

**Private Pensions Policy and Regulation**

**Employer Debt**

(Section 75 of the Pensions Act 1995)

Consultation on draft regulations

September 2009

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## Preface

This consultation document seeks views on new draft regulations on employer debt:

### **The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010**

Your views are also sought on the **Impact Assessment** on the effect of the draft regulations, also contained in this document.

This document is on the Department's website at:

<http://www.dwp.gov.uk/consultations/2009/>

## How to respond

**Timing** Please ensure your response reaches us by:

**19 November 2009**

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# Chapter 1

## Introduction

- 1.1 The Employer Debt requirements are intended to provide protection for members of defined benefit pension schemes where the employer ceases to participate actively in the scheme.
- 1.2 Employer debt is broadly the amount the employer must pay into the scheme when it ceases to participate at a time when there is a shortfall between the scheme's assets and liabilities, calculated on a buy out basis<sup>1</sup>.
- 1.3 Amounts of employer debt can be very significant, but this is necessary to protect the members. There exist a number of ways in which employers exiting a multi-employer scheme can reduce the amount of debt they are required to pay, for example by entering into a Scheme Apportionment Arrangement (if permitted by scheme rules), Withdrawal Arrangement, or Approved Withdrawal Arrangement.
- 1.4 However commentators have argued that one effect of the legislation has been to unnecessarily inhibit corporate activity, in particular to hinder the ability of companies to restructure in order to be better able to deal with changes in the economic environment. The Government has acknowledged these problems and has been working with the pensions community to resolve them. The draft regulations which form part of this consultation give effect to the new proposals.

## Group Guarantees

- 1.5 In developing these proposals, a key consideration has been the need to maintain member protection. In light of this, the Government considered whether it would be possible to apply the new arrangements to any kind of corporate restructuring activity. It has not proved possible to find a way of agreeing arrangements which would apply in these circumstances and maintain adequate member safeguards, without increasing the complexity of the regulations. In particular there would be concern if, as part of a corporate restructuring, the corporate assets were passed to one employer but the liability for the employer debt was passed to another employer.
- 1.6 Our proposals are therefore to allow restructurings between two employers and are consistent with our two key considerations of maintaining member protection and helping employers restructure. Within these parameters, the Government believes there is a

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<sup>1</sup> The amount of liabilities on a buy out basis is the cost of purchasing insurance which will cover all the pensions the scheme is required to pay.

significant amount of flexibility. For example, the new regulations can be used for a number of one-to-one transactions in a multi-employer scheme; transactions where there are a number of exiting employers and a single receiving employer can also take place, provided each transaction is carried out on a one-to-one basis.

- 1.7 An alternative we considered was allowing restructuring between more than two employers in the same group. In order to maintain member protection, a legally binding guarantee to pay any debt (on the basis of joint and several liability) would be needed from all the employers involved in the restructuring. We understand from informal consultation that employers would find this helpful, but a number of issues arose – for example the banks who might already be lending money to a company in the group might well be reluctant to see that company entering into this further type of commitment. Should employers show significant appetite to introduce this sort of further flexibility for a group restructuring by entering into a legal guarantee, then we will consider whether it is possible to do so in the future. We would of course only do so if it were possible to continue to strike the right balance between the additional flexibility and maintaining member protection.

## Consultation

- 1.8 The Government has listened to concerns expressed by employers and their representative groups that the **Employer Debt Regulations**<sup>2</sup> unnecessarily hamper corporate restructuring. The Government is now consulting on changes to these rules, but with the clear principles that pension scheme members' benefits must be protected and any changes must not undermine the employer's covenant.
- 1.9 The main change is the introduction of new arrangements into the regulations. The new arrangements will provide that, in the case of a corporate restructuring, an event which would otherwise be an employment-cessation event will not be treated as such if prescribed conditions are met. Hence no employer debt will arise. This is described in more detail in **Chapter 2**. These new arrangements are in addition to the existing ways in which employers exiting a multi-employer scheme can reduce the amount of debt they are required to pay.
- 1.10 The opportunity is also being taken to make some technical amendments to the regulations. These changes – which are intended to make the existing regulations easier to operate in practice - are discussed in **Chapter 3**. **Chapter 4** explains why it is not proposed to make some other amendments which were suggested by commentators.

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<sup>2</sup> The Occupational Pension Schemes (Employer Debt) Regulations 2005 SI 2005/678.

- 1.11 **Annex A** contains technical information about the way this consultation is being conducted. The **draft regulations** are in **Annex B**. The Impact Assessment is at **Annex C**.

## Background

- 1.12 **Regulations** The **Employer Debt Regulations** came into force on 6 April 2005.
- 1.13 **Deregulatory Review 2007** A report on private pensions legislation was published in July 2007 by Chris Lewin and Ed Sweeney<sup>3</sup>. Among other things, the report considered employer debt legislation and made two recommendations for deregulation:

### Recommendation 1

“Where a company that participates in a DB [*defined benefit*] multi employer scheme ceases to have employees actively participating in that scheme but the scheme continues, the debt should not be triggered if, within a period of up to one year, the employer acquires more employees who participate in the scheme.

### Recommendation 2

“Where there is a group reconstruction of employers in a multi employer scheme, the principle should be established that the debt should not be triggered, where the original covenant was strong and if the remaining employers’ covenant remains as strong, following the reconstruction, as the original covenant. The judgement as to whether the covenant remains intact should be the responsibility of the trustees, after taking appropriate professional advice. However, one of us (Chris Lewin) recommends that, where the original covenant is potentially weak, provided it remains unchanged after the reconstruction, the debt should still not be triggered.”

- 1.14 **Government response** The Government response to the Review accepted the first recommendation<sup>4</sup>. In response to the second, the response said:

“The Government also accepts that the current provisions may create difficulties for employers who wish to undertake a reorganisation and believes that, in principle, there is much to be said for distinguishing between reorganisations and complete severance of an employer from a scheme. However, this is a difficult area and it may not be easy to find a way to address this without creating loopholes within legislation. In addition to the changes already outlined in draft amending regulations, the Government intends to work with the industry over the coming months to seek a practical solution to the difficulties created by the current provisions which does not undermine

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<sup>3</sup> Deregulatory Review of Private Pensions. Chris Lewin and Ed Sweeney - July 2007.  
<http://www.dwp.gov.uk/pensionsreform/pdfs/ReviewPaperJuly2007.pdf>

<sup>4</sup> Deregulatory Review – Government response 22 October 2007  
<http://www.dwp.gov.uk/pensionsreform/pdfs/government-response.pdf>

the principle that employers should fully meet their pension obligations.”

- 1.15 **April 2008 regulations** The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008 (SI 2008/731)<sup>5</sup> came into effect on 6 April 2008 (for most cases). (Further minor amendments were made by the Occupational Pension Schemes (Employer Debt – Apportionment Arrangements) (Amendment) Regulations 2008 (SI 2008/1068) which came into effect on 15 April 2008.) Those regulations gave effect to the first “period of grace” recommendation in the reviewers’ report. The regulations provide that an employer debt will not be triggered for a period of grace of up to twelve months provided that prescribed conditions are satisfied. The regulations also revised the requirements for apportioning employer debts amongst remaining employers and for withdrawal arrangements.
- 1.16 **Discussions with stakeholders** The new regulations introduced in April 2008 were welcomed in some respects by commentators, but they also said they did not fully address the concerns about corporate restructurings. The Government therefore entered into a dialogue with key stakeholders about how best to address these issues.
- 1.17 In November 2008, a limited, informal consultation with a number of key stakeholders was undertaken on proposals for easements in the requirements when a corporate restructuring took place. In December 2008, a further technical informal consultation was undertaken about how best to overcome some practical operational issues with the existing **Employer Debt Regulations**.
- 1.18 A number of meetings have also taken place with stakeholders to consider these issues. These included a meeting of the Deregulatory Advisory Group in November 2008, attended by Lord MacKenzie, the Parliamentary Under Secretary. A further meeting involving many key stakeholders (including CBI and NAPF) took place in January 2009.

### **Statement of policy**

- 1.19 The commentary on the regulations in this document is intended to describe the policy. It is not to be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a court.

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<sup>5</sup> The Stationery Office reissued Statutory Instrument 2008/731 on 19 August 2009. The substituted SI corrects minor typographical errors etc but these changes do not affect the meaning of any of the provisions. The reprinted S.I. is the version which appears on the official OPSI website.

## Chapter 2

### Employer debt and corporate restructurings

#### Introduction

- 2.1 Notwithstanding the changes which were made in April 2008, commentators expressed concern that the **Employer Debt Regulations** did not specifically address the policy issues raised by corporate restructurings. Commentators have argued that where a restructuring takes place amongst a group of associated employers participating in a multi-employer scheme, this should not trigger an employer debt.
- 2.2 The Government accepts that there are circumstances where the triggering of an employer debt on a corporate restructuring is not appropriate. The draft regulations, which are the subject of this consultation, will introduce greater flexibility for employers, whilst at the same time maintaining member protection.

#### General - policy

- 2.3 The issue which has given rise to particular concern is that a corporate restructuring can trigger an employment-cessation event<sup>6</sup>. An employment-cessation event occurs when an employer loses its last active member and others in its multi-employer group still employ active defined benefit members. The occurrence of an employment-cessation event normally gives rise to the triggering of an employer debt.
- 2.4 The draft regulations now provide for exceptions to the “employment-cessation event”, primarily in circumstances relating to corporate restructuring. Provided prescribed circumstances and conditions are met, an event in which an employer loses its last active member will not be counted as an employment-cessation event for the purpose of the regulations. As no employment-cessation event takes place, no employer debt will be triggered.
- 2.5 The new arrangements provide for transactions between two employers – the “exiting employer” and the “receiving employer”<sup>7</sup>. (Definitions of “exiting employer” and “receiving employer” are inserted into the **Employer Debt Regulations** by draft **regulation 4(3)**.)

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<sup>6</sup> The term “employment-cessation event” is currently defined in regulation 2(1) of the Employer Debt Regulations. But please note that under the draft regulations, the definition will be included in new regulation 6ZA

<sup>7</sup> The “exiting employer” is the employer who wants to cease to participate actively in the scheme. The “receiving employer” is the employer who is an active participant in the scheme and who takes over the exiting employer’s responsibilities vis-à-vis the pension scheme.

The two employers must be part of the same multi-employer scheme and must be associated, as defined in the draft regulations.

### **New arrangements**

- 2.6 The new procedures are contained in **regulation 7** of the draft regulations. **Regulation 7** inserts new **regulations 6ZA, 6ZB and 6ZC** into the **Employer Debt Regulations**.
- 2.7 For ease of reference, in this consultation document the new procedures are called the “**general easement**” and the “**de minimis easement**”. New **regulations 6ZA and 6ZB** contain the general easement; new **regulations 6ZA and 6ZC** contain the de minimis easement.
- 2.8 The general easement and the de minimis easement:
- involve the completion of a number of steps; and
  - require the two employers taking part in the corporate restructuring to satisfy a number of conditions.

### **Employment-cessation event**

- 2.9 The definition of “employment-cessation event” is now contained in new **regulation 6ZA(1)**. The definition is qualified by the provisions in new **regulations 6ZA(2)** and **6ZA(3)**. New **regulation 6ZA(2)** provides that an employment-cessation event does not occur if there is a restructuring within new **regulations 6ZB or 6ZC**. In terms of how this regulation relates to new **regulations 6ZB (and 6ZC)**, new **regulation 6ZB(15)** provides that the corporate restructure must take place “on the same date”. The policy intention is that the event which would otherwise be an “employment-cessation event” must take place “on the same date” as the transfer of assets, employees and pensions obligations to the receiving employer. Thus if the exiting employer ceases to employ active members of the pension scheme on a date other than the “same date”, this would fall outside the scope of new **regulation 6ZA(2)** and would be classed as an employment-cessation event. For the de minimis easement, the equivalent regulation is new **regulation 6ZC(13)**.
- 2.10 New **regulation 6ZA(3)** introduces a further qualification. Notwithstanding the exemption from an employment-cessation event provided by new **regulation 6ZA(2)**, new **regulation 6ZA(3)** provides that an employment-cessation event will occur if it subsequently comes to light that steps 5 or 7 have not been properly carried out in accordance with new **regulations 6ZB(11), (12), (15) or (16)**. Step 5, contained in new regulation **6ZB(11)**, is about the potential for the exiting and receiving employers to become insolvent. Step 7,

contained in new regulation **6ZB(15)**, sets out the requirements for the corporate restructuring. Step 8, contained in new **regulation 6ZB(17)** requires the exiting and receiving employers to send the trustees a written confirmation that step 7 has actually been carried out.

- 2.11 The policy intention is to address a possible issue of moral hazard. After step 8 is completed, the corporate restructuring will, to all intents, be completed. However it may subsequently come to light that the decisions made by the receiving and exiting employers about the likelihood of insolvency were unreasonably optimistic. The trustees may also discover that the terms of the acquisition agreement in step 7 have not been complied with. These omissions may possibly be detrimental to the pension scheme, but the position as to whether the trustees could obtain redress would be questionable. New **regulation 6ZA(3)** is intended to provide a safeguard for trustees in these circumstances: if steps 5 or 7 turn out not to have been met, the employer debt is triggered and can then be enforced by the trustees. This provision is intended to be a deterrent and it is expected that it will only apply in exceptional circumstances.

### **General easement – steps**

- 2.12 On the application of the exiting employer (step 1), the trustees of the pension scheme will be required to carry out the assessment prescribed in new **regulation 6ZB(7)** (step 3). For the purposes of this consultation document, step 3 is called the “Restructuring Test”. In carrying out the Restructuring Test the trustees must consult the exiting employer and receiving employer (where it has been created) and must consider whether to obtain advice from the scheme’s professional advisers (step 2).
- 2.13 Very broadly, the Restructuring Test requires the trustees to consider whether, after the corporate restructuring has taken place, the receiving employer will be **at least as likely** as the exiting employer to meet the scheme liabilities it is acquiring from the exiting employer, as well as its own liabilities. In coming to a view on this matter, it is expected that the trustees will have regard to the financial position and legal obligations of the two employers involved in the transaction.
- 2.14 The Pensions Regulator will consider the need to provide guidance on behaviours that it expects, on good practice, and on practical advice on complying with regulations.
- 2.15 The trustees must notify the exiting employer as to whether the Restructuring Test has been satisfied or not (new **regulations 6ZB(9)**) – this is step 4. The restructuring can only be completed if the trustees are satisfied that the receiving employer will be at least as likely as the exiting employer to meet the scheme’s liabilities. New **regulation 6ZB(20)** provides that where the Restructuring Test is satisfied, a copy

of the notification sent to the employers must also be sent to the Pensions Regulator.

- 2.16 New **regulations 6ZB(11) - (12)** contain the requirements for step 5. The exiting employer and the receiving employer must confirm that an insolvency event has not occurred in relation to them. In addition the receiving employer must decide if they are satisfied that an insolvency event would be unlikely to occur to them within 12 months of the date of their decision if a restructuring within this regulation occurs (new **regulation 6ZB(11)(a)(ii)**). The exiting employer must decide whether they are satisfied that an insolvency event would be unlikely to occur in relation to them within 12 months of the date of their decision if the restructuring within this regulation does not occur (new **regulation 6ZB(11)(b)(ii)**). **Sub paragraph (a)** of new **regulation 6ZB(12)** provides that the exiting employer and receiving employer must use section 121 of the Pensions Act 2004 in considering whether an insolvency has occurred or will occur; **sub paragraph (b)** provides that their decision must be reasonable.
- 2.17 Step 6 is set out in new **regulation 6ZB(13)** and requires the exiting and receiving employers to write to the trustees setting out their decisions on step 5.
- 2.18 New **regulation 6ZB (15)** contains step 7. The regulation sets out the requirements that the corporate restructuring must meet. The requirements are intended to safeguard the pension scheme and thus to provide member protection. The first general requirement is that the receiving employer must take over responsibility, under a legally enforceable agreement, for all of the matters in **sub paragraphs (a) to (d)**. The first particular requirement (in new **regulation 6ZB(15)(a)**) is that in the transaction, all of the corporate assets which the exiting employer is legally able to hand over, must be transferred to the receiving employer. The policy intention is that all assets should be transferred to the receiving employer unless there is some legal requirement which prevents this. One of the issues which the trustees will need to consider in carrying out the Restructuring Test is the extent to which assets of the exiting employer cannot be passed to the receiving employer. The second requirement is contained in new **regulation 6ZB (15)(b)**. It provides that all of the employees of the exiting employer must be transferred to the receiving employer as part of the transaction. For the avoidance of doubt, this is not intended to stand in the way of arrangements such as early retirement or redundancy programmes.
- 2.19 New **regulation 6ZB (15)(c) and (d)** contain requirements for the corporate restructuring as they apply to the pension scheme. New **regulation 6ZB (15)(c)** provides that periods of members' pensionable service attributable to the exiting employer must be attributed to the receiving employer. New **regulation 6ZB(15)(d)** provides that the liabilities in relation to the scheme of the exiting employer must be

passed to the receiving employer. For the purposes of **regulations 6ZB and 6ZC**, “liabilities” are defined in new **regulation 6ZB(21)**. One point in particular should be noted: where an employer ceases to participate in a pension scheme without an employer debt being paid, there may be issues about the ongoing arrangements for the funding of the scheme. In the first instance therefore and to provide a measure of continuity, this regulation provides that any scheme funding obligations of the exiting employer must be transferred to the receiving employer. Following the completion of the restructure, it will be open to the trustees to undertake an early actuarial valuation and to reallocate scheme funding obligations amongst remaining employers, if they decide this is necessary.

- 2.20 The transfer of responsibilities provided for in new **regulation 6ZB(15)** must all take place on the same date. The policy intention is that the acquisition agreement and any other agreements should take effect on the same date, notwithstanding for example that the assets are physically passed over on another date.
- 2.21 New **regulation 6ZB(16)** contains further conditions about the completion of step 7. The receiving employer can only carry out step 7 where the requirements of **sub paragraphs (a) – (d)** are satisfied. These requirements are as follows. The trustees must be satisfied that the requirements of step 3 (the Restructuring Test) have been met (**sub paragraph (a)**). In order to take account of any sudden, unexpected changes which would affect the outcome of the Restructuring Test, the trustees must be satisfied, immediately before the date on which step 7 is planned to take place, that no change has occurred which would alter their decision about step 3 (**sub paragraph (b)**). One way in which this requirement might be satisfied for example would be for the exiting and receiving employers to write to the trustees in the period immediately before the transaction is due to be completed, bringing to their attention any changes. The trustees must also have received the undertakings from the exiting and receiving employers about their solvency position (**sub paragraph (c)**). Finally, step 7 must be completed within 12 weeks of the date of the trustees’ written decision in step 4 about the results of the Restructuring Test (**sub paragraph (d)**). (The date of the acquisition agreement and any other agreements, as required by new **regulation 6ZB(15)** will therefore need to fall within this 12 week period.)
- 2.22 New **regulation 6ZB(17)** contains step 8. After step 7 has been completed, the receiving and exiting employers must send the trustees written confirmation of the completion.

