

**The Occupational Pension Schemes
(Employer Debt and Miscellaneous Amendments)
Regulations 2008**

Government response to the consultation

July 2008

Contents

Introduction	3
Contents of the draft regulations	5
Responses to consultation (specific comments and Government's response)	
SI 2008 No. 731	7
List of respondents.....	22

Introduction

- 1 On 7 August 2007, the Government undertook a consultation exercise on the draft Occupational Pension Schemes (Employer Debt) (Amendment) and Pension Protection Fund (Multi-Employer Schemes and Entry Rules) (Amendment) Regulations 2007. (Subsequently the title of the Regulations was changed before they were made in 2008, so that the final version is the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008). These regulations included amendments to:
 - a) the Occupational Pension Schemes (Employer Debt) Regulations 2005 (S.I. 2005/678);
 - b) the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005 (S.I. 2005/441);
 - c) the Pension Protection Fund (Entry Rules) Regulations 2005 (S.I. 2005/459); and
 - d) the Pensions Regulator (Financial Support Directions etc.) Regulations 2005 (S.I. 2005/2188).

The consultation ended on 1 October 2007.

- 2 Some 79 written responses to the consultation were received. They were mainly from advisers to pension schemes e.g. lawyers, actuaries, benefit consultants and insurance companies. We also received comments from employers sponsoring pension schemes and trustees in relation to pension schemes.
- 3 A list of respondents is at page 24. The Government is very grateful to all who contributed to the consultation. Their comments have been very helpful in finalising the regulations.
- 4 The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendment) Regulations 2008 were laid before Parliament on 14 March 2008 and came into force on 6 April 2008.
- 5 The Regulations are available on OPSI's website at <http://www.opsi.gov.uk/si/si200807>
- 6 This document is available on the Department's website at <http://www.dwp.gov.uk/consultations/2007/>

- 7 A paper copy of this document can be obtained from:
Allyson Brook
Department for Work and Pensions
3rd Floor
The Adelphi
1-11 John Adam Street
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- 8 This document describes the policy underpinning the changes being made. Comments on the regulations should not however be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a Court.

Contents of the draft regulations

- 9 The proposed changes to the Occupational Pension Schemes (Employer Debt) Regulations 2005¹ (“the Employer Debt Regulations”) by the draft Occupational Pension Schemes (Employer Debt)(Amendment) and Pension Protection Fund (Multi-Employer and Entry Rules)(Amendment) Regulations 2007 (now the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008) (“the Amending Regulations”) are at both a substantive and technical level and are designed to make the regulations easier to operate, more flexible and provide better protection for scheme members.
- 10 Section 75 of the Pensions Act 1995² (“Section 75”) places a debt on an employer where a scheme has commenced winding-up, the employer has an insolvency event or in the case of a multi-employer scheme, the employer withdraws from the pension scheme. The Employer Debt Regulations came into force on 5 April 2005 and from 2 September 2005 further provisions were added by amending regulations. The Employer Debt Regulations set out the requirements on employers where a debt is treated as due. The employer’s debt is calculated at full buy-out level (i.e. the level an actuary judges appropriate to buy out the benefits through the annuities market).
- 11 The current Employer Debt Regulations make provision for an employer in a multi-employer scheme to not pay the full debt but instead enter into an Approved Withdrawal Arrangement. These arrangements allow an amount less than full buy out to be paid provided there is a guarantee up to the full buy out level. They must be approved by the Pensions Regulator. In many multi-employer schemes, which have the appropriate rule, there is the option of apportionment. In such cases the employer exits a multi-employer scheme with his debt apportioned to the remaining employers in accordance with the rules of the scheme.
- 12 The Amending Regulations make many amendments, but there are two main amendments to existing provisions in the Employer Debt Regulations. These are to:
- the operation of Approved Withdrawal Arrangements and the test used by the Regulator when approving them;
 - the operation of apportionments of scheme shortfalls in multi-employer schemes.

¹ S.I. 2005/678, as amended by the Occupational Pension Schemes (Employer Debt etc) (Amendment) Regulations 2005 (S.I. 2005/ 2224).

