



GOVERNMENT PLANNING SIGNIFICANT EXTENSION TO UK'S PENSIONS NOTIFIABLE EVENTS REGIME FOR CORPORATES

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Legal Briefings

The government has confirmed it plans to make long-anticipated changes to the UK's pensions notifiable events regime. The changes, first floated in 2018 and now confirmed (subject to consultation), are almost certain to mean that corporates will be required to give the Pensions Regulator and trustees of defined benefit (**DB**) pension schemes much earlier notice of material corporate transactions and finance arrangements. Multiple notifications will also likely need to be made in relation to the same transaction.

It is common for companies to engage with the trustees of DB schemes (and, where appropriate, the Pensions Regulator) in relation to most corporate transactions and major re-financing, particularly where the trustees of the DB scheme are significant stakeholders in the business. However, in many instances, they will do so at a later stage than will be required when these new requirements come into force next April. This could raise confidentiality concerns. It could also impact transaction timetables and the approach corporates, lenders and investors take to relevant transactions.

In our experience, where the Regulator becomes aware of material corporate activity and intervenes in negotiations, it will generally support the scheme's trustees in seeking to secure a better deal for the scheme. Whereas the Regulator is currently often reliant on trustees, media coverage, tip-offs and market intelligence to know when a transaction is in the pipeline, these new notification requirements should ensure it is aware at an early stage (i.e. when a "*decision in principle*" is made) where material transactions are being contemplated (even if they do not complete).

Corporate sponsors of DB schemes and corporate groups with such schemes as well as their directors, acquirers, such as private equity firms, and lenders could all be impacted by these changes, which need to be taken seriously, as a failure to comply could result in a fine of up to £1 million. A failure might also form part of a series of acts which might constitute a [criminal offence](#).

PROPOSED CHANGES

The government's proposals include:

- changes to the current list of notifiable events, and
- new notification requirements which will apply once the "*main terms*" have been proposed on material corporate transactions and on the granting of relevant security.

CHANGES TO EXISTING NOTIFIABLE EVENTS

The draft regulations contain two new notifiable events; namely, a "***decision in principle***" by an employer with a DB scheme:

1. to **sell a material part of its business or assets**, or
2. to **grant or extend a relevant security** over its assets, where this would result in the secured creditor being ranked above the scheme in the debt priority order.

A decision in principle is defined as being "*a decision prior to any negotiations or agreements being entered into with another party*". The consultation states this is intended to be the point at which an employer has made a decision to proceed, but has not negotiated specific terms or drawn up the contract.

As drafted, this trigger would create significant uncertainty about *whether* and, if so, *when* a duty to notify the Regulator arises. It assumes that corporate transactions follow a consistent and uniform pattern. But would, for example, a decision to enter into exploratory discussions about the potential sale of part of a business or its assets constitute a decision in principle? What if a decision is contingent on certain conditions being met? Also, what happens if a decision in principle to sell is made *after* negotiations have begun, rather than before as the regulations currently envisage?

It is anticipated the Pensions Regulator will issue guidance to clarify such points. However, it is unlikely this will provide clear answers in every scenario (as is the case with the guidance on the new criminal offences). This means, in some circumstances, difficult judgment calls may need to be made about when a duty to notify arises. This is of particular concern given that a failure to notify by an individual or company without a reasonable excuse, could attract a fine of up to £1 million. This could also be taken into account by the Regulator when it is deciding whether the new criminal offences of causing a material detriment to a DB scheme or avoiding a section 75 debt have been committed.

SALE OF A MATERIAL PART OF A BUSINESS OR ASSETS

In relation to the first new notifiable event, it will be for the employer to establish whether a potential transaction relates to a material part of its business or assets. According to the draft regulations, a material part of a business or assets will, broadly, be such part of a business or assets as account for more than 25% of an employer's annual revenue or asset value.

Where more than one transaction takes place within a 12 month period, the impact of previous transactions will need to be taken into account (and aggregated) in assessing whether the 25% threshold is exceeded.

GRANTING OR EXTENDING RELEVANT SECURITY

The second new notifiable event will arise where an employer, or one or more of its subsidiaries, intends to grant "*relevant security*" comprising more than 25% of either the employer's consolidated revenues or gross assets.

Relevant security includes:

- fixed and floating charges over assets of the employer or wider employer group, and
- all-asset floating charges which give the charge-holder the right to appoint an administrator.