## General easement - employers

- 2.23 The terms “exiting employer” and “receiving employer” are defined in **regulation 4(3)**. The terms “exiting employer” and “receiving employer” apply for the purposes of new **regulations 6ZB and 6ZC**. The exiting and receiving employers must be participating in the same multi-employer pension scheme and will usually be associated (within the meaning of section 435 of the Insolvency Act 1986 or section 74 of the Bankruptcy (Scotland) Act 1985).
- 2.24 The exception to the requirement that the exiting employer must be “associated” with the receiving employer applies where an employer is changing its legal status (see **paragraph (a)(ii)** of the definition of “receiving employer”). A change of legal status may occur for example where an unincorporated charity (with individuals acting as trustees) becomes a company registered under the Companies Acts. It is understood that changes of legal status in the charities sector may become increasingly common. An employer who is not associated with other employers in a multi-employer scheme will be able to use this procedure, for example a partnership which ceases to be a partnership under the Partnership Act and becomes a company registered under the Companies Act. The current employer debt rules mean that when a change of legal status happens, an employer debt may arise. New **regulations 6ZB and 6ZC** now provide a means of effecting a change of legal status without initiating an employment-cessation event. However all the requirements of these regulations will need to be satisfied i.e. all assets remain with the employer under its changed legal status; and the trustees are satisfied that the Restructuring Test (or the de minimis conditions – see de minimis easement section below) has been met.
- 2.25 A further safeguard requires the receiving employer to have their head office in the UK. This is intended as an anti-avoidance measure.

## Consultation Questions

**Question 1** – We would welcome your views on the overall General Easement proposal.

**Question 2** - At present we envisage the easement applying to one-to-one transaction. This is intended to protect scheme members. The expectation is that if a recipient employer receives the business assets of the exiting employer it should be in a position to provide the equivalent level of support for the pensions liabilities it is also receiving. We would welcome your views on this protection measure, in particular, whether you think the costs/risks outweigh the benefits by adding too much complexity?

**Question 3** – Because we envisage the easement applying to one-to-one transactions, we envisaged the trustees considering the financial resources

and legal obligations (i.e. the covenant) of the exiting and receiving employers only. However, we would welcome your views on whether the covenant offered by all employers (including the exiting employer) should be compared with the covenant offered by all remaining employers after the exiting employer has withdrawn. Would you, for example, expect the covenant assessment of all employers to be more complicated than looking at two employers in isolation?

**Question 4** – Our current thinking is that, without a significant amount of prescription, it would not be possible to provide the same level of member protection for multiple transactions (e.g. where assets of one employer go to several employers; or where several employers are merged into one) as in a one-to-one transaction. However, we would welcome your views on whether multiple transactions (e.g. one-to-many) in a group of associated companies should not trigger a debt where all the assets remain within the same group, and what safeguards might be appropriate to recognise the complexity and increased risk to members of such transactions. (See also paragraphs 1.5 and 1.6.)

**Question 5** – Changes in economic and business conditions could mean that if there were a long gap between the date the Restructuring Test was satisfied and the date the assets etc were actually transferred, the receiving employer might no longer be capable of taking on and supporting new pensions obligations. To protect members' interests we therefore envisage setting a 12 week time limit. We would welcome your views on whether this timescale is appropriate.

### **De minimis easement - steps**

- 2.26 The de minimis easement is intended to apply where small scale corporate restructurings are being undertaken. A Restructuring Test would be inappropriate in such circumstances; instead with the de minimis easement, the trustees must consider whether four factual conditions are met.
- 2.27 On the application of the exiting employer (step 1), the trustees must decide whether the four factual conditions in new **regulation 6ZC(5)** are satisfied (step 2).
- 2.28 The requirements of new **regulation 6ZC(5)** are based on the most recent information that the trustees have provided to the Pensions Regulator for the purposes of section 179 of the Pensions Act 2004 and the scheme return (see new **regulation 6ZC(6)(b)**). The information should therefore be readily available.
- 2.29 The first condition, in new **regulation 6ZC(5)(a)**, is that the assets of the scheme are at least equal to the protected liabilities of the scheme as calculated in the most recent actuarial valuation under section 179

of the Pensions Act 2004 (**regulation 6ZC(6)(b)(i)**).

- 2.30 The second condition is set out in new **6ZC(5)(b)**. This regulation provides that the number of scheme members in respect of whom defined benefits have arisen in the scheme as a result of service with the exiting employer must be under 2% of the total number of scheme members in respect of whom defined benefits have arisen in the scheme. The numbers to be used in the calculation are those contained in the most recent scheme return (new **regulation 6ZC(6)(b)(ii)**).
- 2.31 New **regulation 6ZC(5)(c)** provides that when the percentage calculated in new **regulation 6ZC(5)(c)(i)** is applied to the protected liabilities of the scheme, as calculated in the relevant valuation, the result must be no more than £100,000. (The actual amount of employer debt liabilities covered in the transaction may well be higher than this amount because it is calculated on a full buy out basis.)
- 2.32 New **regulation 6ZC(5)(d)** provides, broadly, that in a rolling period of three years, no more than 5% of scheme members can be included in transactions under **new regulation 6ZC**.
- 2.33 The trustees must notify the exiting employer whether or not the requirements of new **regulation 6ZC(5)** have been satisfied (new **regulations 6ZC(7)**) – this is step 3.
- 2.34 New **regulation 6ZC(9)** contains step 4. The requirements for this regulation are the same as for new **regulation 6ZB(11)**. The receiving employer and the exiting employer must send the trustees their decisions about step 4 in writing – step 5 and new **regulation 6ZC(11)**.
- 2.35 The requirements relating to the corporate restructuring and pension scheme obligations are contained in new **regulation 6ZC(13)** (step 6). Please see the commentary on new **regulation 6ZB(15)** above, which is the equivalent of new **regulation 6ZC(13)**.
- 2.36 Further conditions for the completion of step 6 are contained in new **regulation 6ZC(14)**. The receiving employer can only carry out step 6 where the requirements of **sub paragraphs (a) – (c)** are satisfied. These requirements are as follows. The trustees must be satisfied that the requirements of step 2 (**sub paragraph (a)**) have been met. The trustees must also have received the undertakings from the exiting and receiving employers about their solvency position (**sub paragraph (b)**). Finally, step 6 must be completed within 12 weeks of the date of the trustees' written decision as required in step 3 (**sub paragraph (c)**). (The date of the acquisition agreement and any other agreements, as required by new **regulation 6ZC(13)** will therefore need to fall within this 12 week period.) It should be noted that there is no equivalent in the de minimis easement to the requirement in new **regulation 6ZB(16)(b)**.

**Question 6** – We would welcome your views on the overall de minimis proposal.

**Question 7** - The de minimis easement is intended to apply where small scale corporate restructurings are being undertaken. As such we propose a monetary limit of £100,000. We would welcome your views on the level of limit.

### **Consequential amendments**

- 2.37 A number of consequential amendments to the **Employer Debt Regulations** are being made as a result of the introduction of new **regulations 6ZA – 6ZC**. The amendments are described in this section.
- 2.38 **Regulation 2** amends the Pension Protection Fund (Multi-Employer Schemes) (Modification) Regulations 2005 (SI 2005/441). The amendment provides that a person is not an employer where a restructuring has taken place within **regulations 6ZB or 6ZC** and that person is the exiting employer. This regulation has also been amended to make clear that the exemption only applies as long as the person does not subsequently employ active members of the scheme.
- 2.39 **Regulation 3** amends the Pension Protection Fund (Entry Rules) Regulations 2005 (SI 2005/590). New regulation 2(4)(e) is inserted into the Entry Rules Regulations to provide that an occupational pension scheme is not excluded from being an eligible scheme by virtue of regulation 2(2) of those regulations if there has been a restructuring within new **regulations 6ZB or 6ZC** of the **Employer Debt Regulations**.
- 2.40 **Regulation 4(2)(c)** inserts a new definition of “defined benefits” into the Regulations. This phrase is used in new **regulations 6ZB and 6ZC**.
- 2.41 **Regulation 4(2)(d)** provides that the definition of “employment-cessation event” is contained in new **regulation 6ZA**.
- 2.42 **Regulation 4(3)** inserts new definitions of “exiting employer” and “receiving employer” into the Regulations.
- 2.43 **Regulation 6(3)(b)** amends regulation 6(4) of the **Employer Debt Regulations** by inserting a new **sub paragraph (ab)**. That new sub paragraph provides that the liabilities that the receiving employer acquires as a result of a restructure within new **regulations 6ZB or 6ZC** are to be attributed to that employer in any subsequent application of regulation 6(4).

2.44 **Regulations 12(2)(d) and (6)** insert new requirements into regulation 9 of the **Employer Debt Regulations**. Inserted regulations 9(3)(c)(iv) and 9(14A) provide that, as a result of a restructuring occurring within new **regulation 6ZB or 6ZC**, no debt arises under section 75(2) or (4) of the Pensions Act 1995. Exiting employers who satisfy the conditions of new **regulation 6ZB or 6ZC** are not former employers.

## Chapter 3

### Technical amendments to regulations

#### Introduction

Commentators have suggested that a number of technical amendments should be made to the existing **Employer Debt Regulations**<sup>8</sup>. The draft regulations now contain amendments intended to address these issues. The proposed amendments are aimed at clarifying the regulations and making them easier to apply.

This Chapter - (i) summarises the issues which have been raised; (ii) gives some comment from the Government on each issue; and (iii) sets out how the issue is addressed in the draft regulations.

**It would be helpful when responding if you could include the original DWP reference numbers in the document alongside your comment.**

#### **Issue 1: Regulation 2(1) of the Employer Debt Regulations – definition of ‘updated actuarial assessment’**

1. Typically, in cases where an employer leaves a defined benefit scheme a debt will arise, representing that employer’s share of any scheme deficit at the time. For the purposes of calculating the deficit, scheme benefits are valued by estimating the cost of buying insurance to meet the benefits. The **Employer Debt Regulations** allow the actuary to (1) perform a new full valuation of those costs or (2) adapt a previous estimate of those costs. The latter approach is referred to in the Regulations as an ‘updated actuarial assessment’. A number of queries in connection with the definition of ‘updated actuarial assessment’ have been brought to our attention. In particular, there have been questions about the actuary’s responsibility in connection with assets and expenses when preparing such an update. Furthermore, the reference to regulation 7(6)(a)(i) and (ii) of the Scheme Funding Regulations 2005<sup>9</sup> in the current definition has been suggested to unnecessarily limit the scope of changes which should rightly be considered by the actuary in preparing such an update.

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<sup>8</sup> The Occupational Pension Schemes (Employer Debt) Regulations 2005 (No. 678), as amended in particular by the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008 (No. 731).

<sup>9</sup> The Occupational Pension Schemes (Scheme Funding) Regulations 2005 (No. 3377).

**DWP comment:**

2. Regulation 5(3) states that assets and liabilities (which by Regulation 5(13) includes wind-up expenses) are to be determined and calculated by reference to the same date.
3. Regulation 5(1) states that the valuation of assets is the province of the trustees/managers. Regulation 5(5) indicates circumstances in which an updated asset assessment may be used.
4. Similarly, regulation 5(13) states that wind-up expenses (excluding the cost of annuities) are the province of the trustees/managers. As mentioned above, this provision refers to wind-up expenses forming part of the liabilities.
5. Regulation 5(11) states that the liabilities in respect of pensions and other benefits are to be calculated by the actuary.
6. At the moment, the actuary is asked to prepare an updated actuarial assessment which includes a figure for assets, liabilities and wind-up expenses. However, an assessment of liabilities is all that is needed from the actuary.
7. Practically speaking, there may be circumstances when the actuary is involved in the preparation of an updated assessment of the value of the assets/wind-up expenses, but this would be under regulation 5(5) and (13) and not regulation 5(2) and (14).
8. Furthermore, the 'updated actuarial assessment' definition describes the actuary's update in terms of two particular references to the Scheme Funding Regulations 2005; however, this was not intended to constrain the aspects that the actuary, in their professional judgement, would deem it necessary to consider, in performing the update.
9. For clarity, if advisors' fees arising from any employer debt calculation exercise (as opposed to the process of actually winding-up the scheme and buying out annuities) were part of the costs directly associated with the employer-cessation event and the departure of the employer concerned, they may be able to be included as cessation expenses, and as such separately payable by the departing employer. Cessation expenses do not currently appear in the actuarial certificates and there may be practical difficulties in seeking to introduce a requirement in this regard.

**We would be interested to hear whether making an amendment to the Regulations to include cessation expenses in actuarial certificates would be of interest to industry.**

**DWP proposed action:**

10. **Regulations 4(2)(h) and (i)** of the amending regulations replace the term “updated **actuarial** assessment” with “updated **liabilities** assessment” and make several changes to the wording of the definition. This proposal ensures that the actuary’s responsibilities are limited to an assessment of any changes in the liabilities of the scheme in respect of pensions and other benefits only. It removes a potential degree of duplication of effort, but it does not otherwise alter the existing debt calculation approach in any way. (There are several consequential amendments to existing references to the ‘updated actuarial assessment.’)
11. **Regulation 4(2)(i)** also removes the wording “in the value of ... the matters set out in regulation 7(6)(a)(i) and (ii) of the Scheme Funding Regulations” from this definition. It is the actuary’s responsibility to ensure that liability updates are carried out in a manner compliant with their professional obligations. The removal of these words is intended to ensure that the actuary’s scope to update the liabilities is not restricted in any way.

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**Issue 2:** This is discussed in Chapter 4.

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**Issue 3: Schedule 1A paragraph 5(2)(b) – calculation of Amount B**

12. As described in Issue 1, when an employer leaves a defined benefit scheme, a (buyout) debt normally arises. Where there is more than one participating employer, arrangements can potentially be made that result in the full debt not being immediately paid in to the scheme by the departing employer. One of these types of arrangements is termed a ‘withdrawal arrangement’. An ‘approved withdrawal arrangement’ is a specific variation of this. Under these types of arrangements, the equivalent debt on a scheme funding basis is calculated (‘Amount A’). An agreement is then reached about how much the departing employer is to pay in, taking Amount A into account. The amount to be paid in can be more or less than Amount A, depending on the circumstances.
13. Broadly, the balance between the original debt (on a buyout basis) and the amount actually paid in is defined as Amount B. The obligation for Amount B is taken over by other parties. The obligation in connection with Amount B can either be expressed in terms of amount(s) of money (the ‘fixed’ approach) or in terms of a proportion of future scheme (buyout) deficit (the ‘floating’ approach). It has been reported that the requirements for the floating version of Amount B (i.e. Schedule 1A paragraph 5(2)) are difficult to operate. In particular, how the initial amount paid as part of a Withdrawal Arrangement or Approved Withdrawal Arrangement should be taken into account when calculating Amount B under this approach.

**DWP comment:**

14. Broadly, Amount A is the share of deficit attributable to a departing employer, where liabilities are calculated by the actuary on a scheme funding basis.
15. An amount more or less than Amount A could be paid in by the departing employer – in the former case, under the terms of a withdrawal arrangement (the ‘withdrawal arrangement share’), and, in the latter case, under the terms of an approved withdrawal arrangement (the ‘approved withdrawal arrangement share’). (For the avoidance of doubt, the payment of Amount A itself would take place under a withdrawal arrangement.) If an amount other than Amount A is paid in then this will have been agreed by parties other than the actuary.
16. Broadly, Amount B is the residual difference between the share of deficit attributable to a departing employer, where liabilities are calculated by the actuary on a buyout basis, and the amount paid in under paragraph 15 above.
17. An (approved) withdrawal arrangement can be established using either a fixed or a floating approach. In the fixed case, the monetary amount of Amount B is determined as it stands at the applicable time. That amount is payable at a subsequent date. In the floating case, the remaining obligation is expressed as a percentage of scheme deficit (after receipt of the initial amount in paragraph 15 above) as it stands at the applicable time. The monetary amount of Amount B is determined at a subsequent date by applying that percentage to a later calculation of scheme deficit.
18. The fixed approach is set out in paragraph 5(3) of Schedule 1A. It has been recognised that paragraph 5(3)(b) of Schedule 1A is superfluous, as the amount initially paid in under an (approved) withdrawal arrangement is by definition the (approved) withdrawal arrangement share and it is consequently not possible for there to be an initial payment in excess of this amount.
19. The floating approach is set out in paragraph 5(2) of Schedule 1A.
20. The departing employer’s liabilities are intended to become orphan liabilities<sup>10</sup>. The risk of any difference arising between the amounts paid/to be paid into the scheme in connection with the (approved) withdrawal arrangement and the deficit that may be determined at any time in connection with those orphan liabilities is a consequence of electing to put an (approved) withdrawal arrangement in place. There will be winners and losers.

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<sup>10</sup> Orphan liabilities are liabilities for which no employer is specifically responsible.

**DWP proposed action:**

21. **Regulation 19(3)(a) and (b)** of the amending regulations amends paragraph 5(2) of Schedule 1A so that it reflects the explanation of the floating case in paragraph 17 above. A new formula is inserted to calculate amount B using the floating method.
  22. **Regulation 19(3)(c)** amends paragraph 5(3) of Schedule 1A. Effectively the existing paragraph 5(3)(b) is removed as it serves no purpose.
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**Issue 4: Regulation 2 of the 2008 Regulations<sup>11</sup> & regulation 9 of the Employer Debt Regulations – Transitional Provisions and Frozen Schemes**

23. This issue relates to the interplay between the pre and post April 2008 versions of the Regulations. Commentators have suggested that the transitional arrangements may apply inappropriately in certain circumstances.

**DWP comment and proposed action:**

24. The definition of an employment-cessation event under the old regulations (i.e. the version of the 2005 Regulations as it stood before April 2008) included terminology that we are aware was interpreted in different ways. The definition introduced in April 2008 ties down the terminology more specifically. The transitional provisions in regulation 2(3) and (4) of the 2008 Regulations were to ensure that provisions were in place to take account of this difference, so that no employer or scheme 'fell between' the definitions. However, we are aware that this has caused some problems in practice, and may have given rise to inappropriate applications of these provisions in certain circumstances. In some cases, the transitional provisions of the 2008 Regulations and regulation 9 of the **Employer Debt Regulations**, which makes provision in relation to frozen schemes, may not work consistently with each other.
  25. **Regulations 12(4) and 26** are intended to ensure that regulation 2 of the 2008 Regulations works consistently with regulation 9 of the **Employer Debt Regulations** and does not allow employers or schemes to 'fall between' the definitions. Comments are invited on whether the transitional arrangements have now been fully secured.
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<sup>11</sup> The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008 (S.I. 2008/731).

## **Issue 5: Regulations 2(1) and 6(4)(a) of the Employer Debt Regulations – definition of ‘scheme apportionment arrangement’**

26. With reference to Issue 3, where there is more than one participating employer, an alternative arrangement can potentially be made that results in the full debt not being immediately paid in by the departing employer, termed a ‘scheme apportionment arrangement’. A ‘regulated apportionment arrangement’ is a specific variation of this. Apportionment arrangements permit some or all of the obligation in respect of a departing employer’s (buyout) debt to be taken over by other parties. Several commentators have queried how this type of arrangement is intended to work in practice, including: the use of the terms ‘amount’ and ‘liability share’, the effect of paragraph (c) in the definition of ‘scheme apportionment arrangement’ in regulation 2(1), the interaction of that definition with regulation 6(4)(a), whether the definition allows for an apportioned obligation to be floating (i.e. amount determined at a later date) and whether an obligation exists to apportion all of the departing employer’s debt that is not paid by that employer as its scheme apportionment arrangement share.

