100 HYMANS # ROBERTSON

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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.[1] 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—

[1] *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>.

  - 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
- 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*.[2] 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

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

with trustees and the Regulator. The prospects of £1m fines for compliance failures and criminal convictions for misinformation will concentrate minds too.

NICs-based levy to fund health & social care

The UK Government announced its intention to impose a 1.25 per cent health and social care levy on employees, employers and the self-employed, from April 2022. The levy will be based on the National Insurance contribution (NIC) system, and the money that is raised will be ring-fenced to provide more funding for the National Health Service and for reform of adult care services.[3]

The levy will be introduced in two stages, so that collection can begin whilst the necessary changes are made to the tax system. The imposition of the levy is to begin, effectively, in April 2022, via a temporary 1.25 percentage points increase to the rates of NICs for employees, employers, and the self-employed. The dividend tax rates will also be increased by 1.25 percentage points from April 2022.

From April 2023, a standalone 1.25 per cent Health and Social Care Levy on earned income will be created, at which point the rates of NICs will be returned to their 2021/22 levels. It will apply to employees and employers who are liable for Class 1 NICs and self-employed persons liable for Class 4 NICs, and will be charged on the same earnings and profits, but (unlike NICs) will affect those who continue to work after reaching State pensionable age. As with NICs, the Levy will be the responsibility of Her Majesty's Revenue and Customs, and it will be collected via the PAYE and self-assessment tax return systems.

	NICs Rates				
	Employee		Employer	Self-employed	
Year	**Main %**	**Additional %**	**%**	**Main %**	**Additional %**
2021/22	12	2	13.8	9	2
2022/23	13.25	3.25	15.05	10.25	3.25
2023/24	12	2	13.8	9	2

	Health &Social Care Levy		
Year	**Employee %**	**Employer %**	**Self-employed %**
2023/24	1.25	1.25	1.25

We should learn some more details when the legislation for the temporary NICs increases and the subsequent Levy is laid in Parliament—the Government's policy paper indicates that this should happen '*shortly*'—but it seems likely that the use of salary-sacrifice arrangements for pension contributions will become even more attractive.

[3] *Build Back Better: Our Plan for Health and Social Care* (September 2021) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015736/Build_Back_Better-_Our_Plan_for_Health_and_Social_Care.pdf>.

New criminal offences in force—the Regulator's prosecutions policy

The Pensions Regulator has announced the outcome of a consultation exercise concerning its prosecutions policy for the new criminal offences introduced by the *Pension Schemes Act 2021* with effect from 1 October 2021.[4] The policy statement, revised in light of consultation responses, is now operational.[5] In a related move, the Regulator is seeking comments on a further three draft policies, broadly intended to situate the criminal prosecution option within the context of its other regulatory powers.[6]

The Act has created two criminal offences concerned with conduct intended to result in avoidance of employer debt, or which knowingly or foreseeably had a detrimental effect on the likelihood of members receiving their accrued benefits. The Regulator has sought to address concerns raised during the consultation exercise, about the potential for criminalization of ordinary behaviour, by providing more clarity on the circumstances in which criminal prosecution is possible, and those in which it is unlikely.

For example, there is a new appendix setting out circumstances in which a person who might otherwise be caught by the new offences will be considered to have a 'reasonable excuse'. It provides reassurance about the continued acceptability of common business activities, as well as good-faith use of the statutory mechanisms contained in the employer debt and corporate insolvency legislation. It also suggests that advisers acting in accordance with their professional obligations and ethical standards should be safe from prosecution. Another appendix contains a case study that considers a hypothetical restructuring scenario from the perspectives of the employer, its parent company, lenders and an arm's-length customer of the sponsoring business.

The final version of the policy contains an expanded section on the relevance of adequate and timely mitigation when establishing whether a person had a reasonable excuse. In summary, the messages are that mitigating steps should be taken as early as possible and should treat the scheme fairly in relation to other stakeholders, and that less-detrimental courses of action should receive due consideration. The Regulator will pursue a memorandum of understanding with the other organizations that are able to initiate prosecutions for the new offences, to agree on a coordinated approach.

