

# Sixty second summary

## Government consults on expansion of DB notifiable events

The Department for Work and Pensions (DWP) has published draft Regulations to amend the ‘notifiable events’ regime for defined benefit (DB) pension schemes.<sup>1</sup> It would create new employer-related notifiable events, and tweak some of the existing ones, with the intention of providing the Pensions Regulator (and trustees) with more—and more-timely—information about significant corporate transactions. The legislation will probably come into force on 6 April 2022.

### History

The pensions legislation obliges the sponsors of DB schemes to notify the Regulator when prescribed events occur in relation to the employer (there are also scheme-related events about which trustees must give notice). In its March 2018 White Paper, *Protecting Defined Benefit Pension Schemes*, the DWP proposed that the existing notifiable events framework be improved by widening its coverage to include more corporate transactions, and by ensuring that the Regulator is made aware of events at an earlier stage, so that it can participate in discussions sooner. That intention was given statutory force via the *Pension Schemes Act 2021*, with the fine details to be supplied by the draft *Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021* that the DWP has now put out for consultation purposes.

### Finer points

The draft Regulations are largely in accordance with pre-2021 Act discussions, with a few noteworthy developments that we will highlight later in this Summary. The expected changes are as follows:

- the requirement to notify wrongful trading would be deleted (those engaged in wrongful trading are highly unlikely to ‘out’ themselves to the Regulator, as the absence of any historical notifications under this heading shows);
- the existing requirement to give notice of a controlling company’s decision to relinquish control of the scheme sponsor would be tweaked to re-position notification at the preliminary stage (when a ‘*decision in principle*’ has been made, prior to negotiation or agreement of terms), and to cover the receipt of offers to acquire the employer (before any decision);
- two new notifiable events would be added, applying when a ‘*decision in principle*’ has been made either to—
  - sell a material part of the employer’s business or assets; or
  - grant or extend a ‘*relevant security*’ that would give the creditor priority over the pension scheme trustees;
- there would be additional requirements to notify certain events (involving intention to relinquish control over a sponsor, sell a material portion of its business or assets, or grant higher-priority security) at the point when ‘*main terms have been proposed*’, and to provide the Regulator and the trustees with ‘*accompanying statements*’ (described during the policy-making stages as ‘*declarations of intent*’); and

<sup>1</sup> *Strengthening The Pensions Regulator’s Powers: Notifiable Events (Amendments) Regulations 2021* (September 2021)  
<[www.gov.uk/government/consultations/strengthening-the-pensions-regulators-powers-notifiable-events-amendments-regulations-2021](https://www.gov.uk/government/consultations/strengthening-the-pensions-regulators-powers-notifiable-events-amendments-regulations-2021)>.

- the accompanying statement would have to describe the event and the proposed terms on which it will take place, any adverse implications for the pension scheme with details of any steps taken to mitigate them, and any related communications with the trustees.

The draft legislation spells out what sorts of security would and would not be '*relevant*'. For example, it encompasses securities granted or extended by the employer itself, or by one or more of its subsidiaries. The threshold of relevance would be reached when the security level exceeds a quarter of either the employer's consolidated revenue or its gross assets.

The draft statutory instrument also defines what counts as a '*material proportion*' of a business (25 per cent of its annual revenue) or of its assets (a quarter of their gross value). The bar for materiality could be cleared either with a single transaction, or cumulatively, taking account of other sales decided upon or completed within the same one-year period.

## What's new?

An earlier version of the proposals would have confined the obligation to give notice of business or asset sales to cases in which the employer is liable for at least twenty per cent of the scheme's liabilities. The Government dropped that condition because of the potential challenges involved in determining whether that liability threshold is met; and because scheme trustees who would not be the ones with the obligation to notify might nevertheless be pushed to make the call, at short notice and considerable cost.

The 2021 Act suggests that an accompanying statement might have to describe any adverse effects on the pension scheme. The draft Regulations adopt that idea and add to it, saying that the statement must also cover any impairment of the sponsor's ability to meet its obligations to support the scheme.

The Act requires that the Regulator is notified about material changes to events or their expected effects (for example, if plans fall through). The draft Regulations say that a '*material change*' can include a change to important terms or to the steps taken to mitigate adverse effects.

## Next steps

The consultation period lasts until 27 October 2021. There is a small discrepancy between two versions of the Regulations published by the Government: the HTML version specifies that the changes come into force on 6 April 2022, whilst the PDF file says that the date is '*to be confirmed*'. The 2022 commencement date would be consonant with the Regulator's recent *Corporate Plan*.<sup>2</sup> The Regulator will need to update *Code of Practice No. 2: Notifiable Events*, and will publish related guidance.

The changes will turn notification of important business transactions into a two-step affair. First contact with the Pensions Regulator should be early on, when the outlines of the deal have been traced; then a more-detailed picture will have to be painted for the Regulator and trustees once the main elements of the transaction, and its implications for the pension scheme, have been filled in.

The threshold for materiality in business or asset sales could be argued upwards or downwards; there is probably no 'correct' level. We can also imagine some debate about '*when the main terms... have been proposed*' in some cases, so it would be helpful to see it covered at length in the Regulator's guidance. Until we find how the Regulator will respond to notices in practice—whether its involvement will delay time-critical activities—it is hard to be confident about how it will pan out. On the whole, though, we are hopeful that it will encourage early consideration of pension issues and engagement with trustees and the Regulator. The prospects of £1m fines for compliance failures and criminal convictions for misinformation will concentrate minds too.

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<sup>2</sup> *Corporate Plan 2021 – 24* <[www.thepensionsregulator.gov.uk/en/document-library/corporate-information/corporate-plans/corporate-plan-2021-24#624ce782c1c54508a7eb3e6c46d389ef](https://www.thepensionsregulator.gov.uk/en/document-library/corporate-information/corporate-plans/corporate-plan-2021-24#624ce782c1c54508a7eb3e6c46d389ef)>.