### **DWP comment and proposed action:**

27. The obligation is in terms of an apportionment of debt (i.e. share of deficit) and not the reallocation of the underlying liabilities of the departing employer, as these should become orphan liabilities. (However, any liabilities of a previously departing employer that have already been explicitly reallocated among remaining employers as a result of – not just as a mechanism in the process of - a previous apportionment arrangement will continue to be attributable to those other employers, unless they are reallocated under the terms of a subsequent apportionment arrangement.)
28. The risk of any difference arising between the amounts paid/to be paid into the scheme in connection with the (scheme or regulated) apportionment arrangement and the deficit that may be determined at any time in connection with the orphan liabilities is a known consequence of electing to put a (scheme or regulated) apportionment arrangement in place. There will be winners and losers.
29. In relation to scheme apportionment arrangements, the policy intention is that all of the departing employer’s debt that is not paid by the departing employer should be apportioned among the remaining named employers, either as fixed or floating obligation(s), but not as a combination of the two.
30. If a fixed obligation is chosen, the employer(s) accepting the apportioned obligation agree(s) to pay a specified amount of money which is always determined at the applicable time but which may be payable at a later time, depending on the terms of the apportionment

arrangement. As this agreement is independent of any future changes to the scheme, this fixed approach may either result in an effective overpayment or underpayment, as mentioned in paragraph 28 above. Fixed arrangements are regarded as debts due and may provide for arrangements as to timing of payments (which can include paying the debt at some point in the future). (See new **regulation 6B(5)(b)(i)**, substituted by **regulation 8** of these amending regulations.)

31. If a floating obligation is chosen, the employer(s) accepting the apportioned obligation agree(s) to pay amount(s) that will be determined at a later time. (See new **regulation 6B(5)(b)(ii)**, substituted by **regulation 8** of these amending regulations.) At that later time, the amount(s) may be either smaller or larger (in aggregate) than the balance of debt due at the original date the employer left the scheme. The floating obligation will be expressed as proportions attributable to one or more of the remaining employers which, when aggregated with the proportion of 'the liabilities defined as "L"' that the departing employer actually paid, equals the departing employer's liability proportion. For this purpose, 'the liabilities defined as "L"' means the liabilities attributable to all of the participating employers at the original date of exit, i.e. excluding orphan liabilities (see the definition of "liability proportion" in regulation 2(1)).
32. At the time of a future employment cessation event, any obligations not yet paid under the terms of any previous apportionment arrangement (or withdrawal arrangement) are expected to be taken into account in the deficit calculated at that time, before the newly departing employer's share of the deficit is calculated. In the case of obligations not yet paid by any employer other than the newly departing employer, this requirement is subject to regulation 5(4)(b). However, in the case of the newly departing employer, the obligation is intended to become payable (or otherwise reallocated) on exit and therefore must be taken into account, i.e. regulation 5(4)(b) is disapplied. New **regulation 6(4)(aa)** provides that the amount or proportion of the debt apportioned under the previous SAA is to be treated for the purposes of regulation 6 (that is, for the purposes of calculating what the newly departing employer must pay) as a liability.
33. As a separate matter, if an existing apportionment arrangement is to be replaced then any obligations not yet paid under that arrangement must be ignored in the calculation of the deficit, as those specific payment obligations are to fall away.
34. We would welcome comments on this treatment of fixed and floating apportioned obligations, and in particular whether it creates any problems in practice.
35. The new regulations also introduce amendments as follows.  
**Regulation 10** adds a new **sub paragraph (3)** to regulation 7A of the

**Employer Debt Regulations.** New **sub paragraph (3)** sets out requirements for the earliest date at which the debt is payable.

36. **Regulation 4(2)(e)** amends the definition of 'liability proportion' to show that it is a fraction (i.e. one liability measure divided by another).

**Regulation 4(2)(f)** amends the definition of 'liability share' to show that it is a share of total scheme deficit (i.e. a monetary amount of deficit, not a portion of the scheme liabilities themselves).

37. **Regulation 4(2)(g)** substitutes a new definition of "scheme apportionment arrangement". The new definition is contained in **new regulation 6B(6)**, which is inserted into the **Employer Debt Regulations** by **regulation 8**.

Minor technical amendments are set out in the following table.

<b>Issues raised with DWP about the Employer Debt Regulations</b>	<b>Regulation reference in <u>existing</u> regulations</b>	<b>DWP response and proposed action</b>	<b>Regulation reference in <u>amending</u> regulations</b>
<p><b>DWP ref 12b</b></p> <p>An issue has been raised that the reference to Regulation 5 of the PPF valuation regs appears to require audited assets and this does not seem consistent with the policy of allowing updates and will cause practical difficulties for trustees.</p>	<p>Schedule 1A, Paragraph 4(5)</p>	<p>An amendment is being made so that the assets are subject to regulation 5 of the Employer Debt Regulations 2005, which do not always require the use of audited accounts. This amendment also makes several minor changes to paragraph 4(5). In particular, typographical errors are corrected.</p>	<p>Regulation 19(2)(c)</p>
<p><b>DWP ref's 14 / 35 / 40 /43</b></p> <p>A comment that the actuarial certificate does not take into account 'cessation expenses' although this is provided for in the provisions of the 2005 Regulations.</p> <p>It has also been suggested that a reference to 'cessation expenses' should be deleted as these are not mentioned in regulation 7 or otherwise in Schedule 1A.</p>	<p>Schedules 1 &amp; 1C;</p> <p>Schedule 1A, Paragraph 6(1)</p>	<p>Under the 2005 Regulations, the debt due from the employer is equal to the employer's share of the difference <u>plus</u> the cessation expenses, so the trustees would be expected to claim this amount.</p> <p>Amendments are being made so that cessation expenses are explicitly mentioned in the actuarial certificates.</p> <p>Paragraph 6(1) of Schedule 1A is to be amended to remove an unnecessary reference to "cessation expenses".</p> <p>Regulation 6(1)(e)(i) is being amended so that cessation expenses are included in the debt due from the employer where there is a relevant event (within the meaning in section 75(6A) of the Pensions Act 1995).</p> <p>Regulation 6(1)(e) indicates that cessation expenses, as distinct from winding-up expenses, are always payable in addition to any agreed share of deficit that a departing employer is paying in. This means that, for instance, in a withdrawal arrangement, cessation expenses can be separately payable at the time of both the initial payment (Amount A or a greater or lesser agreed figure) and the final payment (Amount B). Furthermore, if a</p>	<p>Regulations 6(2), 18(5), 19(4) and 21(6).</p>

Issues raised with DWP about the Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action	Regulation reference in <u>amending</u> regulations
		<p>scheme is winding up then cessation expenses can become payable in respect of processing any outstanding apportionment or withdrawal arrangement payments from legacy arrangements, before the wind up is actioned and wind-up expenses incurred.</p> <p>Amount B is to include wind-up expenses and Amount A is to include funding expenses (if the latest Statement of Funding Principles requires this). The payment of any portion of debt is to require separate payment of cessation expenses.</p>	
<p><b>DWP ref 18</b></p> <p>A query has been raised about the definition of 'liability proportion' and a suggestion has been made that part 'L' should (as per part 'K') refer to liabilities which have been attributed to employment with all the employers 'in accordance with paragraph (4) of regulation 6'.</p>	<p>Regulation 2(1), definition of liability proportion, Paragraph (b)</p>	<p>Regulation 6(4) is used to attribute liabilities to any given employer. As 'L' is effectively a summation of individual employers' liabilities, the explicit reference to Regulation 6(4) for 'L' is unnecessary.</p> <p>However, in using Regulation 6(4) to determine 'L' as a summation of 'K's, trustees are required by the reference to 'Employer A' in Regulation 6(4) to consult each employer whose liabilities form part of 'L'. We think that there should be a requirement to consult the departing employer only.</p> <p>Amendments are being made to regulation 6 to give effect to the second matter above.</p>	<p>Regulation 6(3)(a) and (4).</p>
<p><b>DWP ref 19</b></p> <p>Concern has been expressed about the reduced ability to use the old rules of apportionment under the current regulations. Particularly, the pre 6 April 2008 power to vary some apportionment arrangements by amendment, which is not included in the current version of the 2005 Regulations. The failure to re-instate this would for some schemes 'be inflexible to the point of making future debt calculations extremely</p>	<p>Regulation 6(4)</p>	<p>Future apportionment arrangements acknowledge the binding impact of previous apportionments, for example, according to the requirements of Regulation 6(4)(a).</p> <p>The only situation in which an old apportionment arrangement may be overridden going forward is where an employer exits and their outstanding <u>debt</u> obligation(s) in respect of a previous apportionment arrangement is to be reassigned among the remaining employers</p>	<p>Regulation 16</p>

Issues raised with DWP about the Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action	Regulation reference in <u>amending</u> regulations
difficult'.		<p>(please see paragraph 32 above).</p> <p>An ancillary issue has been brought to our attention regarding the current wording of Regulation 16. Regulation 16 allows the scheme rules to be modified to permit an amount different to the departing employer's share of the deficit to be paid in by that employer. An amendment is being made to the wording of Regulation 16 so that the trustees have power to modify the scheme to enable an apportionment arrangement to be entered into.</p>	
<p><b>DWP ref 22</b></p> <p>Queries have been raised regarding the numbering / formatting of regulation 6(4)(c)(i)(aa) &amp; (bb) where the common thread of 'Employer A being the last employer' has been interpreted as applying to both sub-paragraphs (aa) and (bb).</p> <p>This contrasts with 6(4)(c)(ii) which applies when the last employer cannot be determined.</p>	Regulation 6(4)(c)	<p>We regard the sequence in the current legislation as necessary approach i.e. (c)(i) then (c)(ii). Within (c)(i) there is a choice of (aa) or (bb).</p> <p>Regulation 6(4)(c) is being amended to set out how liabilities which cannot be attributed to any employer (other than at disproportionate cost) are to be dealt with.</p> <p>On a matter related to Regulation 6(4)(b), an amendment is to be made so that where pensionable service is with a single employer, liabilities in connection with any transfers received are attributed to that single employer and not treated as orphan liabilities.</p> <p>DWP invites respondents to comment on any areas in Regulation 6(4) in particular that may potentially be used for avoiding an employer debt.</p>	Regulation 6(3)(b), (c) and (d).
<p><b>DWP ref 25</b></p> <p>A query has been raised whether references need to be added to Regulation 5(4)(b) covering sections 59(2), 60(5) and 75(1) of the Pensions Act 1995 and section 144(1) of the Pension Schemes Act 1993.</p> <p>A concern was raised that the current reference to</p>	Regulation 5(4)(b)	Amendments are to be made to regulation 5(4)(b) to set out which assets are not to be taken into account when the trustees calculate the amount of assets.	Regulation 5(3)

<b>Issues raised with DWP about the Employer Debt Regulations</b>	<b>Regulation reference in <u>existing</u> regulations</b>	<b>DWP response and proposed action</b>	<b>Regulation reference in <u>amending</u> regulations</b>
<p>contributions due (s 228(3) of the Pensions Act 2004) did not cover schemes who have not yet had a scheme funding valuation carried out.</p> <p>A concern was also raised that debts due under old versions of the legislation on winding-up were not covered.</p>			
<p><b>DWP ref 26</b></p> <p>Amendments have been suggested as follows:</p> <ul style="list-style-type: none"> <li>• Insert 'or' before 'if more'</li> <li>• Insert a comma after 'to an employer'</li> </ul> <p>Delete 'and any contributions to that employer's or member's section'.</p>	Regulation 8(2)(a)(i)	Agreed. These and other minor amendments are to be made to Regulation 8(2)(a)(i).	Regulation 11
<p><b>DWP ref 28</b></p> <p>A suggested insertion of 'under section 75(2) or (4) of the 1995 Act' after 'from him'.</p>	Regulation 9(13)	Agreed. Amendment to be made.	Regulation 12(5)
<p><b>DWP ref 29</b></p> <p>A query as to why regulation 12(1B) still refers to GN19 when it has been removed from Regulation 2(3).</p> <p>(GN19 is a guidance note for employer debt formerly issued by The Actuarial Profession and later adopted by the Board for Actuarial Standards.)</p> <p>A comment was also made that the BAS had indicated that GN19 would be disapplied for such calculations that fall to be calculated from 6 April 2008.</p>	Regulation 12(1B)	Agreed. Amendment to be made.	Regulation 13
<p><b>DWP ref 30</b></p> <p>Suggested replacing 'form set out in Schedule 1' with 'forms set out in Schedules 1, 1C and 1D'.</p>	Regulations 14(2)(b), 14(4)(b), 14(6)(b), 15(2)(b)	Agreed. Amendment to be made.	Regulations 14 and 15
<p><b>DWP ref 31</b></p> <p>A suggestion that in regulation 14(4)(a) the terms "approved" and</p>	Regulation 14(4)(a)	Agreed. Amendment to be made.	Regulation 14(3)

<b>Issues raised with DWP about the Employer Debt Regulations</b>	<b>Regulation reference in <u>existing</u> regulations</b>	<b>DWP response and proposed action</b>	<b>Regulation reference in <u>amending</u> regulations</b>
“unapproved” need to be amended.			
<b>DWP ref 32</b>  Suggested that the reference to ‘section 75(6D)(i)’ should be to ‘section 75(6D)(b)(i)’ of the 1995 Act.	Regulation 17(1)	Agreed. Amendment to be made.	Regulation 17
<b>DWP ref 33</b>  Suggested that in the 3 <sup>rd</sup> subparagraph under paragraph 1, ‘assets in scheme’ should read ‘assets of the scheme’.	Schedule 1, paragraph 1 in the certificate.	Agreed. Amendment to be made.	Regulation 18(2)
<b>DWP ref 34</b>  Suggested that in order to comply with regulation 6(8), the amount of the liability proportion (given by K/L) also needs to be explicitly shown. Currently only the separate values of K and L are shown.	Regulation 6(8) and Schedule 1, paragraph 2 of the certificate.	Paragraph 2 of the certificate in Schedule 1 records the figures K and L and the employer’s debt that results from calculating the liability share. The definitions of liability share and liability proportion set out the calculation formula of K/L. Regulation 6(8) refers to those definitions. An amendment is to be made to regulation 6(8).	Regulation 6(6)
<b>DWP ref 39 a)</b> It has been suggested there is a need to exclude estimated winding up expenses from the calculation of Amount A as this is already included (by default) within the calculation of Amount B. Otherwise there will be double counting of such expenses.  To correct this it is suggested amending “paragraph (12)” in paragraph 4(4)(a)(ii) of Schedule 1A to read “paragraphs (12) and (13)”.	Schedule 1A, paragraph 4.	Agreed. Amendment to be made.	Regulation 19(2)(b)
<b>DWP ref 41</b>  Suggested deletion of paragraph 4(2) as it is inconsistent with 4(4).	Schedule 1A paragraph 4	Agreed. Amendment to be made.	Regulation 19(2)(a)
<b>DWP ref 42</b>  Suggested deletion in	Schedule 1B,	Agreed. Amendment to be	Regulation 20

<b>Issues raised with DWP about the Employer Debt Regulations</b>	<b>Regulation reference in <u>existing</u> regulations</b>	<b>DWP response and proposed action</b>	<b>Regulation reference in <u>amending</u> regulations</b>
paragraph 3(1) of the first occurrence of 'under paragraph 1 or 2'.	Paragraph 3(1)	made.	
<b>DWP ref 44.</b>  Suggested deletion of '[regulation 6C(3) regulation 7(5)] of, and paragraph 3 of Schedule 1 to'.	Schedule 1C paragraph 3 in the certificate	We agree and are making an amendment so that paragraph 3 of the certificate in Schedule 1C is similarly worded to paragraph 3 of the certificate in Schedule 1, but allowing for any Schedule 1C-specific wording to be retained.	Regulation 21(2)
<b>DWP ref 45</b>  It has been suggested that as the 'relevant transfer deduction' definition applies equally to withdrawal arrangements and not just to approved withdrawal arrangements, all the words after 'means' should be replaced by 'the amount of the relevant transfer liabilities less the value of the corresponding assets'.	Notes to the certificate in Schedule 1C	Agreed. Amendment to be made.	Regulation 21(3)
<b>DWP ref 47</b>  Suggested replacing 'Occupational Pension Schemes (Employer Debt) Regulations 2005' by 'Employer Debt Regulations' in Paragraph 2.	Schedule 1D, paragraph 2 of the certificate	Agreed. Amendment to be made.	Regulation 22(2)
<b>DWP ref 51</b>  A query as to whether a scheme apportionment arrangement (SAA) can be set out as a stand alone agreement or if this must be specifically written into scheme rules.	Definition of SAA in regulation 2(1)	For flexibility, we want to encompass arrangements both in and out of scheme rules.  An amendment is to be made.	Regulation 8
<b>DWP ref 54</b>  A concern that it might not be appropriate for a scheme that is winding up to use a scheme apportionment arrangement rather than a regulated apportionment arrangement.	Regulation 6B(2)(b)	Regulation 6B(2)(b) allows employers in a scheme that is winding up to enter into an apportionment arrangement. There is no requirement for the funding test. However regulation 7A(1) makes provision for regulated apportionment arrangements where a scheme is in, or is likely to be in, an	Regulation 8, substituted regulation 6B(3)

Issues raised with DWP about the Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action	Regulation reference in <u>amending</u> regulations
		<p>assessment period.</p> <p>It is accepted that boundaries between the requirements of regulations 6B(2)(b) and 7A(1) need to be clarified and amendments have been included in the draft regulations.</p>	
<p><b>DWP ref 55</b></p> <p>Clarification sought about the due date for a debt apportioned under a regulated apportionment arrangement.</p>	Regulation 7A	<p>Agreed an amendment is needed and that the requirements should be the same as for scheme apportionment arrangements. (See Issue 5.)</p>	Regulation 10(2). (See also regulation 8 – substituted regulation 6B(5)(b).)
<p><b>Other minor amendments</b></p>		<p>We have identified several minor issues with the Employer Debt Regulations and propose to make amendments for them. The amendments are being made to:</p> <ul style="list-style-type: none"> <li>- regulation 2(1) definitions of PPF, and statutory funding objective and a new definition of Board of the PPF,</li> <li>- regulation 5(3), (7), (10)(a) and (12),</li> <li>- regulation 6(4)</li> <li>- regulation 6C(2),</li> <li>- regulation 9(3)(c)(iii) and (d),</li> <li>- Schedule 1A paragraph 7,</li> <li>- The Pensions Regulator (Financial Support Directions etc) Regulations 2005, and</li> <li>- The Occupational Pension Schemes (Scheme Funding) Regulations 2005.</li> </ul>	Regulations 4(2), 5(2), (4), (5) and (6), 6(3)(d), 9, 12(2) and (3), 19(5), 24 and 25.

## Chapter 4

### Other technical issues

Commentators have asked for clarification about a number of other issues in the Employer Debt Regulations. These issues, and the Department's responses, are described in the table below. In the Department's view, these issues do not give rise to the need for any amendments to the regulations. However if you are of the view that amendments are needed, please let us know.