² As amended by section 271 of the Pensions Act 2004.

- 13 The amendments are designed to strike a balance between making the existing employer debt regulations more flexible in their operation, and discouraging the avoidance of pension liabilities by scheme sponsors.
- 14 The Amending Regulations introduce new concepts and the main two are:
- the introduction of Withdrawal Agreements (a simplified form of Approved Withdrawal Arrangements);
 - setting out the default method for calculating an employer's share of the difference between assets and liabilities in a multi-employer scheme as being the "liability share" unless any of the following four options apply: scheme apportionment arrangement share, regulated apportionment arrangement share, withdrawal arrangement share or approved withdrawal arrangement share.

Responses to consultation (specific comments and Government's response) SI 2008 No. 731

Definition of employment-cessation events

- 15 Most respondents welcomed the clarification of the definition of employment-cessation events (i.e. that it occurred when an employer ceased to employ active members). Everyone welcomed the announcement that the definition was not intended to affect scheme closures, mergers and transfers.
- 16 Most respondents were concerned about the interaction between the old definition and the new definition (i.e. where some interpreted an employment-cessation event as occurring when the employer ceased to employ a member of the scheme (i.e. deferred member or pensioner member)). There are therefore employers who ceased to have active members before the Amending Regulations come into force and who cannot trigger an employment-cessation event under the Amending Regulations. This is a problem as such employers may want to trigger a debt in the future e.g. where the company is sold the company will need to confirm that its liabilities are discharged, and if an employment-cessation event cannot be triggered no such discharge can be given and the company will be sold with a contingent debt (triggered some time in the future on winding up of the scheme).

Government response – The Government agrees that provision should be made to deal with employers who want to actually trigger a debt in the future. This provision has been made in the amending regulations.

Active members – definition

- 17 Many respondents were concerned about what the definition of “active member” covers. There were different views as to what it covers, and as a result there is some uncertainty. The list of possible members the definition covers is as follows:
- Person who is currently accruing a pension in the scheme;
 - Person who is entitled to a death in service benefit;
 - Person who is not currently accruing a pension but still has a final salary link (so when he comes to normal pension age the increases in his salary during the period the scheme was closed will be reflected in his pension and will thus make his pension larger than it might otherwise have been);
 - Person who has deferred his entitlement to a pension and that pension is benefiting from an actuarial up lift.

Government response – The Government has considered this issue, and has decided that it will, for now, not make any changes to the definition of active (for the purposes of these employer debt regulations). However, further consideration will be carried out by the Government as part of the work we are taking forward (in response to the recommendation in the deregulatory review) to carry out a more fundamental re-appraisal of the way the employer debt legislation can affect corporate restructuring.

12 month period of grace

- 18 The 12 month period of grace was welcomed by most respondents, who commented that it would be of use for small employers and 12 months was an appropriate period of time.
- 19 Many respondents commented that the provisions should allow the employer to notify the trustees on or after the cessation date, as he may not always know in advance that he is about to lose an active member.
- 20 One respondent commented that the trustees should be allowed to request information from the employer i.e. during the 12 months to ask him to confirm he still intends to employ at least one active member.
- 21 The same respondent also commented that the 12 months should be reduced to a fixed 6 months and that the trustees should have discretion to extend this by an additional 6 months.
- 22 Another respondent commented that the trustees should have the right to call in the debt any time during the 12 month period and that they should do so if they think that the employer is being “disingenuous”.
- 23 One respondent commented that it would be useful if the provisions reflected that employers will not be able to force employees to join the scheme i.e. a person may be employed and that person will be eligible to join the scheme but may choose not to.

Government view – The Government has considered these suggestions, but has decided not to take them forward as they would make the 12 month period of grace provisions too complex. A notification for this period of grace must be given by the employer no later than one month after the last active member leaves the scheme.