There remain some likely points of contention in the policy. For example, the Regulator refuses to be drawn on the period for which businesses might need to retain records of their activities and deliberations, arguing that Parliament has set no time limit for prosecutions. It also maintains that, although the offences cannot apply to events occurring before 1 October 2021, details of a person's earlier conduct could nevertheless be relevant to the assessment of 'reasonableness'.

Contextualizing the new powers: further consultation

The Regulator was asked about the interaction of the new criminal prosecution option with other powers and courses of action that are open to it: for example, when it might prosecute rather than fine or impose contribution notices. In response, the Regulator has published an additional consultation paper on three draft policies connected with the *Pension Schemes Act 2021* changes:

- an overlapping-powers policy, for cases in which it has the option to pursue either criminal sanctions or civil enforcement, or both in parallel;
- a monetary-penalty-powers policy, on its new abilities to impose fines of up to £1m; and
- an information-gathering-powers policy, on its use of 'section 72' notices, its interview and inspection powers, and its application of fixed and escalating penalties for non-compliance.

The consultation period is from 29 September to 21 December 2021.

Updated contribution notices Code

The Regulator has also announced the outcome of its consultation on a revised version of Code of Practice No. 12, updated to cover the new 'employer resources' and 'employer insolvency' tests for the imposition of contribution notices (in addition to the existing guidance on the 'material detriment' test.[7] It says that it will consider publishing separate practical

[4] <www.thepensionsregulator.gov.uk/en/document-library/consultations/consultation-on-our-approach-to-the-investigation-and-prosecution-of-the-new-criminal-offences/criminal-offences-consultation-response>.
[5] <www.thepensionsregulator.gov.uk/en/document-library/strategy-and-policy/criminal-offences-policy>.
[6] <www.thepensionsregulator.gov.uk/en/document-library/consultations/new-enforcement-policies-consultation>.
[7] <www.thepensionsregulator.gov.uk/en/document-library/consultations/code-of-practice-12-consultation/response-to-the-code-of-practice-12-consultation>.

guidance on the use of its contribution-notice powers. It is resistant to the idea that it might publish a comprehensive list of cases in which the tests would and would not be satisfied, or the materiality thresholds that it will apply.

Employers and advisers will welcome the additional clarification, as the Regulator attempts to allay concerns over scope. The addition of clearer examples and a case study offers better insight into how the Regulator might apply the powers in practice, and where the bar for criminal prosecution could be set. The policy also reiterates the message that criminal sanctions will be used only in the most flagrant cases of misbehaviour.

Whilst the threat of the Regulator using the 'nuclear option' might be reasonably remote, the increased focus and governance requirements are likely to push defined benefit schemes higher up corporate agenda. To avoid being caught out by the changes, those engaging in corporate transactions, restructuring or refinancing will need to think carefully about the circumstances, seek advice, and document their decisions thoroughly to demonstrate that due consideration has been given to the scheme. Trustees should engage with scheme sponsors accordingly.

Regulators spark discussion on consistency in VfM assessments

The Pensions Regulator and the Financial Conduct Authority have published a joint discussion paper in which they invite comments on proposals intended to promote consistency and transparency in value for money (VfM) assessments in money purchase schemes.[8]

The regulators would like to establish a common framework, amongst the schemes that they regulate (broadly, trust-based schemes in the case of the Pensions Regulator, and contract-based schemes for the FCA), for assessing and disclosing VfM. The idea is to promote consistency in assessments, which would be disclosed publicly, thereby enabling comparison of schemes. This would allow pension providers to see where they need to improve and harness the forces of competition to encourage them to do so; foster competition on quality of service as well as on costs; and provide information that is useful to employers when choosing schemes for their employees. The discussion paper suggests that the information is unlikely to be used by many members; the regulatory bodies instead expect that trustees and governance bodies (the independent governance committees or governance advisory arrangements that contract-based schemes must establish) will use it on behalf of members.

The focus of attention is currently on the accumulation phase: before benefits crystallized. The regulatory authorities' definition of VfM zeroes in on three (perhaps four) aspects that influence long-term outcomes:

- investment performance;
- costs and charges; and
- customer service and governance.