However, it does not include the refinancing of an existing debt (except where this entails the granting of the types of security referred to above), security for chattels or financing for company vehicles.

CHANGE OF CONTROL AND WRONGFUL TRADING

The regulations will also amend the existing notifiable event relating to the relinquishing of control of a DB sponsor to bring forward the timing of the notification requirement so that, in future, it will arise when there is:

- a **decision in principle** by a controlling company to relinquish control of the sponsor company, or
- an **offer** to acquire control of the sponsor company, where a decision in principle to relinquish such control has not been made.

Currently, the duty to notify only arises in this context at the point the decision to relinquish control is actually made. In most circumstances, this is treated as the point at which the transaction signs. Having said that, where the Takeover Code applies to a proposed transaction earlier public disclosure of the transaction and engagement with a DB scheme's trustees is required.

Finally, the regulations will also remove the existing wrongful trading notifiable event, as it is not considered to be effective, given that a director is unlikely to admit voluntarily that a company has been trading wrongfully (and, unsurprisingly, no such notification has in fact ever been made!).

ADDITIONAL NOTIFICATION REQUIREMENTS

As well as introducing new notifiable events at the outset of a material corporate transaction or security arrangement, the draft regulations will also introduce additional notification obligations which will apply as negotiations unfold. In particular, DB sponsors (and "connected" and "associated" persons) will be required to notify the Regulator and their DB scheme's trustees when the "**main terms**" have been "**proposed**" in relation to:

- an intended sale of a material proportion of a DB sponsor's business or assets
- the intended granting or extending of relevant security by a DB sponsor over its assets which would result in the secured creditor outranking the DB scheme, and
- the intended relinquishing of control of a DB sponsor by a controlling company (or the relinquishment itself where this occurs without a decision to do so having been taken).

Once again, it is unclear when the "**main terms**" will be deemed to have been agreed in the context of a relevant transaction. Although the Regulator's guidance may shed some light on this any uncertainty will cause concern among DB sponsors and related group companies, directors, lenders and other related parties given the penalties that can be imposed where there is a failure to notify.

Employers will also be required to notify the Regulator and their scheme's trustees about any "*material change*" to any of the notifiable events listed above, or in the expected effects of them, or if such an event will no longer take place. The draft Regulations define "*material change*" non-exhaustively as covering "*a change in the proposed main terms*" or "*a change in steps taken to mitigate any adverse effect of the event*".

Once again, these definitions are imprecise and will create uncertainty as to when the duty arises. For example would the main terms being proposed capture putting an auction draft of a sale contract into a data room? These new requirements are also likely to mean companies will be required to make multiple notifications to the Regulator and their scheme's trustees in relation to the same transaction. A revised "accompanying statement" will also have to be provided as part of each material change notification.

CONTENTS OF "ACCOMPANYING STATEMENT"

The draft Regulations indicate the so-called "*accompanying statement*", which must be provided as part of a notification once the main terms of a transaction have been proposed (and alongside any subsequent material change notification), will need to contain the following information:

- the event and any main terms proposed
- any adverse effects of the event on the DB scheme
- any adverse effects on the employer's ability to meet its legal obligations to support the scheme
- any steps taken to mitigate those adverse effects, and
- any communication with the trustees or managers or the eligible scheme about the event.

The fact such information will need to be provided at an early stage of a transaction will raise concerns about confidentiality and compliance with market abuse requirements, particularly where the disclosures contain market sensitive information. Despite these concerns being raised when the government first proposed these changes in 2018, the draft regulations do not address this.

NEXT STEPS

The consultation period runs from 8 September 2021 until 27 October 2021, with a view to the new provisions coming into force on 6 April 2022.

COMMENT

A lot has been said about the new pensions criminal offences and financial penalties that come into force on 1 October 2021. Arguably, these new notification proposals will have an even more significant impact, in practice, on day to day corporate activity in the UK.

Although the new offences and sanctions are causing concern they are unlikely to require corporates (and other parties) to significantly alter their approach to corporate transactions and the granting of security. In contrast, these new notification requirements would force corporates with DB schemes to notify the Pensions Regulator and their scheme's trustees at a much earlier stage in such transactions. This in turn is likely to require them to have to go further to address any potential detriment to their scheme.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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