Treatment of closed schemes (also referred to as “Former Employers” provisions)

- 24 Most respondents commented about the position of employers who are “former employers” of schemes closed to active members. They were concerned that unless they paid a debt before the scheme closed to active members, they will always be treated as an employer who has a contingent liability to meet any scheme shortfall. Any such contingent

liability would be triggered when a scheme winds up. If such a former employer wanted at any time to discharge his contingent liability he cannot do so unless the scheme winds up, and he may not have control over when or if that occurs. This raises a problem where, for example, a subsidiary is sold. It is not possible to discharge the contingent liability as an employment-cessation event cannot occur (as the scheme has no active members). As more and more final salary schemes are, or will be, closed schemes this is a serious problem.

- 25 Some respondents suggested that in a scheme closed to active members a debt should be triggered where an employer is no longer liable to pay contributions to the scheme.

Government response – The Government agrees that it should be possible to allow the triggering of an employment-cessation event after a scheme ceases to have active members. This would be triggered when the employer ceased to employ members of the scheme. In such a case if an employer paid any debt due he would thereafter not be treated as a former employer (with contingent liabilities on winding up). This provision has been made in the regulations.

- 26 Some respondents commented that the provisions in regulation 9 of the Employer Debt Regulations (as amended) needed to cater for where an employer is taken over by another employer and as a result no debt is paid. That employer may still be treated as a former employer (solely because no debt was paid) even though another employer took over his liabilities.

Government response – The Government agrees that where an employer is substituted by another employer, he should cease to be treated as a former employer. This provision has been made in the regulations

Attributing liabilities to each employer

- 27 Almost everyone welcomed the amendments made which set out how to attribute liabilities to each employer in a scheme. However, almost everyone thought that the provisions needed more flexibility and that attributing liabilities to the last employer of any members for whom it is not possible to ascertain the full employment record, was not ideal. One respondent commented that the scheme was at the mercy of the solvency of the last employer. Others commented that it was unfair on the last employer. One respondent thought that it would affect the last employers' solvency and the strength of the employers' covenant and possibly affect mergers and acquisitions.
- 28 Some schemes have their own rules (set out in the scheme rules) about how to attribute liabilities. For example, one respondent commented that their scheme required the last employer of any member to be responsible for all liabilities that the member accrued in the scheme. Their scheme rule cannot work due to the requirement in the Amending Regulations that liabilities can only be attributed to the last employer

where it is too expensive or difficult to attribute the liabilities to each employer the member worked for while in the scheme. Another respondent also commented that it had a scheme rule which set out how liabilities should be attributed.

- 29 Many respondents expressed concern about the provision which created orphan liabilities of any liabilities which could not be ascertained or where it was too expensive to do so. One respondent commented that there was scope for abandonment here and another commented that there was scope for avoidance.
- 30 Most suggested that the trustees should be given flexibility to attribute liabilities to employer(s) other than the last employer. There were lots of suggestions about how this could be achieved. For example one respondent suggested that the trustees should be given the discretion where the records were inadequate. Another suggested that the trustees should be given a discretion to make a reasonable estimate of the liabilities to be attributed to each employer.
- 31 One respondent pointed out that where an apportionment attributed additional liabilities to an employer (who remained in a scheme and took responsibility for all or part of the debt of a departing employer) it should be possible to reflect this when attributing liabilities to that employer (the liabilities will not be linked to service with the employer and our proposals may not allow this).

Government response – The Government agrees that trustees should be given some discretion to attribute liabilities, provided they consult the actuary and the employer and it is reasonable to attribute the liabilities in the manner proposed. The Government also believe that where liabilities have been attributed as a result of an apportionment arrangement, these liabilities should remain as apportioned when liabilities are being attributed at a later time. This provision has been made in the regulations.

- 32 One respondent commented that the provisions need to clarify that the actuary is responsible for the calculation of the liabilities and the data collection is the trustees' decision.

Government response – The Government agrees that the assets and liabilities which are to be taken into account should be the responsibility of the trustees or managers with the calculation and verification of liabilities the responsibility of the actuary. This provision has been made in the regulations.

Liability share

- 33 Express provision has been made in withdrawal arrangements for payment of Amount A³ in instalments. No such provision has been made for payment of a debt when a withdrawal arrangement is not in place i.e.

³ Debt recalculated on scheme funding basis.

where the liability share just applies. One respondent asked why there wasn't provision to pay a debt in instalments where the liability share applies.

