the time of the decision to impose the contribution notice, rather than at the date of the act or omission in question, and for the amount demanded to be increased to take account of delayed payment; and
- allowing the ‘*material detriment test*’ to be based on an assessment of the effect of an act or deliberate omission on the strength of the sponsoring employer (this is, seemingly, as an alternative to the current test, which requires the Regulator to determine whether the act or omission has had a materially detrimental effect on the likelihood of accrued benefits being received in full);

So far as financial support directions (FSDs) are concerned, the proposals are that the Government will

- (apparently) allow the FSD to specify the support to be provided (rather than letting targets put forward proposals that the Regulator then approves or rejects);
- limit the forms of support to either a cash payment or a guarantee in relation to all or part of the employer’s scheme liabilities;
- review the basis upon which scheme employers are considered to be ‘*insufficiently resourced*’ (or not);
- allow the Regulator to target individuals—humans, as opposed to companies—in more cases (currently, it can only issue an FSD to an individual if he or she is the scheme employer, or is associated with the individual who is the employer—by marriage, for example);
- specify that an FSD can be judged reasonable because of (amongst other things) the actions of the target in creating or increasing risk;
- give the Regulator power to impose a contribution notice on those associated with or connected to the target of an FSD;
- consider whether and in what circumstances the Regulator might be able to issue FSDs based on a state of affairs that existed more than two years in the past; and
- allow the Regulator to make FSDs, in the form of a requirement to make a cash payment, in connection with schemes that have entered the Pension Protection Fund.

**These are material and, overall, reasonable proposals. They would signify that companies must take their DB liabilities seriously, and that the Regulator has both licence and means to act decisively if they do not.**

<sup>3</sup> <https://www.conservatives.com/manifesto>.