

# Sixty second summary

## Stronger Regulator to protect DB schemes

The Department for Work and Pensions (DWP) has announced the outcome of a consultation exercise on proposed new powers for the Pensions Regulator.<sup>1</sup> It will create new notifiable events, require ‘*declarations of intent*’ to be made before some corporate transactions, introduce additional penalties (including criminal offences) for non-compliance, revise the Regulator’s ‘moral hazard’ powers, and boost its information-gathering abilities.

### Corporate transactions

#### Notifiable events

There will be two new events about which employers must notify the Regulator. They will occur when a decision is made to (i) sell a material proportion of the business or assets of an employer that is responsible for funding at least twenty per cent of a pension scheme’s liabilities; or (ii) grant security over a debt that gives the creditor higher priority than the scheme. It will no longer be necessary for employers to give notification about wrongful trading.

A proposal to require notification to be given at an early stage (rather than after the event, as is common practice now) has been parked whilst the DWP and the Regulator consider the best approach. The Government recognizes the need for suitable definitions of phrases (e.g. ‘*material proportion*’) used in the new notifiable events; another consultation exercise will follow on the details. The consultation outcome document also mentions the possibility of new scheme-related events and others specific to commercial DB consolidators.

#### Declarations of intent

The two new notifiable events, as well as an existing one that applies when a company decides to relinquish control of a sponsoring employer, will also trigger the obligation to produce a ‘*declaration of intent*’. It will be addressed to the trustees, with a copy sent to the Regulator. The contents of the declaration have yet to be settled, but the idea is that it will describe the proposed transaction and how any harm to the scheme will be alleviated.

#### Guidance

The Regulator is to revise *Code of Practice No. 2: Notifiable Events* and associated guidance to set out its expectations for the timing of notifiable events and declarations of intent, and stress the importance of collaboration between trustees and sponsors. The Government plans to formally assess the likely effects on businesses. The Regulator will also review its guidance on the clearance process for corporate transactions.

### Fines & Offences

The DWP will allow the Regulator to impose civil penalties of up to £1 million for some ‘*serious breaches*’, including ‘*wilful or reckless behaviour in relation to a pension scheme*’; failure to comply with contribution and financial support notices or the notifiable events or ‘*declaration of intent*’ rules; and knowingly or recklessly providing false information to trustees or the Regulator. Non-compliance with a contribution notice, and ‘*wilful or reckless behaviour ...*’ will also become *criminal* offences, which could be met with *unlimited* fines and, in the case of wilfulness/recklessness, by imprisonment for up to seven years.

<sup>1</sup> <[assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777758/response-protecting-defined-benefit-pension-schemes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777758/response-protecting-defined-benefit-pension-schemes.pdf)>.

## Contribution notices

A contribution notice essentially demands that an employer (or an associate of the employer) pays a specified amount to a DB scheme because its actions were intended to prevent full recovery of a 'section 75' (buy-out-based) deficit, or were materially detrimental to its ability to pay members' accrued benefits. The payment required by a contribution notice can be all or part of the scheme's buy-out deficit.

The DWP is planning to amend the legislation on contribution notices to clarify some issues. It will specify that the effect of a party's actions on a scheme is relevant when determining the amount payable, and that the 'material detriment test' would be met if the amount recoverable by the trustees in a hypothetical employer insolvency, or the value of the employer relative to the scheme's 'section 75' deficit, has been materially reduced by an act or omission.

At the moment, the sum specified in the notice is calculated at the time of the act or omission in question, which can be some time in the past. The DWP proposes to allow the calculation to take place closer to the date of the Regulator's decision to issue the notice. It is considering whether and how to specify a method for uprating the sum specified to take account of delays in payment.

## Financial support directions/notices

A financial support direction obliges that some form of additional support is put in place for sponsors that are service companies, or are otherwise '*insufficiently resourced*' relative to their scheme liabilities. Unlike a contribution notice, a financial support direction carries no implication of wrongdoing, and cannot ordinarily be addressed to individuals. At present, financial support directions can take several forms. The recipient of the direction is expected to put forward its plan for providing the required support, and the Regulator either approves or rejects the proposed arrangements.

The DWP intends to amend the legislation to make it a single-stage process, under which the Regulator will either require the recipient to provide a cash payment or become joint and severally liable with the employer. As it will become less of a direction and more of a demand, the power will be rebranded as a 'financial support *notice*'. The possible targets for the notice will be broadened to include individual controlling shareholders of the employer, but not its directors; if, however, a financial support notice is not complied with, the Regulator will be able to issue contribution notices against the original recipient and any person (including individuals) associated with it.

The DWP intends to re-define '*service company*' and '*insufficiently resourced*', in the latter case to focus more on the scheme's funding position rather than (as currently) the value of the employer relative to its estimated section 75 debt. It will re-consider whether to allow the Regulator to look back further than two years to identify the existence of the conditions necessary for a financial support notice.

## Information gathering

The Regulator will be given new powers to require people to submit to an interview (subject to prior written notice) and to inspect premises (without notice, if it thinks that an unannounced visit is necessary to ensure that documents are preserved). Those who fail to co-operate will incur new fixed and escalating penalties; the maximum fines have yet to be decided, but are likely to be commensurate with those that can currently be imposed under auto-enrolment and master-trust legislation (£400- to-£500 fixed penalties, and escalating penalties capped at £10,000 per day in some cases).

**Most of the changes have broad industry support. Many will, however, require primary legislation, or further rounds of consultation, or both; and it may be that 6 April 2020 is the earliest possible date on which they can come into effect. Meanwhile, the Regulator is already committed to a '*clearer, quicker and tougher*' approach.**