**It would be helpful when responding if you could include the original DWP reference numbers in the document alongside your comment.**

Issues raised with DWP about Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action
<p><b>DWP ref: Issue 2</b></p> <p>The assets to be taken into account in the calculation of scheme deficit are those reflected in the 'relevant accounts'. It was suggested that the Regulations effectively require the 'relevant accounts' to be as at the latest scheme year end, whereas the scheme deficit needs to be calculated at the employer exit date.</p>	<p>Regulations 2(1), 5(4) and 5(5)</p>	<p>The policy is to allow the trustees to take into account either the assets as stated in the relevant accounts or in the updated asset assessment. The regulations provide the necessary measure of flexibility.</p>
<p><b>DWP ref's 06 / 49.</b></p> <p>A query about the scope of 'active member' definition – particularly whether life cover members are included and also whether only those with a link to final salary only are included.</p>	<p>Regulation 2(1)</p>	<p>"Active member" is defined in s.124(1) PA95 and applies to all regulations made under Part 1 of PA95. As such 'active member' is restricted to members accruing benefits. We think this is appropriate.</p> <p>We understand that different schemes have relied on more than one interpretation of 'active member' based on advice from their legal advisers.</p>
<p><b>DWP ref 08.</b></p> <p>It has been suggested that Condition B in regulation 9(7) is always met as, at the time active members became deferred members, no debt was treated as due under s 75(2) &amp; (4) of PA95.</p>	<p>Regulation 9 (7)</p>	<p>As described in Issue 4 in Chapter 3, where the old regulations were interpreted as not resulting in an employment-cessation event when an employer ceased to employ active members but continued to employ deferred members, an employment-cessation event is subsequently deemed to occur when the last deferred member ceases employment with the employer.</p> <p>Employers are expected to inform the trustees when they cease to employ their last deferred member so that the debt can be identified promptly.</p>
<p><b>DWP ref 10.</b></p> <p>A query about how Amount A</p>	<p>Schedule 1A,</p>	<p>Where the trustees have not yet received their first valuation</p>

Issues raised with DWP about Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action
<p>should be calculated using the PPF basis - as stipulated in Schedule 1A Paragraph 4(4)(b) - if scheme has not yet finalised its first scheme funding valuation and wishes to enter into a withdrawal arrangement.</p>	<p>Paragraph 4</p>	<p>under Part 3 of the Pensions Act 2004, the value of assets, liabilities and transfer deductions have to be calculated on the basis of the valuation the scheme is required to make for the purposes of section 179 of that Act. Hence the requirement in paragraph 4(5) of Schedule 1A that these amounts must be calculated in accordance with various provision of the PPF (Valuation) Regs 2005 (SI 2005 No. 672).</p> <p>Please note that paragraph 4(5) is being amended by regulation 19(2)(c) of these amending regulations (see also DWP ref 12b in Chapter 3).</p>
<p><b>DWP ref 12a.</b></p> <p>A concern has been expressed that it may not be possible to update a previous PPF valuation in the same manner as a scheme funding valuation can be updated.</p>	<p>Schedule 1A, Paragraph 4(5)(a)</p>	<p>There is no explicit reference within Schedule 1A paragraph 4(5)(a) to Regulation 5 of the Employer Debt Regulations (dealing with updates to assets and liabilities).</p> <p>The valuation of liabilities for the purposes of s75(a) of the 1995 Act is to be carried out in line with the relevant PPF section 179 valuation guidance and that guidance states that prudent approximations may be used in calculations as long as the actuary certifies that the value of <u>liabilities</u> is not likely to have been understated.</p> <p>Schedule 1A Paragraph 4(5)(a) includes reference to Regulation 5 of the PPF (Valuation) Regs 2005 (SI 2005 No.672) which itself sets out the requirement to determine <u>assets</u> at the applicable time.</p> <p>Please note that paragraph 4(5) is being amended by regulation 19(2)(c) of these amending regulations (see also DWP ref 12b in Chapter 3).</p>
<p><b>DWP ref 13</b></p> <p>This regulation seems to be merely referring to the timing of the calculation and not its effective date. Is it superfluous?</p>	<p>Regulation 6(6)(b)</p>	<p>Sub-paragraph (b) specifies <u>when</u>, in relation to the actioning of a bulk transfer out of the scheme, the liability share calculation is to be made. This ensures that the relevant transfer deduction is taken into account correctly in the calculation of the liability share.</p> <p>The liability proportion is not affected by the relevant transfer deduction. The liability proportion and the exiting employer's initial liability share are calculated as specified in the remainder of the Regulations. However, Regulation 6(6)(a) requires the relevant transfer deduction to reduce the departing employer's initial liability share, to form a reduced liability share. Because the departing employer's liability share therefore cannot be finalised until the relevant transfer deduction is known, Regulation 6(6)(b) makes it clear that the departing employer's (reduced) liability share is calculated after the transfer has taken place.</p>
<p><b>DWP ref 16</b></p> <p>A concern that Regulation 5(15) does not seem to apply to pre-6 April 2008 withdrawal arrangements approved by the Regulator as the funding test was introduced by the 2008 Regulations with effect from 6</p>	<p>Regulation 5(15)</p>	<p>It should be possible for scheme trustees to treat any debt due under a pre-6 April 2008 withdrawal arrangement as an asset, if the trustees deem this appropriate.</p>

Issues raised with DWP about Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action
<p>April 2008.</p> <p>It is suggested that it is therefore not possible for a withdrawal arrangement entered into before that date to meet the funding test and so for Amount B to be treated as an asset of the scheme.</p>		
<p><b>DWP ref 20</b></p> <p>Concern has been expressed about schemes who adopted different apportionment rules since their last apportionment. In these cases the same liabilities could be apportioned to different employers depending on which version of rule applies. Regulation 6(4) should therefore provide for the latest version of the rule to continue to have effect (and not any previous version).</p>	<p>Regulation 6(4)</p>	<p>Different approaches to apportionment are possible, depending on whether the apportionment arrangement occurred before or after April 2008.</p> <p>In the pre April 2008 situation, the scheme rules could set out a <u>mechanism</u> for deeming liabilities to be allocated among all of the participating employers in a manner that would override the 'natural' distribution. This would permit a smaller share of deficit to be attributed to the departing employer than would otherwise have been the case. This mechanism could be used to arrive at a smaller payment. The mechanism was not a formal and permanent reassignment of the liabilities for other purposes.</p> <p>In the post April 2008 situation, the departing employer's share of deficit would be calculated under Regulation 6(4), using the 'natural' distribution of liabilities. The scheme rules could then specify that a smaller amount would be payable by the departing employer, with the balance of the departing employer's share of deficit to be reallocated among the remaining employers.</p> <p>In both situations, although not required under the Regulations, the apportionment arrangement may have formally <u>reassigned</u> the departing employer's liabilities among the remaining employers, so that once the departing employer ceased to support the scheme its liabilities did not become orphan liabilities. At the time of any future employment cessation event, any such reassignment of liabilities would be taken into account under Regulation 6(4)(a) when the newly departing employer's liability share was calculated.</p> <p>In other words, Regulation 6(4)(a) deals only with the reassignment matter in the last paragraph above, and not with the preservation of any mechanism used to derive a reduced payment before April 2008.</p> <p>Regulation 6(4)(a) also deals with the situation where under the pre April 2008 Regulations one or more employers were apportioned a departing employer's liabilities <u>instead of</u> any apportionment of debt. In this situation, Regulation 6(4)(a) serves to ensure that the reassignment of liabilities is carried through to all future calculations.</p> <p>The starting point for the allocation of debt for any future apportionment is the state of play after the last apportionment. If any of the departing employer's liabilities were reassigned to avoid them becoming orphans then this will be picked up by Regulation 6(4)(a). Also, if any apportionment or withdrawal arrangements were previously</p>

Issues raised with DWP about Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action
		<p>entered into then these will need to be taken into account in any calculations for a later employment cessation event, e.g. the treatment of any payments outstanding, but this forms part of Regulation 5(4), as these represent expected future inflows. In conclusion, Regulation 6(4) will be used to derive the newly departing employer's 'natural' liability share.</p> <p>To the extent that there is an existing mechanism in place under the scheme rules or within a document external to the rules to derive a smaller payment for the departing employer by overriding the natural distribution of liabilities among the employers, the parties involved in the new cessation event will need to decide whether to use the same mechanism to derive a reduced payment for the newly departing employer and apportionment of the remaining debt (share of deficit) among the remaining employers or whether a new rule/arrangement is to be put in place, specifically for the employment cessation event at hand. This mechanism does not override Regulation 6(4) but would be used after Regulation 6(4) has already derived the debt (initial share of deficit), to make an apportionment arrangement in connection with that debt. (Where there is more than one mechanism already in existence, it may be more practical to prepare a new rule/arrangement than to attempt to work them in).</p> <p>In response to the technical issue raised, we consequently think regulation 6(4) is fit for purpose.</p>
<p><b>DWP ref 21</b></p> <p>Regulation 6(4)(c)(ii) covers cases where either trustees or managers cannot determine to whom liabilities are to be attributed, or where to do so would be disproportionately costly.</p> <p>A concern was raised that regulation 6(4)(c)(ii) fails to deal with situations where employment with a particular employer can be <u>positively excluded</u>. In these cases liabilities should be shared amongst other employers but not the one who is positively excluded.</p>	<p>Regulation 6(4)(c)(ii)</p>	<p>Regulation 6(4) is used to get the attribution of liabilities correct for a particular selected employer. If it is known for sure that certain liabilities do not belong to that employer then those liabilities are irrelevant for the purposes of determining that particular employer's liabilities under Regulation 6(4). This is not to say that the liabilities will be ignored under Regulation 6(4) in the case of other employers, where they cannot be positively excluded. Where liabilities can be positively excluded in the case of each employer, then the liabilities will not be taken into account at all under regulation 6(4), but will instead become part of the 'orphans' liabilities.</p> <p>We do not therefore propose to make any amendments to the legislation to deal with this point.</p>
<p><b>DWP ref 24</b></p> <p>Queried why the current regulations now <u>always</u> exclude from the assets any resources invested in contravention of the limits on employer related investments within section 40(1) of PA 1995.</p> <p>It is suggested that the pre-6 April regs allowed the inclusion of any employer related investment exceeding (the usual maximum of)</p>	<p>Regulation 5(4)(a)</p>	<p>As these resources are invested in contravention of section 40(1), it would be inappropriate to count them as assets. No changes are planned to the regulation.</p>

<b>Issues raised with DWP about Employer Debt Regulations</b>	<b>Regulation reference in <u>existing</u> regulations</b>	<b>DWP response and proposed action</b>
<p>five per cent of scheme assets where the applicable time falls after the scheme begins to wind-up.</p> <p>It is suggested that regulation 5(4)(a) needs a caveat as per pre-6 April regulation, but updated to refer to 2005 'Investment Regulations' (SI2005/3378).</p>		
<p><b>DWP ref 27</b></p> <p>Suggested deletion of the words after 'related' as, by virtue of regulation 6 of S.I. 1996/3128, it is suggested that a former participator cannot have ceased to participate before 19 December 1996.</p>	<p>Regulation 9(3)(b)</p>	<p>We do not propose to make any amendments to the legislation in relation to this point. Regulation 9(3)(b) is about the position over 12 years ago and we do not propose to alter that position now.</p>
<p><b>DWP ref 36</b></p> <p>Suggested inclusion of definitions for 'relevant transfer liabilities' and 'corresponding assets'.</p>	<p>Notes to Schedules 1 &amp; 1C</p>	<p>These terms are not used in the certificate although they are referred to in the definitions of terms used in the certificate. We would expect the regulations to be read if a certificate is being drawn up. Regulation 2(1) defines both of these terms, so it is clear what they mean in the Schedules.</p>
<p><b>DWP ref 37</b></p> <p>Suggested there are various parts in certificates which may not be relevant but which are not shown as 'delete as appropriate'. For example Paragraph 2 is not relevant to single employer schemes.</p>	<p>Schedules 1, 1C &amp; 1D.</p>	<p>There are a small number of areas identified in the actuarial certificates that could be marked as "[delete as appropriate]" but have not been.</p> <p>However, we think the certificates are clear as they are.</p>
<p><b>DWP ref 38</b></p> <p>Suggested that paragraph 1(j) of Schedule 1A needs to include provision for the amounts to be paid to the PPF if the PPF assumes responsibility for the scheme.</p>	<p>Schedule 1A paragraph 1(j)</p>	<p>Inserting additional wording in these Regulations may cause confusion given the primary legislation override that already exists. No amendment is consequently proposed.</p>
<p><b>DWP ref 39 b)</b></p> <p>Suggested adding 'in relation to section 179 valuations under the 2004 Act' after 'PPF', but excluding any allowance for expenses in that guidance.</p>	<p>Schedule 1A paragraph 4(4)(b)</p>	<p>In this context, the Section 179 approach is being used as a proxy for a scheme specific funding valuation. Expenses are an integral part of the Section 179 approach, referred to in both the PPF Board's guidance on methodology and its guidance on assumptions. In placing a value on the liabilities for the purpose of Schedule 1A paragraph 4(4)(b), the Section 179 approach is adopted in its entirety. We do not therefore think it is appropriate to omit this part of the Section 179 valuation.</p>

Issues raised with DWP about Employer Debt Regulations	Regulation reference in <u>existing</u> regulations	DWP response and proposed action
<p><b>DWP ref 46</b></p> <p>Suggested that for consistency with Schedule 1 a further note could be included as follows:            'The valuation of the amount of the liabilities of the scheme may not reflect the actual cost of securing those liabilities by the purchase of annuities [if the scheme were to have been wound up on the date as at which the valuation is made] [delete if scheme had commenced winding-up on the applicable date]'.</p>	<p>Notes to Schedule 1C</p>	<p>We think that Schedule 1 is clear as it currently stands.</p>
<p><b>DWP ref 48</b></p> <p>Identified incorrect cross-references. Regulation 5(11) should be replaced by Regulation 5(14) while Regulation 6(5) should be replaced by Regulation 6(6). Optional wording is not shown as 'to be deleted'.</p>	<p>Notes to Schedule 1</p> <p>Schedule 1 – end of paragraph 2.</p>	<p>These items have now been corrected by the Stationery Office. SI 2008/731 was reissued on 19 August 2009.</p>
<p><b>DWP ref 50</b></p> <p>Queried the scope of 'active member' as applied to hybrid schemes. Does it cover active members in the defined benefit (DB) section of the scheme only or does it include members in both the DB and defined contribution (DC) sections?</p> <p>Also queried how active members should be defined in non-segregated cross-subsidised hybrid schemes as this has a bearing on how deficits should be attributed.</p>	<p>Regulation 2(1)</p>	<p>No amendments have been made in relation to hybrid schemes because the outcome of a court case may touch on these issues. If however there are issue you wish to bring to our attention, please include them in your response to the consultation.</p>
<p><b>DWP ref 53</b></p> <p>Suggested that in relation to the funding test, it is unclear how far into the future trustees will have to look when assessing if the test has been met.</p>	<p>Regulation 2(4A)</p>	<p>We think trustees need a degree of flexibility in determining the criteria for meeting the funding test. Trustees can seek advice from their Scheme Actuary and any other advisors, as required, so would not be working in isolation.</p>

# Annex A

## Consultation arrangements

### Introduction

#### Who this consultation is aimed at

1. The consultation is aimed primarily at pension industry professionals, pension schemes, trustees, and industry and member representative organisations, but we would be interested in views from any source.

#### Consultation arrangements

2. The Government Code of Practice on consultation advises that a minimum of 12 weeks is appropriate for public consultations, unless there are good reasons for a shorter period. In the case of this consultation, these are deregulatory changes which the pensions community has been pressing for; an informal consultation over four weeks with key stakeholders has already been undertaken on these issues; there has been an ongoing dialogue with the pensions community on the development of these proposals; and the new regulations are permissive. Ministers have therefore decided that a limited consultation period of nine weeks is appropriate.

#### How to respond

3. Details about how to respond to this consultation are set out in the Preface to this consultation document.

4. In responding, it would be helpful if you would indicate whether you are doing so as an individual or whether you are representing an organisation. If you are responding on behalf of a representative organisation, please make it clear how the views of constituent members have been gathered.

#### Freedom of information

5. The information you send us may need to be passed to colleagues within the Department for Work and Pensions, and published in a summary of responses received.

6. All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purpose of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information

which is provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality of electronic responses even if your IT system claims it automatically.

7. If you want to find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Charles Cushing or Carol Smith  
Department for Work and Pensions,  
Information Policy Division,  
Central Freedom of Information Team,  
Caxton House  
Tothill Street  
London SW1H 9NA  
(email [charles.cushing@dwp.gsi.gov.uk](mailto:charles.cushing@dwp.gsi.gov.uk) or  
[carol.smith14@dwp.gsi.gov.uk](mailto:carol.smith14@dwp.gsi.gov.uk)).

8. Please note that Charles and Carol cannot advise on this particular consultation exercise, only on Freedom of Information issues.

9. More information about the Freedom of Information Act can be found on the website of the Ministry of Justice:

<http://www.justice.gov.uk/guidance/guidancefoi.htm>

## **The consultation criteria**

10. The consultation is being conducted in line with the Government Code of Practice on Consultation - [www.berr.gov.uk/files/file47158.pdf](http://www.berr.gov.uk/files/file47158.pdf) - and its seven consultation criteria, which are as follows:

**When to Consult.** Formal consultation should take place at a stage when there is scope to influence the outcome.

**Duration of consultation exercises.** Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible. (The Government's reasons for a limited consultation are set out in paragraph 2.)

**Clarity of scope and impact.** Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence, and the expected costs and benefits of the proposals.

**Accessibility of consultation exercises.** Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is designed to reach.

**The burden of consultation.** Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

**Responsiveness of consultation exercises.** Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

**Capacity to consult.** Officials running consultation exercises should seek guidance in how to run an effective consultation exercise, and share what they have learned from the experience.

## **Feedback on this consultation**

11. We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

Roger Pugh  
DWP Consultation Coordinator,  
Room 4F, Britannia House  
2 Ferensway  
Hull HU2 8NF  
Phone: 01482 609571  
Fax: 01482 609658  
Email: [roger.pugh@dwp.gsi.gov.uk](mailto:roger.pugh@dwp.gsi.gov.uk)

12. In particular, please tell us if you feel that the consultation does not satisfy the consultation criteria. Please also make any suggestions as to how the process of consultation could be improved further.

13. If you have any requirements that we need to meet to enable you to comment, please let us know.

14. In due course a report will be published which will summarise the responses to the consultation and the action that we have taken as a result of them.

**2010 No. [draft consultation]**

**PENSIONS**

**The Occupational Pension Schemes (Employer Debt and  
Miscellaneous Amendments) Regulations 2010**

*Made* - - - -

*Laid before Parliament*

*Coming into force* - -

*xxx 2010*

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 75(5), 75A(1) to (8), 119, 124(1), 125(3) and 174(2) and (3) of the Pensions Act 1995(a).

[In accordance with section 120(1) of the Pensions Act 1995, the Secretary of State has consulted such persons as the Secretary of State considers appropriate before making these Regulations.]

**Citation, commencement and interpretation**

**1.**—(1) These Regulations may be cited as the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010.

(2) These Regulations come into force on xxx 2010.

(3) In these Regulations, “the 2005 Regulations” means the Occupational Pension Schemes (Employer Debt) Regulations 2005(b).

**Amendment of the Pension Protection Fund (Multi-Employer Schemes) (Modification) Regulations 2005**

**2.** In regulation 1 of the Pension Protection Fund (Multi-Employer Schemes) (Modification) Regulations 2005(c) (interpretation)—

(a) in paragraph (3)(a)—

(i) for “C or D”, substitute “C, D or E and paragraph (4)”, and

(ii) after paragraph (iv), insert—

“(v) condition E is that—

(aa) there is a restructuring within regulation 6ZB or 6ZC of the Occupational Pension Schemes (Employer Debt) Regulations 2005; and

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(a) 1995 c.26. Section 75 was amended by section 271 of the Pensions Act 2004 (c.35) and section 75A was inserted by section 272 of that Act. Section 124(1) is cited for the meaning it gives to “prescribed” and “regulations”.

(b) S.I. 2005/678. Amending instruments are S.I.s 2005/993, 2224, 3377 and 3378, 2006/467 and 558, 2007/60 and 2008/731 and 1068.

(c) S.I. 2005/441. Regulation 1(3) was substituted by S.I. 2005/2113.