The regulators envisage an annual process of VfM assessment and disclosure. Their discussion paper asks numerous questions, about the most appropriate ways of measuring and presenting investment performance, to what extent and how risk adjustments should be used, which charges and transaction-cost definitions should be employer, how to quantify good governance and service standards, and what benchmarks might be useful for each element.

The regulatory bodies note the existence of new VfM-related obligations in Department for Work and Pensions legislation and statutory guidance that came into force on 1 October 2021.[9] Occupational pension scheme trustees are thereby obliged to disclose net returns on investments relating to their default arrangements and other funds in which members are invested; and, in the case of schemes with less than £100m in assets, to compare their member-borne charges and transaction costs with those of at least three larger schemes, and assess their performance against certain administration and governance criteria. The discussion paper raises questions about the extent to which VfM assessments under the common framework should be aligned with the DWP provisions. However, the establishment of a common framework that supports VfM is presented as a longer-term project, indeed, the discussion paper says that even the initial steps toward assessment and disclosure under the proposed common framework will take time.

[8] *Driving Value for Money in Defined Contribution Pensions* (DP21/3) (September 2021) <www.thepensionsregulator.gov.uk/en/document-library/consultations/value-for-money-discussion-paper/driving-value-for-money-in-defined-contribution-pensions>.
[9] See our Sixty Second Summary, *New Value-for-Members' Obligations for Small DC Schemes* (July 2021) <www.hymans.co.uk/media/uploads/New_value-for-members_obligations_for_small_DC_schemes.pdf>.

A common framework is essential if trustees, governance bodies and members are to understand how their schemes are situated within the landscape of trust- and contract-based arrangements. There is no current, basis-agnostic standard for demonstrating 'value for money'. Indeed, there are differences in terminology as well as definition, so that the legislation for trust-based schemes instead uses the phrase 'value for members'. This makes comparisons that cross regulatory boundaries difficult. We look forward to a joined-up approach to value assessment in money purchase pensions that has member outcomes at its heart, rather than focusing narrowly on charges.

BSP earnings link suspended

As was widely expected, the Government has announced its intention to temporarily override the earnings-linking provision within the State pension rules, for the increases due in 2022.[10]

The suspension will be accomplished via the *Social Security (Up-rating of Benefits) Bill*, which had its First Reading in Parliament on 8 September 2021.[11] It did the same last year (in the *Social Security (Up-rating of Benefits) Act 2020*) for the 2021 increases, but for rather different reasons. Then, it was because, with negative earnings growth due to the pandemic lockdown, there would otherwise have been no legal mechanism for *any* increases to the basic and new State pensions. This time, it is because average earnings have bounced back from that low point, with the re-opening of businesses, and would oblige the Government to increase those benefits by around eight per cent. If the Bill passes (as is likely), the 2022 increase will be at least 2.5 per cent, or in line with consumer prices inflation if that is higher (which it will almost certainly be). The non-statutory 'triple lock'—which promises increases at the highest of earnings inflation, prices inflation, and 2.5 per cent—will then kick back in for what remains of this Parliament.

The extraordinary circumstances occasioned by the end of the furlough scheme were not, unsurprisingly, foreseen when the triple-lock formula was introduced. This is a short-term technical issue, and we are pleased that the Government has not been persuaded to abandon the triple lock completely, but has instead made a reasonable accommodation for the one-year anomaly. The UK already has one of the least-generous State pensions across the OECD countries; throwing out the triple lock would have risked more pensioners falling into poverty.

Reducing fixed-rate GMP revaluation

The Department for Work and Pensions (DWP) proposes to reduce the fixed rate of revaluation for guaranteed minimum pensions (GMPs) to 3.25 per cent per annum for those leaving service during the period from 6 April 2022 to 5 April 2027.[12] The rate of revaluation for those whose pensionable service terminates between 6 April 2017 and 5 April 2022 is 3.5 per cent p.a..