- 34 Most respondents asked why the relevant transfer deduction facility⁴ was not extended to liability shares. Most commented that they did not see why it should only be available for where there is a withdrawal arrangement.

Government response – The Government has considered this issue, but has decided that no provision should be made at this stage to expressly allow liability share payments to be made in instalments.

However, the Government agrees that it should be possible to allow the relevant transfer deduction facility to extend to payment of debt under liability share. Provision for the departing employer's liability share to be reduced has been made in the regulations if the relevant liabilities and corresponding assets are transferred out within 12 months of these assets and liabilities being determined, and the liability share is calculated after all transfers have been completed.

Difference of treatment between single and multi-employer schemes

- 35 It is not possible to trigger an employment-cessation event in relation to an employer who ceases to participate in a single-employer scheme or who participates in a single-employer section of a scheme. Thus if such an employer were to withdraw from such a scheme he would not trigger a debt at that time. A debt would be triggered at a later date if the scheme is wound up. Some respondents pointed out that this difference in treatment was "illogical; inappropriate and ineffective".

Government response – The Government has considered this issue, but has decided not to change the current position, whereby an employment cessation event cannot be triggered in a single employer scheme.

Effect of pension regulator's draft clearance guidance

- 36 Almost everyone commented on the Regulator's draft clearance guidance. Most thought that it made many of the helpful provisions in the Amending Regulations difficult to operate. For example one respondent said it "muddied the water"; another said it made apportionment difficult.

Government response – The Pensions Regulator is independent from the DWP and its role is defined in relation to its statutory objectives. The Regulator's finalised guidance on clearance – and report on the consultation

⁴ This is the facility to reduce a debt after a triggering event where all or part of an employer's liabilities have been transferred to another scheme. Otherwise the debt payment made would not follow the liabilities i.e. the debt would be paid to the scheme in respect of particular liabilities but the liabilities would have been transferred to another scheme.

exercise it undertook – indicates that apportionment of the deficit will in some cases pose an unacceptable risk to members' benefits and that permitted apportionments and other apportionments should still be considered to be a type A events, for which clearance is an appropriate consideration.

The Regulator does not expect all withdrawal arrangements that do not require the regulator's approval to come for clearance, however there may be some circumstances in which a withdrawal arrangement could itself be detrimental to the ability of a scheme to meet its pension liabilities. More information is available in the Regulator's clearance guidance on its website at www.thepensionsregulator.gov.uk

Valuation of assets and liabilities

37 The Amending Regulations proposed that trustees or managers should be jointly responsible for valuation of assets and liabilities. The majority of responses expressed concern about this joint power as issues would arise where there was disagreement i.e. who would decide then? Most respondents suggested that trustees should just be required to consult the actuary. Many respondents objected to the requirement that the trustees or managers value the assets after consulting the scheme auditor. They thought this added new costs which were not always necessarily required (depending on whether you read the existing Employer Debt Regulations as always requiring audited accounts). One respondent pointed out that auditors are not advisers and it is up to the trustees to prepare the accounts.

Government response – The Government agrees that the requirement to consult the scheme auditor should be removed, and that audited accounts should continue to be required unless an update is permitted. The requirement to consult the scheme auditor has been removed from the regulations.

Requirement for audited accounts

38 Many of the responses pointed out that there was uncertainty as to whether audited accounts are needed each time a debt falls to be determined. One respondent suggested that full audited accounts should not be required if trustees decide that the cost is disproportionate. Another pointed out that for the insured final salary schemes (it holds) audited accounts are not necessary.

Government response – The Government agrees that updates of most recent accounts or most recent valuations should be used only where trustees decide after consulting employers. Where an update of a scheme valuation is proposed the actuary must also be consulted. The actuary will be responsible for preparing the valuation. This provision to allow updates has been made in the regulations.