- (bb) in that restructuring, the employer was the exiting employer (see the definition of “exiting employer” in regulation 2(1) of those Regulations);”,
- (b) in paragraph (3)(b)—
  - (i) for “C or D”, substitute “C, D or E and paragraph (4)”, and
  - (ii) after paragraph (iv), insert—
    - “(v) condition E is that—
      - (aa) there is a restructuring within regulation 6ZB or 6ZC of the Occupational Pension Schemes (Employer Debt) Regulations 2005; and
      - (bb) in that restructuring, the employer was the exiting employer (see the definition of “exiting employer” in regulation 2(1) of those Regulations).”, and
- (c) after paragraph (3), insert—
  - “(4) This paragraph is satisfied where—
    - (a) condition A, B, C, D or E of paragraph (3)(a) or (b) is satisfied in respect of a person, and
    - (b) that person has not subsequently started employing active members of the scheme.”.

#### **Amendment of the Pension Protection Fund (Entry Rules) Regulations 2005**

**3.** In regulation 2(4) of the Pension Protection Fund (Entry Rules) Regulations 2005(a) (schemes which are not eligible schemes), after sub-paragraph (d) insert—

“(e) a restructuring within regulation 6ZB or 6ZC of those Regulations.”.

#### **Amendment of regulation 2 of the 2005 Regulations**

**4.—(1)** Regulation 2 of the 2005 Regulations (interpretation)(b) is amended in accordance with this regulation.

(2) In paragraph (1)—

- (a) Omit the definitions of “PPF” and “statutory funding objective”,
- (b) After the definition of “the Board for Actuarial Standards”, insert—
  - ““the Board of the PPF” means the Board of the Pension Protection Fund(c);”,
- (c) After the definition of “the corresponding assets”, insert—
  - ““defined benefits”, in relation to a member of an occupational pension scheme, means benefits which are not money purchase benefits (but the rate or amount of which is calculated by reference to earnings or service of the member or any other factor other than an amount available for their provision);”,
- (d) For the definition of “employment-cessation event”, substitute—
  - ““employment-cessation event” has the meaning given in regulation 6ZA;”,
- (e) In the definition of “liability proportion”, for ““K/L”” substitute “K divided by L”,
- (f) In the definition of “liability share”, for “of the total” substitute “multiplied by the total”,
- (g) For the definition of “scheme apportionment arrangement”, substitute—
  - ““scheme apportionment arrangement” has the meaning given in regulation 6B(6);”,

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(a) S.I. 2005/590. Regulation 2(4) was substituted by S.I. 2008/731.

(b) Relevant amendments are [...].

(c) The Board of the Pension Protection Fund is established under section 107 of the Pensions Act 2004.

- (h) Omit the definition of “updated actuarial assessment”,
- (i) After the definition of “updated asset assessment”, insert—
  - ““updated liabilities assessment” means the actuary’s assessment of any changes in the liabilities of the scheme in respect of pensions and other benefits between—
  - (a) the effective date of the actuary’s estimate of the solvency of the scheme (as defined in regulation 7(6) of the Scheme Funding Regulations) included in the most recent actuarial valuation of the scheme received by the trustees or managers—
    - (i) under section 224 of the 2004 Act (actuarial valuations and reports); or
    - (ii) where the trustees or managers have not received an actuarial valuation under section 224, which the actuary thinks it is appropriate to use, and
  - (b) the applicable time;”.
- (3) After paragraph (3), insert—
  - “(3A) For the purposes of a restructuring within regulations 6ZB or 6ZC—
  - “exiting employer” means an employer who—
    - (a) is part of a multi-employer scheme, and
    - (b) employs at least one active member of the scheme in respect of whom defined benefits are arising;”, and
  - “receiving employer” means an employer who—
    - (a) is either—
      - (i) associated (within the meaning in section 435 of the Insolvency Act 1986<sup>(a)</sup> or section 74 of the Bankruptcy (Scotland) Act 1985<sup>(b)</sup>) with the exiting employer, or
      - (ii) the new legal status of the exiting employer,
    - (b) is part of the same multi-employer scheme as the exiting employer,
    - (c) employs at least one active member of the scheme in respect of whom defined benefits are arising, and
    - (d) has its head office in the United Kingdom;”.

**Amendment of regulation 5 of the 2005 Regulations**

**5.**—(1) Regulation 5 of the 2005 Regulations (calculation of the amount of scheme liabilities and value of scheme assets) is amended in accordance with this regulation.

- (2) For paragraph (3), substitute—
  - “(3) The assets of the scheme shall be valued, the liabilities of the scheme shall be determined and the amount of those liabilities shall be calculated by reference to the same date.”.
- (3) For paragraph (4)(b), substitute—
  - “(b) any amounts which are—
    - (i) treated as a debt due to the trustees or managers under—
      - (aa) section 75(2) or (4) of the 1995 Act (deficiencies in assets);
      - (bb) section 228(3) of the 2004 Act (amounts due in accordance with a schedule of contributions);
      - (cc) sections 59(2), 60(5) or 75(1) of the 1995 Act as they were in force before 6th April 2005; or

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(a) 1986 c.  
 (b) 1985 c.

- (dd) section 144(1) of the 1993 Act as it was in force before 6th April 1997,  
and
- (ii) unlikely to be recovered without disproportionate cost or within a reasonable time;”.
- (4) For paragraph (7), substitute—
  - “(7) For the purposes of paragraph (6)—
    - (a) “external liabilities” means such liabilities of the scheme as are shown in—
      - (i) the net assets statement in the relevant accounts; or
      - (ii) an estimate used for the purposes of an updated asset statement, except that the liabilities in paragraph (8) are to be disregarded; and
    - (b) the amount of the external liabilities is—
      - (i) where sub-paragraph (a)(i) applies, the amount shown in the statement referred to in that sub-paragraph in respect of the external liabilities; or
      - (ii) where sub-paragraph (a)(ii) applies, the amount shown in the estimate referred to in that sub-paragraph in respect of the external liabilities.”.
- (5) In paragraph (10)(a), omit “(“the receiving scheme”)”.
- (6) At the beginning of paragraph (12), insert “For the purposes of paragraph (11),”.
- (7) In paragraphs (14) and (17)(b), for “updated actuarial assessment” substitute “updated liabilities assessment”.

#### **Amendment of regulation 6 of the 2005 Regulations**

**6.—**(1) Regulation 6 of the 2005 Regulations (multi-employer schemes: general) is amended in accordance with this regulation.

(2) In paragraph (1)(e)(i), after “an amount equal to” insert “the sum of any unpaid expenses which were incurred by the scheme in connection with a previous employment-cessation event occurring to the employer and”.

(3) In paragraph (4)—

(a) in the opening words, for “the actuary and Employer A” substitute “the persons listed in paragraph (4A)”,

(b) for sub-paragraph (a), substitute—

“(a) where, before 6th April 2008, an exercise of a scheme apportionment rule has required certain liabilities to be apportioned to one or more employer in a particular way, those liabilities shall be so attributed;

(aa) where a scheme apportionment arrangement (or before 6th April 2008, an exercise of a scheme apportionment rule) or a regulated apportionment arrangement has required certain amounts or proportions to be apportioned to one or more employer in a particular way, those amounts or proportions shall be—

(i) treated for the purposes of this regulation as liabilities, and

(ii) so attributed;

(ab) where there is a restructuring within regulation 6ZB or 6ZC, all of the liabilities in relation to the scheme which were attributable to the exiting employer shall be attributed to the receiving employer;

(ac) where all the liabilities to or in respect of any member arose as a result of pensionable service with Employer A only, all those liabilities shall be attributable to Employer A (including any liabilities attributable to a transfer in respect of that member received by the scheme during that pensionable service);”.

(c) in sub-paragraph (b), after “attributable to a transfer” insert “in respect of that member”,  
and

(d) for sub-paragraph (c), substitute—

“(c) the liabilities mentioned in paragraph (5) are attributable as follows—

- (i) if Employer A is the last employer of any member with liabilities mentioned in paragraph (5), all of the liabilities in respect of that member are attributable to Employer A, or
- (ii) if Employer A is not the last employer of any member with liabilities mentioned in paragraph (5) or the trustees or managers are unable to determine whether or not Employer A is the last such employer—
  - (aa) where the trustees or managers decide that the liabilities mentioned in paragraph (5) can be attributed in a reasonable manner to one or more employer (which may or may not include Employer A), those liabilities are attributable in that manner, or
  - (bb) where the trustees or managers decide that the liabilities mentioned in paragraph (5) cannot be attributed to employers in a reasonable manner, those liabilities are not attributable to any employer.”.

(4) After paragraph (4), insert—

“(4A) The persons listed in this paragraph are—

- (a) the actuary, and
- (b) where the amount of a scheme’s liabilities attributable to the departing employer is being determined for the purposes of calculating that employer’s liability proportion, the departing employer.”.

(5) For paragraph (5), substitute—

“(5) The liabilities referred to in paragraph (4)(c) are the liabilities in respect of any member which the trustees or managers—

- (a) cannot attribute to any employer under paragraph (4)(b); or
- (b) can only attribute to an employer under paragraph (4)(b) at disproportionate cost to the scheme.”.

(6) In paragraph (8), after “under paragraph (4),” insert “the amounts to be used for determining(a)”.

### **Insertion of regulations 6ZA to 6ZC of the 2005 Regulations**

7. After regulation 6 of the 2005 Regulations, insert—

#### **“Employment-cessation events: general**

**6ZA.**—(1) In these regulations, “employment-cessation event” means, subject to paragraph (2), an event which—

- (a) occurs in relation to a multi-employer scheme,
- (b) is not a relevant event, and
- (c) subject to regulation 6A, occurs on the date on which—
  - (i) an employer has ceased to employ at least one person who is an active member of the scheme, and
  - (ii) at least one other employer who is not a defined contribution employer continues to employ at least one active member of the scheme.

(2) An employment-cessation event does not occur if there is a restructuring within regulation 6ZB or 6ZC.

(3) Where—

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(a) Amounts K and L are used to determine the liability proportion – see definition of “liability proportion” in regulation 2(1).

- (a) step 8 in regulation 6ZB(17) has been carried out, and
- (b) an employment-cessation event occurs because it becomes apparent that either step 5 or 7 has not been carried out in accordance with regulation 6ZB(11), (12), (15) or (16),

section 75(4) of the 1995 Act applies as if the amount of the debt due from the exiting employer is treated as a debt due from the exiting employer and the receiving employer jointly and severally.

### **Employment-cessation events: exemptions**

**6ZB.**—(1) There is a restructuring within this regulation if each of steps 1 to 7 in the following paragraphs are carried out.

- (2) Each of steps 2 to 8 can only be carried out if the previous step has been carried out.
- (3) Step 1 is for the exiting employer to write to the trustees or managers asking them to make a decision for the purposes of this regulation.
- (4) The exiting employer decides whether and when to carry out step 1.
- (5) Step 2 is for the trustees or managers to—
  - (a) consult the exiting employer about the decision to be made in step 3,
  - (b) consult the receiving employer about the decision to be made in step 3, unless the receiving employer has not yet been created, and
  - (c) consider whether to obtain advice from professional advisers<sup>(a)</sup> about the decision to be made in step 3.
- (6) The trustees or managers must carry out step 2 without undue delay.
- (7) Step 3 is for the trustees or managers to decide whether they are satisfied that the receiving employer will, after step 7 has been carried out, be at least as likely—
  - (a) as the exiting employer to meet all the liabilities in relation to the scheme which were attributable to the exiting employer, and
  - (b) to meet any liabilities in relation to the scheme which were attributable to the receiving employer immediately before step 7 is carried out.
- (8) The trustees or managers must carry out step 3 without undue delay.
- (9) Step 4 is for the trustees or managers to send the exiting employer their decision in step 3 in writing.
- (10) The trustees or managers must carry out step 4 without undue delay.
- (11) Step 5 is for—
  - (a) the receiving employer to decide whether they are satisfied that an insolvency event—
    - (i) has not occurred in relation to them, and
    - (ii) would be unlikely to occur in relation to them within 12 months of the date of their decision if a restructuring within this regulation occurs, and
  - (b) the exiting employer to decide whether they are satisfied that an insolvency event—
    - (i) has not occurred in relation to them, and
    - (ii) would be unlikely to occur in relation to them within 12 months of the date of their decision if a restructuring within this regulation does not occur.
- (12) The receiving employer and exiting employer decide whether to carry out step 5 and if they decide to carry out step 5—

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(a) See section 47(4) of the Pensions Act 1995.

- (a) the definition of “insolvency event” in section 121 of the 2004 applies, and
  - (b) their decision on whether they are satisfied that an insolvency event has occurred or will occur must be reasonable.
- (13) Step 6 is for the receiving employer and the exiting employer to send the trustees or managers their decisions in step 5 in writing.
- (14) The receiving employer and the exiting employer must carry out step 6 without undue delay.
- (15) Step 7 is for the receiving employer to take over responsibility, under a legally enforceable agreement, for all of the—
- (a) exiting employer’s assets for which the exiting employer is legally able to hand over responsibility,
  - (b) employees of the exiting employer,
  - (c) scheme members in respect of whom defined benefits arose as a result of pensionable service with the exiting employer, and
  - (d) liabilities in relation to the scheme which are attributable to the exiting employer,
- on the same date.
- (16) The receiving employer decides whether to carry out step 7, but the receiving employer can only carry out step 7—
- (a) where the trustees or managers decided in step 3 that they are satisfied,
  - (b) where the trustees or managers are satisfied that immediately before step 7 is carried out, there has been no change which would alter that decision in step 3,
  - (c) where the receiving employer and the exiting employer reasonably decided in step 5 that they are satisfied, and
  - (d) within 12 weeks of the date of the written decision in step 4.
- (17) Step 8 is for the receiving employer and exiting employer to send the trustees or managers written confirmation that step 7 has been carried out.
- (18) The receiving employer and exiting employer must carry out step 8 without undue delay.
- (19) The requirement in paragraph (20) is not part of steps 1 to 8.
- (20) Where the trustees or managers decide in step 3 that they are satisfied, they must send the written decision in step 4 to the Regulator without undue delay.
- (21) In this regulation, liabilities in relation to the scheme means all such liabilities including, but not limited to, any—
- (a) liabilities to or in respect of members which arose as a result of pensionable service with the employer,
  - (b) liabilities to or in respect of members which did not arise as a result of pensionable service with the employer but which are attributable to the employer under regulation 6(4)(c),
  - (c) liabilities or amounts which have been apportioned to the employer in—
    - (i) a scheme apportionment arrangement,
    - (ii) an exercise of a scheme apportionment rule before 6th April 2008, or
    - (iii) a regulated apportionment arrangement,
  - (d) liabilities which were attributed to the employer as part of a previous restructuring within this regulation or regulation 6ZC,
  - (e) amount for which the employer is a guarantor under a withdrawal arrangement or an approved withdrawal arrangement,
  - (f) payments which are due to be made by the employer under the schedule of contributions,

- (g) payments which are due to be made by the employer under any recovery plan, and
- (h) liabilities listed in sub-paragraphs (a) and (b) of regulation 5(8).

**6ZC.**—(1) There is a restructuring within this regulation if each of the six steps in the following paragraphs are carried out.

(2) Each of steps 2 to 6 can only be carried out if the previous step has been carried out.

(3) Step 1 is for the exiting employer to write to the trustees or managers asking them to make a decision for the purposes of this regulation.

(4) The exiting employer decides whether and when to carry out step 1.

(5) Step 2 is for the trustees or managers to decide whether they are satisfied that the following conditions are met—

- (a) the assets of the scheme are at least equal to the protected liabilities of the scheme,
- (b) A is less than 2% of B where—
  - (i) A is the number of scheme members in respect of whom defined benefits arose as a result of pensionable service with the exiting employer, and
  - (ii) B is the total number of scheme members in respect of whom defined benefits have arisen,
- (c) C multiplied by D is no more than £100,000 where—
  - (i) C is the percentage of the total number of scheme members in respect of whom defined benefits arose as a result of pensionable service with the exiting employer, and
  - (ii) D is the protected liabilities of the scheme, and
- (d) less than 5% of the total number of scheme members in respect of whom defined benefits have arisen become the responsibility of one or more receiving employers as a result of a restructuring within this regulation occurring—
  - (i) on any one or more previous occasions in the three years before step 5 is carried out, and
  - (ii) when step 5 is carried out.

(6) The trustees or managers must carry out step 2—

- (a) without undue delay, and
- (b) using the figures contained in the most recent—
  - (i) actuarial valuation under section 179 of the 2004 Act (valuations to determine scheme underfunding) for the assets and protected liabilities of the scheme, and
  - (ii) scheme return within the meaning in section 65(2) of the 2004 Act (scheme returns: supplementary) for the number of members of the scheme.

(7) Step 3 is for the trustees or managers to send the exiting employer their decision in step 2 in writing.

(8) The trustees or managers must carry out step 3 without undue delay.

(9) Step 4 is for—

- (a) the receiving employer to decide whether they are satisfied that no insolvency event—
  - (i) has occurred in relation to them, and
  - (ii) would be likely to occur in relation to them within 12 months of the date of their decision if a restructuring within this regulation occurs, and
- (b) the exiting employer to decide whether they are satisfied that no insolvency event—
  - (i) has occurred in relation to them, and

- (ii) would be likely to occur in relation to them within 12 months of the date of their decision if a restructuring within this regulation does not occur.
- (10) The receiving employer and exiting employer decide whether to carry out step 4 and if they decide to carry out step 4—
  - (a) the definition of “insolvency event” in section 121 of the 2004 applies, and
  - (b) their decision on whether they are satisfied that an insolvency event has occurred or will occur must be reasonable.
- (11) Step 5 is for the receiving employer and the exiting employer to send the trustees or managers their decisions in step 4 in writing.
- (12) The receiving employer and the exiting employer must carry out step 5 without undue delay.
- (13) Step 6 is for the receiving employer to take over responsibility, under a legally enforceable agreement, for all of the—
  - (a) exiting employer’s assets for which the receiving employer is legally able to take over responsibility,
  - (b) employees of the exiting employer,
  - (c) scheme members in respect of whom defined benefits arose as a result of pensionable service with the exiting employer, and
  - (d) liabilities (as defined in regulation 6ZB(21)) in relation to the scheme which are attributable to the exiting employer,
 on the same date.
- (14) The receiving employer decides whether to carry out step 6, but the receiving employer can only carry out step 6—
  - (a) where the trustees or managers decided in step 2 that they are satisfied,
  - (b) where the receiving employer and the exiting employer reasonably decided in step 4 that they are satisfied, and
  - (c) within 12 weeks of the date of the written decision in step 3.”.

**Amendment of regulation 6B of the 2005 Regulations**

8. For regulation 6B of the 2005 Regulations (scheme apportionment arrangements), substitute—

**“Scheme apportionment arrangements**

- 6B.**—(1) A scheme apportionment arrangement may be entered into if—
- (a) an employment-cessation event has occurred in relation to an employer in a multi-employer scheme (referred to in this regulation as the cessation employer<sup>(a)</sup>),
  - (b) the following persons consent—
    - (i) the trustees or managers,
    - (ii) the cessation employer, and
    - (iii) any employers remaining in the scheme who are required to make a payment under the scheme apportionment arrangement (see paragraph (5)(a)), and
  - (c) either—
    - (i) the funding test is met, or
    - (ii) paragraph (2) or (3) applies.
- (2) This paragraph applies where—

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(a) See definition of “cessation employer” in regulation 2(1).