The fixed rate is reviewed every five years or so. As usual, the DWP undertook the review on the basis of advice from the Government Actuary's Department (GAD). The GAD recommended a rate of between 3 per cent and 3.5 per cent per annum, based on its short- to medium-term view on earnings growth.[13] The DWP proposes to go with a rate in the middle of GAD's suggested range.

The Government is seeking views on the proposed change, with responses to be submitted by 18 November 2021.

The proposed change anticipates lower medium-term wage growth than was previously assumed. It will be important for schemes that are part way through GMP equalization projects to factor in this potential change.

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10 <www.gov.uk/government/speeches/annual-review-of-state-pension-and-industrial-death-benefit-rates>.
11 <bills.parliament.uk/bills/3042>.
12 <www.gov.uk/government/consultations/guaranteed-minimum-pension-fixed-rate-revaluation/guaranteed-minimum-pension-fixed-rate-revaluation>.
13 <www.gov.uk/government/consultations/guaranteed-minimum-pension-fixed-rate-revaluation/annex-a-government-actuarys-department-report-fixed-rate-of-revaluation-of-guaranteed-minimum-pensions>.

PPF 90-day payment window extended

The Pension Protection Fund (PPF) has extended for another year the availability of a 90-day window for payment of levy invoices. The extension is available to those who can show that they are suffering financially due to the SARS-CoV-2 pandemic.[14]

Usually, the levies are due within 28 days of receipt of the invoice, with late payments incurring interest. In June 2020, the deadline was extended to 90 days, for those who had been adversely affected by the pandemic. The PPF has now announced that the extension will also apply to the 2021/22 levy payments. Schemes and sponsoring employers can apply for a payment extension within 28 days of receiving their invoice, and must complete an online form to explain how they continue to be affected by the pandemic.

Pension Schemes Newsletter 133

Her Majesty's Revenue and Customs issued the 133rd edition of its *Pension Schemes Newsletter*.[15]

It has delayed a forthcoming feature of the Managing Pension Schemes Service that will provide scheme administrators with lists of the schemes that they need to migrate over to the Service. It was due to launch on 19 October 2021, but will not now be available until November. There should be more information in the next Newsletter.

The Revenue thinks it has fixed a problem that it first acknowledged back in December 2017 concerning the reporting of multiple small pots payments via the Real Time Information system, which was sometimes merging reports in error. There is revised guidance on how such payments should be recorded from now on.

It seems that the logging of updates to the *Pensions Tax Manual* glitched sometime in March 2021. The Revenue has corrected the error, and backfilled the missing information.

[14] < www.ppf.co.uk/press-releases/ppf-confirms-levy-payment-extension>.
[15] <www.gov.uk/government/publications/pension-schemes-newsletter-133-september-2021/pension-schemes-newsletter-133-september-2021>.

And Finally…

As the nights draw in and we approach that celebration of the Gothic and macabre that is Hallowe'en (although not so much when one has small children planning to go 'trick or treating' whilst dressed as a Pikachu from *Pokémon*, or Pinkie Pie from *My Little Pony: Friendship Is Magic*), it seemed a strangely fitting time to encounter the headline, *Austrian Man Arrested for Keeping Dead Mother in Basement to Claim Pension*.[16]

The part of the report that really caused us to choke on our *PG Tips*, and thereby distracted us from our quest to the attic to find out if we still owned a copy of *Psycho*, was about how he had mummified her. With cat litter.

The grisly tale provoked a feeling of *déjà vu* (again, it might just have been the time of the year). In the course of investigating whether and where he'd seen something like it in the past, *AF* chanced upon a profile of Armin Miewes, the 'Rotenburg Cannibal', who infamously advertised for—and found—a willing victim on the internet. It claimed that Miewes, a computer repairman, was born in Essen.

AF is making one of his sporadic, ultimately doomed attempts to learn German, so this struck him as rather too good to be true. Those of you who *etwas Deutsch sprechen* (meh, close enough) will understand; the rest will just need to make use of Google Translate…

[16] <www.europeanpensions.net/ep/Austrian-man-arrested-for-keeping-dead-mother-in-basement-to-claim-pension.php>.

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