Updated asset valuation

- 39 Most respondents welcomed the facility to update the most recent scheme accounts. Most also pointed out that the facility could not be used very often because of the requirement that the scheme accounts cannot be more than 12 months old. This is because it can take about 7 months for scheme accounts to be finalised.
- 40 Many respondents pointed out that there is a certain amount of risk attached to updates as using estimates risks producing a debt which is too high or too low; that it was good practice to not use updates where the debt is significant or where there have been some recent significant events which would make the estimate too unreliable. Many also pointed out that if the decision is for the trustees alone to make, they may be put under a lot of pressure by the employer and could be put in a difficult position.
- 41 One respondent pointed out that it will be difficult to get an auditor to sign off on updated accounts and if they do so they will charge fees similar to those that would be incurred when preparing audited accounts. One other respondent commented that the Amending Regulations need to set out who prepares the updated asset valuation, the process for updating and any safeguards.

Government response – The Government agrees to remove the 12 month constraint on age of scheme accounts for use in updates that the trustees or managers decide to use an update after consulting with the departing employer and other scheme employers, and that certificates which use updates are clearly labelled with appropriate caveats. These provisions have been made in the regulations

Updated actuarial valuations

- 42 Most welcomed the facility to update the scheme valuation (or actuarial assessment), rather than commission a special valuation each time a debt is triggered. Most also pointed out that the facility could not be used very often or might never be used because of the requirement that the scheme valuation cannot be more than 12 months old. This is because it can take almost 15 months for scheme valuations to be finalised.
- 43 One respondent commented that the Amending Regulations could also use a 12 month roll back i.e. an event 12 months before the most recent actuarial valuation could use an update.
- 44 Some respondents commented that the Amending Regulations need to set out the level of approximation to be used in the actuarial update. Another respondent suggested it should refer to something along the lines of “accepted roll forward techniques”.

Government response – The Government agrees to remove the 12 month constraint on age of scheme valuations for use in updates, that the regulations

provide initial guidelines with further specific guidance for updates to be set by relevant actuarial bodies, and that certificates which use updates are clearly labelled with appropriate caveats. These provisions have been made in the regulations.

Other conditions for using updates

- 45 Two respondents suggested that trustees should be given discretion to use updates where there is a small debt. This should be subject to consulting the actuary. This would be useful in many cases as the cost of full valuations may be disproportionate.
- 46 Another respondent suggested that the trustees should have a general discretion to use an update where they think it will produce an accurate basis.
- 47 One respondent suggested that where the employer is prepared to pay more than the estimated debt that updates should be used to calculate the actual debt payable.

Government response – The Government agrees that an update may be used if this is deemed appropriate by the trustees or managers, after consulting the departing employer and other scheme employers, or in the case of an update in relation to liabilities, after consulting the departing employer and the actuary. These provisions have been made in the regulations.

Estimates of full buy out

- 48 Most respondents welcomed the facility for actuaries to estimate the full buy out cost. This is because it is sometimes difficult to get such quotes. Most commented that GN 19 will need to provide guidance in relation to this.
- 49 One respondent pointed out that two actuaries could produce very different results under this provision. Another suggested that a requirement be added that actuaries should not over estimate.
- 50 One respondent queried the meaning of the reference to “not practicable”. They thought that it meant where the cost of purchasing annuities cannot be reasonably estimated because the market capacity does not exist.

Government response – The Government agrees that there should be some guidance which limits the variation in estimates from one actuary to another. The regulations provide general guidance for actuaries on this matter, which has been cleared with the relevant actuarial professional bodies as being sufficient. The reference to ‘not practicable’ is compliant with the terminology used in the Scheme Funding Regulations and this reference has been maintained in the regulations.

Treatment of employer related investments

- 51 One respondent pointed out that GN 19 currently includes as assets of the scheme all employer related investments. However the scheme funding regulations which are referred to as the basis of asset valuations in the Employer Debt Regulations only include allowable employer related investments.

Government response – The Government agrees that the mismatch between GN19 (which allows inclusion of all such investments) and scheme funding / employer debt regulations which only include investments up to the permitted level should be rectified.

The relevant professional actuarial bodies have subsequently stated that GN19 will cease to apply after 6 April 2008. Any BAS standards which – in due course – replace GN19 will rectify any such discrepancy which then applies.