- (a) the scheme apportionment arrangement provides that the cessation employer's scheme apportionment arrangement share is higher than that employer's liability share, and
  - (b) the trustees or managers are satisfied that the cessation employer is able to pay that scheme apportionment arrangement share.
- (3) This paragraph applies where—
- (a) the scheme has commenced winding-up by the date the scheme apportionment arrangement is entered into,
  - (b) the scheme apportionment arrangement provides that the cessation employer's scheme apportionment arrangement share is lower than that employer's liability share,
  - (c) the trustees or managers are satisfied that it is likely that the cessation employer—
    - (i) will be able to pay the cessation employer's scheme apportionment arrangement share, and
    - (ii) would have been unable to pay the cessation employer's liability share if there been no scheme apportionment arrangement,
  - (d) the trustees or managers are satisfied that it is likely that any remaining employers within the meaning in paragraph (5)(a) will be able to pay any amount C (see paragraph (5)(c)),
  - (e) the scheme is not in an assessment period, and
  - (f) the trustees or managers are satisfied that the scheme is unlikely to begin an assessment period within the following 12 months.
- (4) The scheme apportionment arrangement must—
- (a) be permitted by the scheme rules or contained in the scheme rules,
  - (b) set out the amount of the cessation employer's scheme apportionment arrangement share, and
  - (c) provide for the cessation employer to pay that scheme apportionment arrangement share instead of the cessation employer's liability share.
- (5) Where the cessation employer's scheme apportionment arrangement share is less than that employer's liability share—
- (a) the scheme apportionment arrangement must provide that amount C is to be paid by one or more of the employers remaining in the scheme who are not defined contribution employers ("remaining employers"),
  - (b) the scheme apportionment arrangement must provide that amount C is to be calculated on—
    - (i) the date the cessation employer's scheme apportionment arrangement share is calculated, or
    - (ii) whichever of the following occurs first—
      - (aa) the date on which the scheme commences winding up,
      - (bb) the date on which a relevant event occurs in relation to the last employer in relation to the scheme,
      - (cc) the date on which the remaining employers agree to pay, and the trustees or managers agree to receive, amount C,
      - (dd) the date specified in the scheme apportionment arrangement,
  - (c) the scheme apportionment arrangement must provide that amount C is the amount by which the cessation employer's scheme apportionment arrangement share is less than that employer's liability share on the date specified under sub-paragraph (b),
  - (d) amount C must be calculated by the actuary,

- (e) the actuary must certify amount C by completing the form set out in Schedule 1E, and
- (f) section 75(4) of the 1995 Act has effect as if amount C is treated as a debt due from the remaining employers on the date specified under sub-paragraph (b).

(6) In these Regulations, a “scheme apportionment arrangement” means an arrangement entered into in accordance with this regulation.

(7) Where a scheme apportionment arrangement is entered into, section 75(4) of the 1995 Act has effect as if the cessation employer’s scheme apportionment arrangement share is treated as a debt due from the cessation employer to the trustees or managers.”.

#### **Amendment of regulation 6C of the 2005 Regulations**

**9.** In regulation 6C(2) of the 2005 Regulations (withdrawal arrangements)—

- (a) for “When the” substitute “Where a”, and
- (b) for sub-paragraph (b) substitute—

“(b) section 75(4) of the 1995 Act shall apply as if amount B is treated as a debt due from the guarantors at the guarantee time for which (if there is more than one guarantor) they are jointly liable or, if the withdrawal arrangement provides, jointly and severally liable.”.

#### **Amendment of regulation 7A of the 2005 Regulations**

**10.** After paragraph (2) of regulation 7A of the 2005 Regulations (regulated apportionment arrangements), insert—

“(3) Where a regulated apportionment arrangement is entered into, section 75(4) of the 1995 Act has effect as if the regulated apportionment arrangement share is treated as a debt due from the employer to the trustees or managers at whichever of the following dates occurs first—

- (a) the date on which the scheme commences winding up,
- (b) the date on which a relevant event occurs in relation to the last employer in relation to the scheme,
- (c) the date on which the remaining employers agree to pay, and the trustees or managers agree to receive, the regulated apportionment arrangement share,
- (d) the date specified in the regulated apportionment arrangement.”.

#### **Amendment of regulation 8 of the 2005 Regulations**

**11.** For regulation 8(2)(a)(i) of the 2005 Regulations (single employer sections, multi-employer sections, etc), substitute—

“(i) any contributions payable to the scheme by a member or an employer in relation to the scheme are allocated to that employer’s section or, if more than one section applies to an employer, to the section to which the employment relates; and”.

#### **Amendment of regulation 9 of the 2005 Regulations**

**12.—**(1) Regulation 9 of the 2005 Regulations (frozen schemes and former employers) is amended in accordance with this regulation.

(2) In paragraph (3)(c)—

- (a) immediately before paragraph (i), omit “, he”,
- (b) in paragraph (i), after “6th April 1997,” insert “the person”,
- (c) in paragraph (ii), after “6th April 2008”, insert “the person”,

- (d) for paragraph (iii), substitute—
  - “(iii) on or after 6th April 2008 and before [date these Regulations commence], an employment-cessation event or insolvency event occurs in respect of the person and one of conditions A to I is met; or
  - (iv) on or after [date these Regulations commence] and before the applicable time, an employment-cessation event or insolvency event occurs in respect of the person and one of conditions A to J is met; or”.
- (3) In paragraph (3)(d), for the words from “he ceased to be a person” to the end substitute—
  - “one of conditions A to J is met and an employment-cessation event is treated as having occurred in respect of the person under paragraph (4).”.
- (4) In paragraph (4)—
  - (a) the words from “notice is given” to the end become sub-paragraph (a) of paragraph (4), and
  - (b) after sub-paragraph (a), insert—
    - “, and
    - (b) the employment-cessation event would not result in only defined contribution employers remaining in relation to the scheme.”.
- (5) In paragraph (13), after “becoming due from him” insert “under section 75(2) or (4) of the 1995 Act”.
- (6) After paragraph (14), insert—
  - “(14A) Condition J is that as a result of a restructuring occurring within regulation 6ZB or 6ZC, no debt arose under section 75(2) or (4) of the 1995 Act.”.

#### **Amendment of regulation 12 of the 2005 Regulations**

**13.** In regulation 12(1B) of the 2005 Regulations (multi-employer money purchase schemes), omit the words from “in accordance with the guidance given in GN19” to the end.

#### **Amendment of regulation 14 of the 2005 Regulations**

**14.—**(1) Regulation 14 of the 2005 Regulations (schemes covering United Kingdom and foreign employment) is amended in accordance with this regulation.

(2) In paragraphs (2)(b), (4)(b) and (6)(b), for “form set out in Schedule 1” substitute “forms set out in Schedules 1, 1C and 1D”.

(3) In paragraph (4)(a), for “approved and unapproved” substitute “registered and unregistered”.

#### **Amendment of regulation 15 of the 2005 Regulations**

**15.** In regulation 15(2)(b) of the 2005 Regulations (schemes with partial government guarantee), for “form set out in Schedule 1” substitute “forms set out in Schedules 1, 1C and 1D”.

#### **Amendment of regulation 16 of the 2005 Regulations**

**16.** For regulation 16 of the 2005 Regulations, substitute—

##### **“Modification of schemes: apportionment of section 75 debts**

**16.—**(1) This regulation prescribes a purpose for which the trustees of a trust scheme (whether or not a money purchase scheme) may by resolution modify the scheme under section 68 of the 1995 Act (power of trustees to modify schemes by resolution).

(2) The purpose is to enable—

- (a) a scheme apportionment arrangement, or

(b) a regulated apportionment arrangement,  
to be entered into.

(3) No modification may be made for the purpose in paragraph (2) unless the trustees have consulted such employers in relation to the scheme as they think appropriate.”.

### **Amendment of regulation 17 of the 2005 Regulations**

**17.** In regulation 17(1) of the 2005 Regulations (disregard of staying of voluntary winding up of employer for purposes of section 75 of the 1995 Act), for “section 75(6D)(i)” substitute “section 75(6D)(b)(i)”.

### **Amendment of Schedule 1 to the 2005 Regulations**

**18.—**(1) Schedule 1 to the 2005 Regulations (actuary’s certificate of total difference between scheme assets and liabilities) is amended in accordance with this regulation.

(2) In the first paragraph in the certificate(**a**), for “assets in scheme” substitute “assets of the scheme”.

(3) Omit the third paragraph in the Notes(**b**).

(4) In the fifth paragraph in the Notes, for “updated actuarial assessment” substitute “updated liabilities assessment”.

(5) After the sixth paragraph in the Notes, insert—

“The total amount of the employer’s debt will be the amount stated in paragraph 2 of the certificate plus any cessation expenses (as defined in regulation 2(1) of the Employer Debt Regulations). See regulation 6(1)(e)(ii) of the Employer Debt Regulations.”.

### **Amendment of Schedule 1A to the 2005 Regulations**

**19.—**(1) Schedule 1A to the 2005 Regulations (withdrawal arrangements and approved withdrawal arrangements) is amended in accordance with this regulation.

(2) In paragraph 4 (calculation of amount A)—

(a) omit sub-paragraph (2),

(b) in sub-paragraph (4)(a)(ii), for “paragraph (12)” substitute “paragraphs (12) and (13)”,

(c) for sub-paragraph (5), substitute—

“(5) Where sub-paragraph (4)(b) applies, both the trustees or managers of the scheme and the actuary must determine, calculate and verify—

(a) the value of the assets of the scheme at the applicable time in accordance with regulation 5 of these Regulations; and

(b) the amount, at the applicable time, of the liabilities of the scheme and the relevant transfer deduction in accordance with—

(i) guidance issued by the Board of the PPF entitled ‘Guidance for undertaking the valuation in accordance with section 179 of the Pensions Act 2004’ as from time to time amended(**c**), and

(ii) regulations 6 (valuation of protected liabilities) and 7 (alternative valuation of assets and protected liabilities in specific cases) of the PPF Valuation Regulations.”.

(3) In paragraph 5 (calculation of amount B)—

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(a) The first paragraph in the certificate is headed “Comparison of value of scheme assets with amount of scheme liabilities”.

(b) The third paragraph in the Notes reads “The value of the assets was provided by the trustees or managers of the scheme.”

(c) This guidance is available from [the Pension Protection Fund’s address] and on the Pension Protection Fund’s website at [http://www.pensionprotectionfund.org.uk/section\\_179\\_guidance\\_version\\_g5\\_may\\_2009.pdf](http://www.pensionprotectionfund.org.uk/section_179_guidance_version_g5_may_2009.pdf).

- (a) in sub-paragraph (2), for “of the liability share” substitute “calculated under sub-paragraph (2A)”,
- (b) after sub-paragraph (2), insert—
  - “(2A) The amount calculated under this sub-paragraph is worked out by dividing X by Y and then multiplying the result by Z where—
    - (a) X is the liability share at the applicable time minus—
      - (i) the withdrawal arrangement share at the applicable time, or
      - (ii) the approved withdrawal arrangement share at the applicable time,
    - (b) Y is the total difference at the applicable time between the amount of the liabilities of the scheme calculated in accordance with regulation 5(11) and (12) and the value of the assets of the scheme minus—
      - (i) the withdrawal arrangement share at the applicable time, or
      - (ii) the approved withdrawal arrangement share at the applicable time, and
    - (c) Z is the total difference at the guarantee time between the amount of the liabilities of the scheme calculated in accordance with regulation 5(11) and (12) and the value of the assets of the scheme.”, and
- (c) in sub-paragraph (3), for paragraphs (a) and (b) substitute—
  - “(a) in the case of a withdrawal arrangement, the withdrawal arrangement share; or
  - (b) in the case of an approved withdrawal arrangement, the approved withdrawal arrangement share.”.
- (4) In paragraph 6(1) (approval of withdrawal arrangements in advance), omit ““cessation expenses””.
- (5) In paragraph 7(1) (replacement withdrawal arrangements), for “6B” substitute “6C”.

#### **Amendment of Schedule 1B to the 2005 Regulations**

**20.** In paragraph 3(1) of Schedule 1B to the 2005 Regulations (notifiable events), omit “under paragraph 1 or 2” the first time it appears.

#### **Amendment of Schedule 1C to the 2005 Regulations**

**21.**—(1) Schedule 1C to the 2005 Regulations (actuary’s certificate for withdrawal arrangement share or approved withdrawal arrangement share in multi-employer scheme) is amended in accordance with this regulation.

- (2) For the third paragraph in the certificate, substitute—

##### **“3 Valuation principles**

The scheme’s assets and liabilities are valued in accordance with—

- (a) section 75(5) of the Pensions Act 1995,
- (b) regulations 5, 6[, 6C(3) and 7(5)] [delete as appropriate] of the Employer Debt Regulations, and
- (c) relevant BAS standards.”.

- (3) In the first paragraph in the Notes, for the definition of “relevant transfer deduction” substitute—

““relevant transfer deduction” means the amount of the relevant transfer liabilities less the value of the corresponding assets;”.

- (4) Omit the second paragraph of the Notes.

- (5) In the fourth paragraph in the Notes, for “updated actuarial assessment” substitute “updated liabilities assessment”.

- (6) After the last paragraph in the Notes, insert—

“The total amount of the employer’s debt will be the amount of the (approved) withdrawal arrangement share stated in paragraph 2 of the certificate plus any cessation expenses (as defined in regulation 2(1) of the Employer Debt Regulations). See regulation 6(1)(e)(ii) of the Employer Debt Regulations.”.

#### **Amendment of Schedule 1D to the 2005 Regulations**

**22.**—(1) Schedule 1D to the 2005 Regulations (actuary’s certificate of amount B under a withdrawal arrangement or approved withdrawal arrangement in a multi-employer scheme) is amended in accordance with this regulation.

(2) In the second paragraph of the Certificate, for “Occupational Pension Schemes (Employer Debt) Regulations 2005” substitute “Employer Debt Regulations”.

(3) Omit the third paragraph in the Notes(a).

(4) In the penultimate paragraph in the Notes, for “updated actuarial assessment” substitute “updated liabilities assessment”.

#### **Insertion of Schedule 1E into the 2005 Regulations**

**23.** After Schedule 1D to the 2005 Regulations (actuary’s certificate for amount B under a withdrawal arrangement or an approved withdrawal arrangement in a multi-employer scheme), insert the Schedule specified in the Schedule to these Regulations.

#### **Amendment of the Pensions Regulator (Financial Support Directions etc.) Regulations 2005**

**24.** In regulation 15(2) (former employers) of the Pensions Regulator (Financial Support Directions etc.) Regulations 2005(b), before “A, AA, AB, B, C or D” insert “condition”.

#### **Amendment of the Occupational Pension Schemes (Scheme Funding) Regulations 2005**

**25.** In paragraph 3(2) of Schedule 2 (frozen/paid up schemes) to the Occupational Pension Schemes (Scheme Funding) Regulations 2005(c), for “paragraph (1)” substitute “sub-paragraph (1)”.

#### **Amendment of the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008**

**26.**—(1) Regulation 2 of the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008(d) (commencement and transitional provisions) is amended in accordance with this regulation.

(2) In paragraph (3), at the end of sub-paragraph (b) insert—

“, and

(c) the scheme has not ceased to have active members.”.

(3) In paragraph (4), for “, as it appeared in regulation 6(4) of the old Regulations,” substitute “referred to in paragraph (4A)”.

(4) After paragraph (4), insert—

“(4A) The definition referred to in this paragraph is the definition of “employment-cessation event” as it appeared in regulation 6(4) of the old Regulations but with “who is not a defined contribution employer” inserted after “when at least one other person”.”.

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(a) The third paragraph in the Notes reads “The value of the assets was provided by the trustees or managers of the scheme.”  
(b) S.I. 2005/2188.  
(c) S.I. 2005/3377.  
(d) S.I. 2008/731.

Signed by authority of the Secretary of State for Work and Pensions.

Date *Name*  
Parliamentary Under-Secretary of State,  
Department for Work and Pensions

## SCHEDULE 1

Regulation 23

### Insertion of Schedule 1E to the 2005 Regulations

After Schedule 1D to the 2005 Regulations, insert—

#### “SCHEDULE 1E

Regulation 6B(5)(e)

#### Actuary’s certificate for scheme apportionment arrangements

Given as required by regulation 6B(5)(d) of the Occupational Pension Schemes (Employer Debt) Regulations 2005 (“the Employer Debt Regulations”)

This certificate is subject to the Notes below

The name of the multi-employer scheme is:

The name of the cessation employer is:

The amount by which the cessation employer’s scheme apportionment arrangement share is less than that employer’s liability share is: £

The date in respect of which I calculated that amount is:

I valued the scheme’s assets and liabilities in accordance with—

- (a) section 75(5) of the Pensions Act 1995,
- (b) regulation 5 of the Employer Debt Regulations, and
- (c) relevant BAS standards.

Signature:

Date of signature:

Name:

Qualification:

Address:

Name of Employer:

#### **Notes:**

The references to—

“cessation employer” means the employer referred to in regulation 6B(1)(a) of the Employer Debt Regulations;

“scheme apportionment arrangement share” means the amount under a scheme apportionment arrangement that is the employer’s share of the difference (within the meaning in regulation 2(1) of the Employer Debt Regulations);

“liability share” means an amount equal to the liability proportion (within the meaning in regulation 2(1) of the Employer Debt Regulations) of the total difference between the value of the assets and the amount of the liabilities of the scheme.

The date in respect of which the amount is calculated was determined in accordance with regulation 6B(5)(b) of the Employer Debt Regulations.

The value of the assets was provided by the trustees or managers of the scheme by relying on an updated asset assessment, that they decided to use in accordance with the conditions in regulation 5(5) of the Employer Debt Regulations [delete as appropriate].

The liabilities were calculated and verified by relying on an updated liabilities assessment which the trustees or managers of the scheme decided to use in accordance with the conditions in regulation 5(14) of the Employer Debt Regulations.”.

#### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations amend the Occupational Pension Schemes (Employer Debt) Regulations 2005 (S.I. 2005/678) (“the 2005 Regulations”). The 2005 Regulations contain provisions about debts arising under section 75 of the Pensions Act 1995 (c.s26) in respect of occupational pension schemes.

[Explanatory Note to be completed]

An assessment of the impact these Regulations have on business, charities and the voluntary sector has been made. Copies of that Impact Assessment are available from the libraries of both Houses of Parliament, the Better Regulation Unit of the Department for Work and Pensions, [address] and the Department’s website at: <http://www.dwp.gov.uk/resourcecentre/ria.asp>.

# Summary: Intervention & Options

# ANNEX C

<b>Department /Agency:</b> Department for Work and Pensions	<b>Title:</b> The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 Impact Assessment of Deregulating Pension-related “ Employer Debt” (or Section 75 Debt) Requirements	
<b>Stage:</b> Consultation	<b>Version:</b> Consultation stage	<b>Date:</b> September 2009
<b>Related Publications:</b> Employer Debt (Section 75 of the Pensions Act 1995) Consultation on Draft Regulations. Deregulatory Review – Response to the Consultation Dec 2007 <a href="http://www.dwp.gov.uk/docs/formal-response-to-the-consultation-december-2007.pdf">http://www.dwp.gov.uk/docs/formal-response-to-the-consultation-december-2007.pdf</a>		

Available to view or download at: <http://www.dwp.gov.uk/consultations/>

Contact for enquiries: Mike Rochford

Telephone: 020 7449 7392

**What is the problem under consideration? Why is government intervention necessary?**

Where an employer’s relationship with a pension scheme ends, legislation sets out requirements for the “**employer debt**”. Effectively this is the amount that the employer must pay into the pension scheme - if there is a shortfall between assets and liabilities - in order to relinquish responsibility for the scheme without imposing detriment on scheme members.

