

UK Pensions Briefing

Changes to the Pensions Regulator's mandatory notifications regime

September 2021

Introduction

The Department for Work and Pensions (DWP) is [consulting](#) on the detail of proposed changes to the Pensions Regulator's mandatory "notifiable events" regime.

These are red-flag events which could harm a defined benefit (DB) pension scheme, for example by reducing the support from its sponsoring employer. Pensions legislation sets out a list of events that employers must tell the Regulator about. To date this early warning system will often only have required notification to be given on signing of a transaction – too late for the Regulator or trustees to have a seat at the table.

In the wake of the Bhs and Carillion scandals, the Government decided to strengthen this regime by:

- Expanding the list of events that need to be notified to the Regulator.
- Requiring notification at an earlier stage.
- For the most material corporate transactions, increasing the level of information that needs to be provided to the Regulator and scheme trustees.

The framework for a stronger notifiable events system was set out in the Pension Schemes Act 2021 at the start of this year. The DWP has now given us the details in [draft regulations](#).

What is the significance of these changes?

If passed in their current form, the new rules will require companies with DB pension schemes embarking on certain transactions to engage with both the Regulator and the trustees more intensively and at a much earlier stage in the transaction process.

It will be important to get this right. From October 1, 2021 the Regulator will be able to impose penalties of up to £1 million for breaches of the notifiable events regime. There is also a risk of criminal penalties if false or misleading information is provided to the Regulator.

Is the list of “notifiable events” changing?

Yes. Two additional events will have to be notified to the Regulator:

New notifiable event	Points to note
A “decision in principle” by an employer to sell a material proportion of its business or assets	<p>“Material” means more than 25% of the gross value of the employer’s assets or a business that accounts for more than 25% of its annual revenue.</p> <p>A series of smaller transactions conducted over a 12-month period will have to be added together to see if the 25% threshold is passed.</p> <p>Internal reorganisations can also trigger a notification.</p> <p>This notification was originally going to be limited to employers with responsibility for at least 20 % of scheme funding. That limit has been dropped. This could lead to some odd results in multi-employer schemes, e.g. a small employer having to notify the Regulator of a sale that has no covenant impact while the main employer on which the scheme relies sells a quarter of its assets without having to notify.</p>
A “decision in principle” by an employer to grant or extend security over its assets, resulting in the secured creditor ranking above the scheme	<p>The DWP’s intention (as set out in the consultation document) seems to be that only material security (comprising more than 25% of the employer’s consolidated revenues or gross assets) will require notification. However, the drafting of the regulations doesn’t reflect that and instead applies the materiality test to the subsidiaries. This may be a drafting error.</p> <p>The consultation document also says that existing debt refinancings don’t need to be notified, but the draft regulations say they will require notification if they involve the grant of security. It seems odd that the Regulator would want to be notified of like-for-like refinancings.</p> <p>Both fixed and floating charges are caught.</p>

Two existing notifiable events are being amended or deleted:

Existing notifiable event	Points to note
A decision by a controlling employer to relinquish control of the employer company	<p>The timing for notification is being changed to where a “decision in principle” is made or where an offer is made to acquire control of the employer company.</p> <p>No notification is currently required if (broadly) the scheme is fully funded on the Pension Protection Fund (PPF) basis and amounts due under the schedule of contributions have been paid. It is not clear to what extent these conditions will continue to apply or whether any conditions will attach to the new events.</p>
Receipt by the employer of advice that it is trading wrongfully	<p>This is being deleted because realistically an employer that is prepared to trade wrongfully is not going to notify the Pensions Regulator.</p>

Will more information need to be provided to the Pensions Regulator and trustees?

Yes. There will be a two-stage process for notifying the two new events and the amended event.

After the initial (“decision in principle”) notification has been given, the employer will have to provide a written statement to the Regulator and the trustees explaining (among other things) any adverse effects of the transaction for the DB pension scheme and any steps taken to mitigate those adverse effects.

This statement will have to be provided at the point when “the main terms” of the transaction “have been proposed”. The DWP expects this to be “at a later point in a corporate transaction than the notifiable event notification, when there is greater certainty as to whether the transaction is going ahead, its nature and the implications for the scheme.”

If there are material changes to the terms of the transaction or to the mitigation proposed for the scheme, further notifications will be needed.

Is the timing of the notifications and statement problematic?

Potentially yes.

We anticipate that it will be hard to pin down when “a decision in principle” is made. The draft regulations just say that this is “prior to any negotiations or agreements being entered into with another party”. How specific or firm does the decision need to be? For example, would internal conversations about options for raising cash be enough to trigger a notification requirement? Would exploratory discussions with advisers about a particular option trigger it? Also, whose decision will trigger it?

It may also be difficult, particularly on a fast-moving transaction, to identify at what point “main terms have been proposed” (the trigger for a written statement). For example, at what point are a buyer’s proposed terms close enough to being acceptable to the seller to need confirming in writing to the Regulator and trustees? Companies will naturally be concerned about commercial sensitivity and about engaging with trustees at a time when a deal is still uncertain and may fundamentally change.

Given the new requirement to notify the Regulator of material changes, some transactions could require companies to make multiple notifications as negotiations progress.

Are there any other issues to be aware of?

It is not clear how or whether the new events are meant to apply to takeover offers for listed companies. There is nothing in the new rules about the takeover panel or price sensitive information.

What actions should companies be taking now?

Keep a watching brief for these changes and review and update your trustee confidentiality agreements. Ensure the relevant people at the employer are trained on the new requirements.

Once the timing of these changes is confirmed, consider having a notifiable events protocol to set out trigger points, reporting responsibilities and deadlines. Build these into the timetable of any affected transaction and devise a strategy for engaging with your trustees.

What will happen next?

The detailed rules raise several questions, particularly on timing, which it is to be hoped will be resolved at the consultation stage. We will be responding to the consultation.

Fundamentally, however, the Government’s clear intention is to give the Regulator and trustees much earlier warning of key transactions and they are bound to welcome this – although the Regulator may be less happy if it ends up receiving a flood of information about innocuous events. We expect these early trigger points to survive in some form in the final regulations.

It has not yet been confirmed when these changes will come into force – probably not until April 2022. The consultation ends on October 27, 2021.

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