Treatment of expenses in debt calculations

- 52 One respondent suggested that the expenses included in any debt calculation should reflect the actual cost of buyout for an employer's liabilities rather than a proportion of the cost for the whole scheme. They considered this to be a particular problem in schemes with non-associated employers as the other employers may not want to meet a shortfall in expenses.
- 53 One respondent commented that it was difficult for trustees to estimate the cost of winding up. Another suggested that trustees should be given discretion to allow a guarantor (in case of cessation agreements/withdrawal arrangements) to cover the cost of winding up expenses (a proportion of which is included in the debt calculation).

Government response – The Government considered this issue, but has decided to continue the current treatment of expenses as stipulated in the employer debt regulations 2005.

Actuarial certificates

- 54 A few respondents suggested that there should be more flexibility around the production of actuarial certificates. The main reason being that they can be costly and may not always be necessary in some cases e.g. where the debt is quite small in relation to the total scheme liabilities.
- 55 A few respondents suggested that where the debt is a fixed amount e.g. on apportionment, an actuarial certificate should not be required and was an unnecessary expense.

Government response – The Government has decided that an actuarial certificate will be required in all cases but that updated asset and liability assessments may be used to inform actuarial certificates if the trustees or

managers (after consulting the actuary and the departing employer) decide such use of updates is appropriate. In addition, debts which are unlikely to be recovered without disproportionate cost or within a reasonable time are excluded from the estimation of assets.

- 56 There were a number of suggested amendments for the certificates e.g.
- expressly refer to where updates have been used;
 - expressly refer to the fact that the actuary relied on asset value figures provided by the trustees;
 - amend headings so that they are more informative;
 - certificates should refer to actual debt attributable to the employer or refer to proportion of total debt which employer is responsible for
 - expressly refer to where there is a relevant transfer deduction (i.e. a transfer after triggering event);

Government response – The Government agrees to these amendments and the actuarial certificates have been revised in consultation with relevant professional actuarial bodies to include these.

- 57 A few respondents asked how certificates should be prepared where there is an apportionment or withdrawal arrangement before the applicable time, for example, should estimates be used?

Government response – The Government has decided that an estimate may be used before the debt has been triggered but that a certificate should be produced after a debt triggering event.

Transitional provisions

- 58 Many respondents commented on the need for some transitional provision.

Government response – The Government has decided to permit some transitional provisions for up to 12 months after the 6 April 2008 commencement date. These provisions will allow old rules to continue to apply for this 12 month duration if an agreement or related transaction had been entered into before the 6 April 2008.

Apportionment not requiring the regulator's involvement

- 59 In general many commented that in principle this was the correct test and reflected the approach taken by trustees at the moment.

Government response – The Government (in acknowledging some concerns expressed and market developments which have come to the fore since this consultation) has decided to strengthen the funding test which has to be met to allow apportionments not requiring the Regulator's involvement. These changes have been made following further informal consultation with Industry.

Reference to technical provisions/ Schedule of Contributions and Recovery Plan

60 Most respondents commented on how the test would apply in practice. Some raised questions about which employers the test should apply to. They thought that there should be more flexibility built in so that the test will not always apply to all remaining employers. There should be the ability to only apply it to the principal employer or to the employer(s) to whom the withdrawing employer's debts are apportioned. Where the test applies to all of the remaining employers they also thought it should be an aggregate test, as otherwise one weak employer could make the scheme fail the test. One respondent suggested that where the withdrawing employer is being taken over by the new employer (who is not yet participating in the scheme) the test should include this employer. Another respondent commented that service companies would have problems satisfying the test.

Government response – The Government agrees that the test should just apply to the employers to whom the debt is apportioned, and the test should apply to employers collectively rather than individually. These provisions have been made in the regulations.

61 One respondent asked about how far forward the test regarding technical provisions should apply for and what future events should be taken into account. Many respondents commented that the test could be interpreted as requiring full technical provisions. Another asked if the technical provisions to apply should be the current ones or those applying in the future?