Employers and adviser groups (e.g. CBI & NAPF) are concerned – and the Government acknowledged that - **corporate restructuring** within a group of companies can sometimes unnecessarily trigger the payment of an employer debt (often involving large sums of money), even though there has been no detriment to the pension scheme or its members’ entitlements.

**What are the policy objectives and the intended effects?**

To reduce the circumstances in which a corporate restructuring triggers unnecessary “employer debt” payments by the exiting employer. However, towards achieving this objective, policy ensures that the following safeguards are included: the net strength of the employer covenant (post restructuring) should not be weakened; the level of member protection should not be reduced; and the restructuring should not lead to increased calls on the Pension Protection Fund.

The intended effects are that employers should be able to restructure their businesses without unnecessarily triggering the employer debt provisions, but that pension scheme member protection should remain intact.

**What policy options have been considered? Please justify any preferred option.**

Three options have been considered:


- (i) No employer debt triggered on a corporate restructuring provided a Restructuring Test is met.
- (ii) No employer debt triggered provided transaction falls within prescribed de-minimis proportion (i.e. 2%) and monetary (i.e. £100,000) liability thresholds. Where satisfied no Restructuring Test required.
- (iii) Do nothing.

Options (i) and (ii) are the preferred options as these would permit a significant proportion of corporate restructurings to take place without an employer debt being triggered.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?** No formal review of the policy is planned. But the operation of the regulations will be monitored on an ongoing basis by means of representations and feedback from the pensions community, the Pensions Regulator and the Pension Protection Fund.

**Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*



Signed by the responsible Minister:

15 September 2009

## Summary: Analysis & Evidence

<b>Policy Option: Main Restructuring Easement</b>	<b>Description: Main restructuring easement: Permits restructurings as defined to occur without an employer debt being triggered.</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups'. The aim is not to increase costs or risks. The changes are intended to facilitate restructurings by not inappropriately triggering an employer debt. The Restructuring Test which has to be satisfied ensures that the overall employer's covenant is not weakened so that there is no material risk to members' pension entitlements following the restructure.		
	<b>One-off</b> (Transition)	<b>Yrs</b>			
		1			
	<b>Average Annual Cost</b> (excluding one-off)				
<b>£ Negligible</b>		<b>Total Cost (PV)</b>		<b>£ Negligible</b>	
Other <b>key non-monetised costs</b> by 'main affected groups'. Increased costs are not envisaged. This proposal is aimed at saving employers from incurring unnecessary costs triggered by the current employer debt legislation. Such triggering of debt currently occurs if companies restructure to enhance business efficiencies even though these transactions may not be detrimental to members' pension entitlements.					

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups'. The benefits from the main restructuring easement will accrue from any employer debt which is not triggered and which the exiting employer will not be obliged to negotiate or fund. When a debt is inappropriately triggered it is assumed that employers have to borrow up front to pay the debt that would normally be paid over time. The additional cost to the employer is the interest on this loan and the benefit (as estimated here) represents the value of this interest, which no longer needs to be paid as a result of the proposal.		
	<b>One-off</b>	<b>Yrs</b>			
	£	10			
	<b>Average Annual Benefit</b> (excluding one-off)				
<b>£ 100 million</b>		<b>Total Benefit (PV)</b>		<b>£ 890 million</b>	
Other <b>key non-monetised benefits</b> by 'main affected groups'. The main objective is to ensure that employer debt legislation does not unnecessarily hamper business restructurings. The benefits extend beyond the monetary estimates cited above as employers are able to proceed with changes to enhance the sustainability of their concerns, to safeguard employee jobs, and the ability of its employees to continue to accrue occupational pensions. This is particularly relevant and crucial in the current economic downturn.					

**Key Assumptions/Sensitivities/Risks** It is assumed that 20% of companies take advantage, restructuring only once, with the benefits of not paying interest on inappropriately-triggered debt spread over a number of years. It is assumed that companies borrow by issuing 10 year bonds with an 'AA' rating, and the term structure of their payments is such that they only pay off the interest in each year, with repayment of the principal on maturity of the bond.

Price Base Year 2009	Time Period Years 10	<b>Net Benefit Range (NPV)</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ 890 million</b>
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What is the geographic coverage of the policy/option?				UK	
On what date will the policy be implemented?				6 April 2010	
Which organisation(s) will enforce the policy?				N/A	
What is the total annual cost of enforcement for these organisations?				£ N/A	
Does enforcement comply with Hampton principles?				N/A	
Will implementation go beyond minimum EU requirements?				N/A	
What is the value of the proposed offsetting measure per year?				N/A	
What is the value of changes in greenhouse gas emissions?				N/A	
Will the proposal have a significant impact on competition?				No	
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	No	No

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)	
Increase of	£ 0	Decrease of	£ 0	<b>Net Impact</b>	<b>£ 0</b>

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Summary: Analysis & Evidence

<b>Policy Option: De-minimis - for small transactions</b>	<b>Description: De-minimis easement: Permits a limited number of restructurings involving small exiting employers, without the requirement to assess the receiving employer's covenant.</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		<p>Description and scale of <b>key monetised costs</b> by 'main affected groups'. The aim is not to increase undue costs or risks. Easement is only available where the scheme is fully funded on the PPF basis<sup>1</sup>. Only single transactions where no more than 2% of scheme membership is involved in the transaction with subsequent repeats up to 5% in aggregate within any 3 year period will be allowed under this option. Any risks to this small proportion of members with pensions secure to PPF levels would be negligible relative to the strength of entire group.</p>	
	<b>One-off (Transition)</b>	<b>Yrs</b>		
	£	1		
	<b>Average Annual Cost (excluding one-off)</b>			
£ Negligible			<b>Total Cost (PV)</b>	£ Negligible
<p><b>Other key non-monetised costs by 'main affected groups'</b> May cause some concern for employees who perceive some detriment to the security of their pensions as a result of the withdrawal of their original sponsor's covenant and subsequent replacement with a new employer's covenant. However it is important to note that whilst this option has caused some concern to the PPF, it does not increase the actual risk to members' benefits.</p>				

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		<p>Description and scale of <b>key monetised benefits</b> by 'main affected groups' The de-minimis easement may be used by employers whose schemes meet specified funding levels and whose restructure involves an exiting employer whose PPF liabilities are small relative to those of the entire group. When a debt is inappropriately triggered it is assumed that employers have to borrow up front to pay the debt that would normally be paid over time. The additional cost to the employer is the interest on this loan and the benefit (as estimated here) represents the value of this interest, which no longer needs to be paid as a result of the proposal.</p>	
	<b>One-off</b>	<b>Yrs</b>		
	£	10		
	<b>Average Annual Benefit (excluding one-off)</b>			
£ 28,000 – 45,000			<b>Total Benefit (PV)</b>	£ 240,000 – 390,000
<p><b>Other key non-monetised benefits by 'main affected groups'</b> Provides a quick and easy way for employers to progress small restructurings which enhance their business competitiveness and sustainability. Legislation has been perceived to be inappropriate and these changes should be welcomed by the pensions industry as pragmatic, without weakening the pension protection regime.</p>				

**Key Assumptions/Sensitivities/Risks** Schemes can only use this easement if their PPF levels of funding have been met; if the restructure involves no more than 2% of scheme membership and a threshold of £100,000 is not exceeded. This easement is therefore very sensitive to funding levels and fewer schemes will be able to take advantage of it in a depressed economic climate. Around 1% - 4% of schemes are currently estimated to be eligible to take it up. It is assumed that companies borrow by issuing 10 year bonds with a 'AA' rating, and that they only pay off the interest in each year, with repayment of the principal on maturity of the bond.

Price Base Year 2009	Time Period Years 10	Net Benefit Range (NPV) £ 240,000 – 390,000	<b>NET BENEFIT (NPV Best estimate)</b>
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What is the geographic coverage of the policy/option?			UK		
On what date will the policy be implemented?			April 2010		
Which organisation(s) will enforce the policy?			N/A		
What is the total annual cost of enforcement for these organisations?			£ N/A		
Does enforcement comply with Hampton principles?			N/A		
Will implementation go beyond minimum EU requirements?			N/A		
What is the value of the proposed offsetting measure per year?			N/A		
What is the value of changes in greenhouse gas emissions?			N/A		
Will the proposal have a significant impact on competition?			No		
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	No	No

<sup>1</sup> The PPF basis equates to a funding level at which PPF level of benefits can be bought out with an insurance company that is 100 per cent of expected benefits for most pensioners, and 90 per cent for other members (subject to a cap).

**Impact on Admin Burdens Baseline** (2005 Prices)

(Increase - Decrease)

Increase of £ 0

Decrease of £ 0

**Net Impact £ 0**

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

### **Background**

#### **Introduction**

1. This Impact Assessment considers two options for changes to the way employer debt is treated in the context of a company restructuring. It is accompanied by a set of draft regulations: the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010.

#### **Background**

2. **Employer debt** Defined benefit pension schemes provide pension benefits based on the individual member's salary, often his or her final salary, and the individual's length of service. Defined benefit schemes in the private sector are jointly funded by contributions from the employer and employees. The role of the employer in a defined benefit pension scheme is very important. The employer is the scheme's "sponsor"; and, in the last resort, if the funds in the scheme are insufficient to pay benefits, it is the employer's responsibility to make good the shortfall. The ability and the willingness of the employer to support the pension scheme is known as the "**employer covenant**".

3. Where an employer's relationship with their under-funded pension scheme is ended, legislation sets out requirements for the "**employer debt**", which is the amount the employer must pay into the scheme in order to relinquish responsibility for the scheme. This is also called a "**section 75 debt**"<sup>2</sup>. For a variety of reasons, it may no longer be appropriate for an employer to be the sponsor of a particular pension scheme. During a company restructure, when one company merges with or takes over another, an 'exiting employer' may sever its relationship with its pension scheme, and so trigger an employer debt.

4. The policy intention behind the employer debt legislation is to provide protection for pension scheme members after the departure of the sponsoring employer. The basis of the protection is that the scheme should be funded to the "full buy out" level with sufficient monies to fully cover the cost of securing the members' benefits with an insurance company. For larger schemes, employer debts as calculated on a "full buy out" basis can amount to tens of millions of pounds. Where an employer debt is triggered, it may be paid as a lump sum into the pension scheme. However, it is accepted that it may not always be feasible or necessary for the employer to fund the entire lump sum up front, and there are several provisions<sup>3</sup> currently in legislation which permit the size of the debt paid up front to be safely reduced.

5. Employers and their representative bodies have made representations for further easements in the rules, in particular in relation to associated multi-employer schemes who undertake a company restructuring. "Multi-employer schemes" are pension schemes with more than one participating employer. Multi-employer schemes are either associated or non-associated. "Associated" means that the employers are related in some way; for example they are all directly or indirectly linked to one company, or each employer is controlled by the same party. Non-associated employers are, as the name implies, not associated with each other. These non-associated employers might be charities or voluntary organisations. The majority (around 70 per cent) of defined benefit scheme members are in multi-employer schemes.

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<sup>2</sup> Section 75 of the Pensions Act 1995 and the Occupational Pension Schemes (Employer Debt) Regulations 2005 SI 2005/678.

<sup>3</sup> Existing provisions for reducing the size of the employer debt paid up front include withdrawal arrangements, approved withdrawal arrangements, and apportionments.

6. **Amendments to the Employer Debt regulations in April 2008.** These April 2008<sup>4</sup> amendments did not specifically address the restructuring issues, but instead introduced other changes to jointly protect members and assist employers. For example, loopholes on apportioning debts were tightened while easements were introduced where employers could delay debts being triggered altogether or else allowed more flexibility for employers paying the employer debt as triggered. An Impact Assessment was also produced for the regulations<sup>5</sup>.

### **Problem under consideration**

7. Whilst the pensions industry welcomed many of the changes in the April 2008 regulations, there was still concern that easements should be introduced which specifically addressed company restructurings. Such transactions are often regarded as unnecessarily triggering the employer debt provisions, requiring the employer to pay large amounts into a pension scheme which was not detrimentally affected as a result of the restructuring. This could lead to cash-flow problems for sponsoring employers and the need to tap the capital markets or borrow from banks for additional funds.

8. Concern was expressed in particular about the triggering of employer debt arising out of an internal restructuring within the same group of companies. This could include mergers or acquisitions between companies in the same group - usually the merging of a smaller company with a larger company in the same group and the ensuing effect of a company ceasing to have any employees. Restructurings may also involve the merger of a new employer who participates in the pension scheme.

9. Industry commentators and their research of employers and business practice<sup>6 7</sup> have called for reform of ED legislation in the context of corporate restructuring and advised that such transactions ought not to be detrimental to pension schemes. Instead restructures may indeed lead to a strengthening of the employer's covenant, through the streamlining of a company's operations when efficiencies would be increased and costs reduced. Recent research<sup>8</sup> has also highlighted the impact of the current crisis on sponsoring employers' strategies towards pensions. The survey comments that "The relatively optimistic picture which emerged from the Annual Survey 2008 has changed significantly in the wake of the current economic downturn."

10. **Deregulatory Review** The employer debt legislation was also considered in the Deregulatory Review report of private pensions, conducted by two external reviewers Chris Lewin and Ed Sweeney<sup>9</sup>, and two recommendations were made:

"Where a company that participates in a DB [*defined benefit*] multi employer scheme ceases to have employees actively participating in that scheme but the scheme continues, the debt should not be triggered if, within a period of up to one year, the employer acquires more employees who participate in the scheme."

"Where there is a group reconstruction of employers in a multi employer scheme, the principle should be established that the debt should not be triggered, where the original covenant was strong and if the remaining employers' covenant remains as strong, following the reconstruction, as the original covenant. The judgement as to whether the covenant remains intact should be the responsibility of the trustees, after taking appropriate professional advice. However, one of us (Chris Lewin) recommends that, where the original covenant is potentially weak, provided it remains unchanged after the reconstruction, the debt should still not be triggered."

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<sup>4</sup> The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008 SI 2008/731.

<sup>5</sup> <http://www.dwp.gov.uk/docs/ia-aed-regs.pdf>

<sup>6</sup> NAPF Annual Survey – July 2008

<sup>7</sup> A view from the top – 2007. A survey of business leaders views on UK pension provision (CBI & Watson Wyatt)

<sup>8</sup> NAPF follow-up survey - Pension provision and the economic crisis – January 2009

<sup>9</sup> Deregulatory Review of Private Pensions. Chris Lewin and Ed Sweeney - July 2007.

<http://www.dwp.gov.uk/pensionsreform/pdfs/ReviewPaperJuly2007.pdf>

11. The Government accepted the first of the reviewers' recommendations and the April 2008 regulations included an amendment which in specific circumstances permits a twelve month period of grace before the triggering of an employer debt. In response to the second recommendation, the Government said as follows<sup>10</sup>:

“The Government also accepts that the current provisions may create difficulties for employers who wish to undertake a reorganisation and believes that, in principle, there is much to be said for distinguishing between reorganisations and complete severance of an employer from a scheme. However, this is a difficult area and it may not be easy to find a way to address this without creating loopholes within legislation. In addition to the changes already outlined in draft amending regulations, the Government intends to work with the industry over the coming months to seek a practical solution to the difficulties created by the current provisions which does not undermine the principle that employers should fully meet their pension obligations. “

12. The Government has therefore been working with key stakeholders from the pensions industry to seek a practical solution to employers' concerns in the context of such company restructurings.

13. **Informal consultation** In November 2008, the Government undertook an informal consultation which though not confidential was aimed at inviting views from a limited number of key stakeholders. The options outlined in this Impact Assessment are based on the outcomes of this informal consultation.

14. In the light of the consultation, revised options were drawn up and these are considered in the section on **Policy options** below.

### **Policy objectives and intended effects**

15. The objective is to reduce the circumstances in which a corporate restructuring - involving one exiting and one receiving employer - triggers unnecessary employer debts. While industry commentators have suggested that restructurings do not change the employers' commitment to the pension scheme, the Government is also keen to ensure changes should not reduce the strength of the employer covenant to support the pension scheme; should not reduce levels of member protection; and should not lead to increased calls on the Pension Protection fund.

16. The employer debt provisions were intended to protect the pension entitlements of scheme members and not to hamper legitimate business practices. In the case of restructurings it is understood that debts are inadvertently triggered even though the remaining employers' sponsorship of the pension scheme remains unchanged. For example two companies within the group are “merged” to save on administration costs and the new company employs the same staff, has the same assets etc, but this nonetheless triggers an employer debt. The intended effects of current changes are therefore that employers should be able to proceed with such restructuring of their companies without unnecessarily triggering the employer debt provisions. This will benefit employers by making it easier to unlock the commercial and competitive advantages that arise from corporate restructurings.

17. Without these regulations there is a risk that employers could unnecessarily trigger debts that will cause them financial problems. This could have a material impact on their business and in extreme circumstances could even threaten the viability of the group.

18. There may be a particular need for these regulations at the current time, since an emerging issue is the extent to which the current economic conditions will increase company reorganisations and merger and acquisitions activity – hence leading to the increased frequency with which the employer debt requirement has to be considered.

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<sup>10</sup> Deregulatory Review – Government response 22 October 2007  
<http://www.dwp.gov.uk/pensionsreform/pdfs/government-response.pdf>

## Groups affected

19. This section describes the **groups affected** by the Options.
20. **Groups affected** The groups affected by the Options are as follows:
  - **Employer** – The employer debt requirements are a cost on employers. The requirements are based on the cost of buying out benefits with an insurance company. There are arrangements for postponing the payment of a debt, for example by apportioning it to other employers in the group. But when the debt is triggered, trustees would nevertheless usually expect some portion to be paid and employers may therefore have to borrow up front to pay such debt that would normally be paid over time. The cost of servicing any such borrowing represents the true cost to the employer of the current requirements. In a restructuring involving a multi employer pension scheme, the relevant employers therefore have a financial and business sustainability interest in minimising or if possible negating any employer debt payable as a lump sum. The proposed options reduce the circumstances in which employer debts are triggered. No debt triggering is intended to reduce the pressure on and from trustees to exact over-cautious payments from employers.
  - **Members** - The security of members' benefits is determined by the level of pension scheme funding and by the strength of the employer's covenant which supports the scheme. Members would be concerned by changes which might lead to a weakening in scheme funding or of the employer covenant backing the scheme
  - **Trustees** – Trustees have a fiduciary responsibility towards scheme members and would not welcome a position where new statutory requirements meant they were unable to protect members' interests. Trustees would also not support the introduction of unnecessarily complicated requirements which they found difficult to operate, or which involved them making choices between the interests of members or the ongoing sustainability of the business as a whole.
  - **Pensions Regulator** – The Pensions Regulator is the UK regulator of work-based pension schemes. The Regulator's main statutory objectives include the protection of the benefits of members of work-based pension schemes; and the reduction in risk of situations arising that may lead to claims for compensation from the Pension Protection Fund. The Regulator would therefore be concerned if any of the options ran counter to these objectives.
  - **Pension Protection Fund** – The Pension Protection Fund's main function is to provide compensation to members of defined benefit pension schemes where the employer becomes insolvent and where there are insufficient assets in the pension scheme to provide at least the Pension Protection Fund level of compensation. The effect on the Pension Protection Fund depends on the extent to whether any of the options would lead to more schemes being under-funded to PPF levels and, as a result, more schemes needing to be taken on by the Fund. However the main restructuring option in maintaining the strength of the covenant should not materially increase the likelihood of schemes having to have recourse to the Pension Protection Fund. Those schemes using the de-minimis option are required to be funded to at least PPF level anyway and these will always involve small relative and absolute amounts.
  - **Levy payers** - The Pension Protection Fund is funded in part by a compulsory levy on all eligible schemes. Increasing calls on the Pension Protection Fund may be addressed by increases in the levy and eligible schemes are already expressing concern about the amounts they are required to pay. As the proposed options

should not lead directly to any new calls on the Pension Protection Fund there should be not be any material financial consequences for levy payers.