Government response – The Government agrees that the wording should be clarified. Trustees must be satisfied that the remaining employers are now required to be able to fund the scheme to cover its technical provisions after the applicable time and after taking account of changes necessary to those provisions due to the departure of the employer and as a result of the arrangement. In the case of apportionments the arrangement must also (broadly) not adversely affect the security of members' benefits as a result of specified changes. These provisions have been made in the regulations.

62 Some respondents asked about the reference to the schedule of contributions and recovery plan and which period it referred to and which employers were covered (i.e. leaving employer and remaining employers or just remaining employers?)

Government response – These references were intended to clarify that full technical provisions were not required. Trustees may consider that the first part of the funding test is satisfied if the remaining employers are able to abide by the Schedule of Contributions, taking into account any changes necessary to that Schedule as a result of the arrangement.

Interaction with apportionment rules in scheme rules

- 63 Most respondents asked whether provisions in scheme rules in relation to apportionment could continue to apply – most thought that they should. Two respondents commented that the drafting should clarify that the scheme rules apply. Scheme rules may have different provisions in relation to how apportionment will apply. For example some may apportion the debt to other specific employers.

Government response – The Government agrees to link apportionment arrangements to scheme rules, although scheme rules can be overridden if the funding test cannot be met in accordance with these. These provisions have been made in the regulations.

Apportionment and schemes in wind up

- 64 One respondent was very concerned about schemes which have an apportionment rule that applies when the scheme commences winding up. The rule would have been agreed some time in advance of the actual winding up (“future apportionment rule”).

Government response – The Government has decided that apportionments according to any prior rules will only be permitted if the funding test and other conditions for a scheme apportionment arrangement have been met. These provisions have been made in the regulations.

Apportionment approved by the Pensions Regulator

- 65 Very few comments were received about this.

Cessation agreements / Withdrawal arrangements

- 66 Most respondents were positive about cessation agreements. Most pointed out that the test was too strict and almost impossible to meet. Most suggested that the same test should apply as for apportionment.
- 67 Most respondents highlighted that trustees will be advised that where there is a choice between withdrawal arrangements and cessation agreements they are better off getting the benefit of the Pension Regulator’s approval of a withdrawal arrangement. This will make it easier for them to justify their exercise of their powers under the trust deed and rules. Most commented that if there were provisions which added further conditions in order to access a withdrawal arrangement it would make it easier for trustees to justify a decision not to seek a withdrawal arrangement (and the Pension Regulator’s seal of approval). For example, one respondent suggested that cessation agreements should be available as a first attempt. Another respondent suggested that cessation agreements should be merged with withdrawal arrangements.

Government response – The term ‘cessation agreements’ which was used during consultation has been changed to ‘withdrawal arrangements’. The test

for withdrawal arrangements has been simplified to make such arrangements easier to use. Approved Withdrawal Arrangements which allow the departing employer to pay a smaller amount with Regulator approval have also been made easier to use by lowering the guarantor requirements.

Other comments about cessation agreements

68 One respondent suggested that all employers in relation to the scheme should be party to the cessation agreement.

Government response – The Government has considered this, but believes it is not necessary as it will make the process too burdensome.

69 Two respondents commented that there needs to be provision for terminating and replacing a cessation agreement.

Government response – The Government agrees that this would be a helpful provision. These provisions have been made in the regulations and apply to both Withdrawal Arrangements and Approved Withdrawal Arrangements.

70 One respondent commented that the trustees' agreement should not be required.

Government response – The Government believes that this would not be justifiable.

71 One respondent commented that there should be more flexibility as regards when Amount B should be paid under a cessation agreement.

Government response – The Government has considered this and while flexibility as regards time of payment of amount B is unchanged, the events where this must be paid have been clarified.

Withdrawal arrangements

72 Everyone welcomed the changes made to the test. However, concern was expressed by some respondents about the last part which required the Pensions Regulator to consider the affect on the likelihood of full benefits being received from the scheme.

Government response – The Government has agreed to maintain the easements to Withdrawal Arrangements which were welcomed in consultation.

73 Suggestions were made about the relationship with cessation agreements. For example:

- that withdrawal arrangements should be available where there is failure to agree a cessation agreement;
- that withdrawal arrangements should be available where one party to the cessation agreement is taking an “intractable stance”.

Government response – To minimise complexity, further suggestions have not been included in the regulations.

74 Many respondents queried how the new provisions for withdrawal of the Pensions Regulator’s approval would work.

Government response – Further clarifications and simplifications have been made to all withdrawal arrangements.

Relevant transfer deduction

75 The relevant transfer deduction applies for both cessation agreements and withdrawal arrangements⁵. Many respondents commented that there were some drafting glitches i.e. that Amending Regulations provided that the deduction for the liabilities transferred is taken from the total debt rather than the liability share. The deduction should have been taken from the liability share. The other apparent drafting glitch was that some thought that any liabilities transferred out (rather than the liabilities which related to the employer who had the triggering event) could be used to reduce a debt.

Government response – The Government has amended the regulations to correct these ‘drafting glitches’.

Allow trustees to charge interest when debt is paid late

76 One respondent commented that they had received legal advice that they could not charge for interest on a debt.

Government response – The Government does not see this as an issue for many schemes. It is therefore not convinced that changes are necessary.

Clarify when a debt becomes due

77 As a result of the “Phoenix” case there is authority that a debt is not due until it has been certified by an Actuary. Many asked us to clarify this point.

Government response – The Government recognises that there may be some uncertainty, however it has no current plans to legislate on this point.

Housing Associations

78 We had a large number of letters from the Housing Associations and their solicitor. Their main concern was about the way in which debts are triggered for final salary schemes housing associations participate in. They wanted an exemption from the definition of employment-cessation

⁵ This is the facility to reduce a debt after a triggering event where all or part of an employer’s liabilities have been transferred to another scheme. Otherwise the debt payment made would not follow the liabilities i.e. the debt would be paid to the scheme in respect of particular liabilities but the liabilities would have been transferred to another scheme.

event where there is a transfer or merger of housing associations or transfer of employees.

Government response – The Government has no current plans to make any specific exemptions for Housing Associations.

Merchant Navy Officers' Pension Fund

79 We received a letters in relation to the Merchant Navy Officers Pension Fund. They want special treatment for the Fund because of the unique nature of their scheme. In particular they want an exemption from the definition of employment-cessation event.

Government response – The Government has no current plans to make any specific exemptions for the Merchant Navy Officers' Pension Fund.

Thanks

42. We are most grateful to everyone who took the time to comment on this consultation document.

List of respondents

ACA Ltd
Addleshaw Goddard
AEGON
Allen & Overy
AON
Ashurst
AstraZeneca
Aviva
AXA
Balfour Beatty
Barnett Waddingham
BP Finance
Cadbury Schweppes
CBI
Chamber of Shipping
Charity Commission
Charles Cameron
Charles Russell
Citizens Advice Bureaux
Hounslow, Brent and Greenwich branches of CAB
Clifford Chance
C M S Cameron McKenna
Communities Scotland
Co-operative
Deloitte
Devonshires Solicitors
Dickinson Dees
Electricity Pensions Services
Eversheds
Freshfields Bruckhaus Deringer
James Fisher & Sons Plc
G15 Group of Housing Associations
Hammonds
HBOS Plc
Hewitts
Housing Corporation
HSBC
Hymans Robertson
ICI
Institute of Actuaries
Institute of Chartered Accountants

Jardine Lloyd Thompson
J W D Trythall
Lane Clark & peacock
Law Society of Scotland
Legal & General
Linklaters
Lloyds TSB
Lovells
L&Q Group (London & Quadrant Housing Trust)
Macfarlanes
Mercer
National Grid
National Housing Federation
Pensions Management Institute
Pension Protection Fund
Pensions Trust
Pinsent Masons
Plumbing and Mechanical Services
PricewaterhouseCoopers
RBS
Rolls-Royce
RPMI
Sackers
Sainsbury's
Saint-Gobain
Sandvik
Slaughter & May
Society of Pension consultants
Tesco
Towersperrin
Travers Smith
Unilever
Universities Superannuation Scheme
Vauxhall
Watson Wyatt
Welsh Assembly Government (Housing Directorate)
Wragge & Co
Wolseley