## Policy options

21. Four options were initially considered in November 2008, as part of an informal consultation process with stakeholders:

21.1. **Option A** scheme apportionment as the default

- Following a corporate restructuring a debt would not be triggered where the existing *funding test*<sup>11</sup> was satisfied and where the employers' covenant was strong both before and after apportionment. If those conditions were satisfied there would be automatic apportionment to other employers in the group.

21.2. **Option B** De-minimis threshold

- An employer debt would not be triggered on a corporate restructuring if the section 75 debt of the exiting employer was less than a de minimis limit, defined as a pre-determined proportion of the section 75 debt of the group as a whole.

21.3. **Option C** Lower amount of employer debt

- The employer debt would be calculated on a corporate restructuring by reference to scheme funding liabilities or PPF liabilities (rather than full buy out<sup>12</sup>).

21.4. **Option D** "Do nothing".

22. The main concern about **Option A** was the perception that trustees would adopt a cautious approach in carrying out the funding test. There was also a concern that the covenant measured by the funding test must be "strong". **Option A** was replaced with a provision whereby a debt would not be triggered in relevant cases so long as a new Restructuring Test was satisfied to show that the receiving employer will be **at least as likely** as the exiting employer to meet the scheme liabilities it is acquiring from the exiting employer, as well as its own liabilities. **Option B** introduced both an absolute liability cap and proportional caps, and to permit section 179 liabilities (instead of section 75 debts) to be used in estimating these. **Option C** attracted little support. Most respondents acknowledged that where an employer ceased to participate, the required funding level for the scheme needed to be well above the scheme funding level. **Option C** was not therefore considered an appropriate way forward. Given the current economic climate coupled with intense Industry interest and criticism of current provisions in relation to corporate restructurings, doing nothing (**Option D**) was not considered tenable

23. In light of the informal consultation, the following options have been included in the draft Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010:

23.1. **Option 1** Main restructuring easement; and

23.2. **Option 2** De-minimis easement

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<sup>11</sup> Broadly the funding test involves gauging the financial strength of the covenant for funding the ongoing scheme as specified in Regulation 2(4A) of the Occupational Pension Schemes (Employer Debt) Regulations (2005 SI 2005/678), as amended in April 2008.

<sup>12</sup> The estimated cost of securing member benefits in full with an insurance company via annuity policies.

24. Further details of the two revised options are explained below. A consultation on the draft regulations is being undertaken in tandem with the publication of this Impact Assessment.

25. **Financial consequences** – The monetised benefits shown in this IA derive from a dataset holding funding details for PPF-eligible DB schemes as estimated at the end of February 2009. The detail of this latest dataset has been validated against a similar dataset from March 2008 and the Government is satisfied that the later version more accurately reflects the impact on scheme funding of the current economic downturn. Nevertheless assumptions had to be applied as the level of detail available was limited to whole schemes, with no detail on individual employers' funding. Estimates must therefore be treated with some degree of caution. Further detail on the estimates and assumptions is supplied below.

### **Option 1 – Main restructuring easement**

26. This option may be used by associated employers who are undertaking a corporate restructuring. No debt would be triggered provided the following conditions were satisfied:

- A Restructuring Test - considering the present resources and future commercial prospects of the exiting and receiving employers - would have to be satisfied<sup>13</sup>. Broadly, the Test requires that the receiving employer is **at least as likely** as the exiting employer to meet the scheme liabilities it is acquiring from the exiting employer, as well as its own liabilities.
- The corporate assets and employees of the exiting employer must be passed to another employer remaining in the group (the "receiving employer"). The receiving employer also becomes responsible for the exiting employer's obligations towards the pension scheme.
- The receiving employer must have their head office in the UK.

27. In very limited circumstances, this option would be extended to include non-associated employers. It would apply where an employer changed its legal status, such that, for example an unincorporated charity changed to an incorporated company; or a partnership became a Limited Liability Partnership.

28. To assist trustees, the Pensions Regulator will consider the need to provide guidance on behaviours that it expects, good practice, or practical advice on complying with regulations.

29. **Informal consultation** This option was not included in the informal consultation – being drawn up following responses to that consultation. In particular several respondents to that consultation said that corporate restructurings in which all assets, employees and pensions liabilities remained within the corporate group posed no risk to the pension scheme. These conditions are now key features of this option. Other respondents supported a covenant test as being the best way to assess whether a receiving employer was able to support new obligations in addition to his own, and again this forms an important part of this option.

### **Groups affected / financial consequences**

30. The Government's intention is that this main restructuring option would be supported by **employers** because it should enable corporate restructuring to be managed more effectively. No debt would be payable as a lump-sum, and, there would be a wider benefit to employers who would find it easier to restructure their business.

31. It is estimated that the main restructuring easement could provide considerable savings for **employers**. These estimates are based on the following assumptions. There are 1,975 associated multi-employer schemes (source: Pensions Regulator). Employers expressing an interest in restructuring their businesses - from responses to CBI's survey<sup>14</sup> combined with

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<sup>13</sup> The requirements for the restructuring test are set out in the draft regulations which accompany this Impact Assessment.

<sup>14</sup> See footnote 7

knowledge of the scope of this option - suggest that around 20 per cent<sup>15</sup> of medium to large employers sponsoring multi-employer defined benefit schemes would welcome and make use of this option as it currently stands. For the purposes of calculating this estimate, it is assumed that all of these restructures would occur in year 1. This gives a total of 395 schemes estimated to take advantage of this easement.

32. The median employer debt for these schemes is estimated at £4.2 million per scheme. The aggregate debt across all 395 schemes would therefore be  $395 * £4.2 \text{ million} = £1.67 \text{ billion}$ .

33. For the purposes of calculating this estimate, the amount of the employer debt itself has not been counted as a saving. This is because amounts of the order of the employer debt may be paid when the scheme winds up and discharges its liabilities via an insurance company. Instead the focus has been on employers' cash flow and an assumption that employers would borrow to meet the debt. On this basis, the additional cost of borrowing to employers would be the interest on the debt. This approach is consistent with that used in the Impact Assessment on the April 2008 amendments to the Employer Debt regulations (see footnote 5). The saving to employers is the value of the interest payments that no longer have to be paid as a result of no debt being triggered.

34. It is assumed that companies borrow by issuing 10 year corporate bonds. The assumed yield for the purposes of this estimate is 6.94% (based on the yield on the AA corporate bond index in March 2009). In each year it is assumed that only the interest is paid (with the principal being paid at maturity) -  $6.94\% * £1.67 \text{ billion} = £116 \text{ million}$ . Over 10 years the aggregate savings would amount to around £890 million (on present value terms, based on 2009/10 prices). On the same basis the average annual savings would amount to £100 million – this is a simple average of the annual aggregate interest payments expressed in 2009/10 prices.

35. Some costs and savings associated with the administration of the main restructuring easement will arise. It has not been possible to estimate these costs and savings, but having had discussions with the pensions industry, it is considered that they would be negligible. If respondents have any information about the potential amount of these administrative costs or savings, please include it in responses to the consultation.

36. The new regulations will require employers to provide pension schemes with certain information. However if employers want to deal with the employer debt under existing regulations they would also have to pass information to trustees. For example if employers decided to enter into an agreement to apportion the debt or to enter into a withdrawal arrangement, information would have to be passed across. The new regulations will not introduce any additional information requirements; rather the total amount of information provided will remain the same – but it will be required under different headings / regulations.

37. **Members** would benefit from their employers being able to run their business in a sustainable and competitive manner. This may lead to increased job security and continuing accrual in a defined benefit pension sponsored by a viable employer. Since this option includes safeguards such as the assessment of the employer's covenant and a simple and workable definition of a restructure which is less likely to give rise to loopholes, there is no compromise in the security of members' pensions and hence no additional costs imposed on members.

38. The **trustees'** primary duty is to the members and the security of their benefits. While the current economic climate is a testing time for trustees, explicitly different policies for restructuring transactions coupled with new guidance from the Pensions Regulator should go some way towards allaying concerns about this easement. In particular, the safeguards inherent in the option will be to enable trustees to have continued confidence in the strength of the overall employer covenant.

39. Concerns about the option would be addressed in a number of ways. First, following the restructuring, the receiving employer must be **at least as likely** as the exiting employer to meet

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<sup>15</sup> While the survey reported in excess of 40 per cent of employers to be constrained by ED restrictions in the event of a restructure, it is known, based on discussions with the industry, that such transactions as is proposed between two employers may only account for half of all likely restructurings.

the scheme liabilities it is acquiring from the exiting employer, as well as its own liabilities. Second, the corporate assets and employees of the exiting employer must be passed to the receiving employer. The receiving employer also becomes responsible for the exiting employer's obligations towards the pension scheme. In addition the Regulator will also be able to influence trustees via its additional guidance. This option should therefore not directly result in greater calls on the Pension Protection Fund and there should be no additional costs for this body.

## **Option 2 – De-minimis easement**

40. Under this option, de-minimis limits would be introduced, below which, in the case of a restructuring, an employer debt would not be triggered. The underlying rationale is that the interests of the exiting employer qualifying for this easement are not material to the ongoing viability of the scheme. The key features of this option would be as follows:

- The corporate assets and employees of the exiting employer must be passed to the receiving employer. The receiving employer also becomes responsible for the exiting employer's obligations towards the pension scheme.
- The de-minimis would be calculated by reference to the protected liabilities of the pension scheme<sup>16</sup>.
  - (i) The de-minimis would only apply where the scheme's assets exceed protected liabilities when measured on a PPF (s179) basis.
  - (ii) The de-minimis would only apply if the pension scheme members of the exiting employer were no greater than 2 per cent of the scheme's total membership.
  - (iii) These liabilities of the exiting employer (as proxy for the exiter's interests in scheme) must not exceed £100,000.
  - (iv) The aggregate proportion for successive transactions under this option must not exceed 5 per cent of the scheme's total membership in a rolling period of 3 years.

41. **Informal consultation** Respondents considered that a de-minimis would be helpful in small "housekeeping" reorganisations amongst a group of employers. However, there was concern firstly about the cost of calculating the de-minimis by reference to employer debt; and secondly that successive de-minimis transactions could lead to a large and unchecked level of debt effectively being ignored. These concerns have been addressed by limiting the individual use of this easement in both relative and absolute terms. Additionally, aggregate proportions are not allowed to exceed 5 per cent within any rolling three-year period. This effectively caps the accumulated level of transactions permitted over time.

42. **Extent of applicability** – The Government is particularly aware of the reduced applicability of the de-minimis easement in the current economic climate. While between 4 and 25 per cent of multi-employer schemes should have been able to use this easement in March 2008, between 1 and 4 per cent may be able to do so by February 2009. (Of course, as asset values recover, the proportion of schemes able to take advantage of de minimis could increase as rapidly as it has fallen.) Note these ranges are wide with upper estimates representing the scope for more frequent use by any exiting employers with very low proportional interests. Conversely lower estimates represent those exiters with interests close to or at the upper 2 per cent threshold.

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<sup>16</sup> **Methodology** - it can be difficult and costly to calculate an employer's liability for section 75 debt. Accordingly a proxy measure of liabilities has been adopted, based on "protected liabilities". Protected liabilities are broadly the cost of securing benefits for members equivalent to the compensation that would be payable by the Pension Protection Fund. See sections 131 and 179 of the Pensions Act 2004. In particular for (iii) the liabilities of the exiting employer are calculated by applying the membership ratio in (ii) to the total of the scheme's liabilities. If the ratio produces a result for liabilities of less than £100,000, this condition is satisfied.

## Groups affected / financial consequences

43. The de minimis option would be useful to **employers** and **advisers** undertaking minor “housekeeping” restructurings – with these now easier and cheaper to manage, with no debt triggered and no assessment of the employer covenant required.

44. Where an Employer Debt is inappropriately triggered, it is again assumed that the employer would borrow to pay this debt. As with the main restructuring easement, the direct financial benefit of the option to the employer is the saving arising from no longer having to service the debt. As with option 1, the estimates assume that employers borrow by issuing debt of a maturity of 10 years<sup>17</sup> at a rate equivalent to that on an ‘AA’-rated corporate bond – currently assumed to yield 6.94% as at the end of March 2009. (In reality of course, for such small amounts, employers would borrow rather than issue bonds, but this approach provides a standardised approach to the estimates of savings.)

45. Using PPF scheme funding data, it is calculated that the inappropriately triggered debt in the absence of this option as being in the range £450,000 - £740,000. The lower end of this range (£450,000) is based on the strictest of assumptions that the exiting employer has proportional interests at the upper 2% cap and liabilities no greater than £100,000. This assumption so rules out a substantial number of exiting employers with high proportional interests (i.e. at 2%) and liabilities exceeding £100,000. Conversely, the top end of the range (£740,000) assumes that the exiting employer has very low proportional interests of around 0.1% and liabilities no greater than £100,000. This generous assumption permits a much larger number of exiting employers to qualify for this option.

46. Based on the current data, the lower end of this range thus represents a more conservative estimate of the aggregate employer debt that could be inappropriately triggered. The aggregate range of savings to employers from their no longer having to make interest payments on this inappropriately triggered debt is estimated to be between £240,000 and £390,000 over a ten year period (present value terms, based on 2009/10 prices). While the monetary saving to employers is small under either assumption, the wider benefits associated with the facilitation of such small (i.e. non-material) restructuring transactions should be welcome. There are some information requirements attached to the new regulations. However, as with the main restructuring easement, these are not regarded additional burdens but a modification of existing requirements.

47. Some costs and savings associated with administration would also arise with this option. It has not been possible to estimate these costs and savings but it is believed they would be negligible. Any information on these amounts should be included in responses to the consultation.

48. It may introduce a small added risk to **members’** benefits as a scheme funded to PPF levels is permitted to undertake a restructuring exercise without the requirement to assess the covenant of the employer who now has additional obligations following the restructure. In February 2009, for example, around 1,000 members could have been in groups associated with exiting employers whose interests are near to or at two per cent but not exceeding £100,000. Similarly, over 29,000 members could be in groups associated with exiting employers having very small interests (e.g. 0.1 per cent and not exceeding £100,000). However with a five per cent limit on the proportion of interests allowed to accumulate over any rolling three year period, additional risks are not envisaged for members who continue to be supported by the strength of the wider group.

49. Overall, therefore, it is envisaged that the interests of **trustees** and **members** to be protected by the requirement that the corporate assets, employees and obligations towards the pension scheme of the exiting employer must be passed to the receiving employer, and by the limited monetary value of these transactions. While admittedly this option does not require a Restructuring Test and may be a concern for the **Pensions Regulator** and the **Pension**

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<sup>17</sup> Note that it is assumed the employer simply pays off the interest on the loan in each year and then the full principal when the debt matures.

**Protection Fund**, as described in previous paragraph, only risks limited by size and number of transactions are permitted. This option should also not lead directly to greater calls on, or additional costs for, the Pension Protection Fund.

## **OTHER TESTS**

### **Small firms impact test**

50. The new regulations will have a limited effect on small companies - with medium and large companies reporting the greatest need to restructure. Apart from a few cases of a change to legal status, the new regulations will only apply to associated companies participating in a defined benefit pension scheme. However, the regulations will enable relevant groups to restructure more efficiently and should contribute to the sustainability of the overall group.

### **Competition assessment**

51. The new regulations will not alter competitiveness with regard to any of the four questions contained in the Office of Fair Trading's guidance on completing competition assessments. In fact, by enabling companies to reorganise more efficiently, competition should be enhanced.

### **Enforcement**

52. The new regulations are permissive and hence no compliance action is required.

### **Implementation and delivery plan**

53. The new requirements will be delivered by means of a new Statutory Instrument. As the new requirements are permissive there is no requirement for a delivery plan.

### **Post implementation review**

54. No formal review of the new regulations is planned. But the operation of the regulations will be monitored on an ongoing basis by means of representations and feedback from the pensions community, the Pensions Regulator and the Pension Protection Fund.

### **Equality**

55. The proposals have their primary effect on occupational pension schemes and their sponsoring employers. However the initial tests for the equality impact assessment have been considered and the results are contained in Annex A to this Impact Assessment.

### **Human rights**

56. The proposals are compatible with the Human Rights Act 1998.

### **Legal Aid**

57. There will be no impact on Legal Aid.

### **Sustainable Development, Carbon Assessment, Other Environment**

58. It is not believed there will be any impacts in these areas.

### **Health Impact Assessment**

59. The options have been considered against the screening questions for health impact assessments and such an assessment will not be necessary.

### **Rural proofing**

60. The proposals have no specific impact on rural communities.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	Yes	No
Rural Proofing	Yes	No

## Annex A

### EQUALITY IMPACT ASSESSMENT

#### DEREGULATORY REVIEW OF EMPLOYER DEBT REQUIREMENTS

**CONTACT:** Mike Rochford at the Department for Work and Pensions Tel: 020 7449 7392 or e-mail: mike.rochford@dwp.gsi.gov.uk

#### PURPOSE

Occupational pension schemes are set up by employers for the benefit of their employees. The role of the employer in occupational pension schemes is very important. The employer is the scheme's sponsor; in the last resort, if the funds in the pension scheme are insufficient to pay benefits, it is the employer's responsibility to make good the shortfall.

For a variety of reasons it may no longer be appropriate for an employer to continue to be the sponsor of a pension scheme, for example where there has been a merger or takeover. Where an employer's relationship with a pension scheme is to be ended, legislation would trigger the default in which the employer must normally pay an amount into the scheme. This amount is known as the "employer debt" and can equate to a large monetary sum. It is intended to protect the funding of members' pension benefits.

Representations have been made to the Government that, in certain circumstances, the rules on "employer debt" are too onerous. In response to the representations the Government has therefore published draft regulations which will ease the requirements<sup>18</sup>. However the new regulations should maintain the existing level of protection of members' pension benefits, with members not likely to lose out as a result of the new regulations.

#### PEOPLE AFFECTED BY THE CHANGE

In relation to occupational pension schemes, equality is primarily an issue in relation to the members of schemes, their families and to prospective members. The new proposals will only have very limited effects on these groups. The new proposals should not lead to less security in the provision of pension benefits. On the contrary, facilitating reorganisations and mergers should make companies stronger, more willing, and hence better able to support both their pension schemes and the continued employment of members.

#### EQUALITY IMPACT OF POLICY

For members and their families, the equality impact has been assessed by reference to the effect on pension benefits. In particular the assessment has focussed on whether the proposals would have different effects on benefits because of a members' race, gender or disability. The conclusion is that there would be no discriminatory effects. Firstly the proposals should have no negative effects on members' benefits. As outlined before, where an employer is strengthened as a result of a merger or reorganisation, that employer is better able to support the pension scheme and provide employment opportunities. This will be to the benefit of all members, regardless of race, gender or disability.

If employers are strengthened as a result of mergers or reorganisations, they may also be more willing to keep their defined benefit pension schemes open to new members. Each pension scheme has its own eligibility criteria and clearly those criteria could involve equality issues.

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<sup>18</sup> The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010.

However the new proposals would not impact on individual scheme's eligibility criteria and no equality issues would therefore arise with respect to prospective members.

#### **NEXT STEPS**

The proposals have no effect on equality issues and there are therefore no plans to proceed to the full impact assessment stage.

#### **CHANGES MADE**

No changes have been made to the proposals as a result of the initial impact assessment.