

**Amendments to the
Occupational Pension Schemes (Employer Debt)
Regulations 2005**

**Consultation on the Draft Occupational Pension
Schemes (Employer Debt)(Amendment) and
Pension Protection Fund (Multi-employer and
Entry Rules)(Amendment) Regulations 2007**

7th August 2007

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Foreword

Preface

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

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

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

The Regulator recently issued guidance for trustees on the subject of abandonment (May 2007).

5. The Amending Regulations introduce new concepts and the main two are:
 - the introduction of Cessation Agreements (a simplified form of Approved Withdrawal Arrangements);
 - setting out the default method for calculating an employer's share of the difference between assets and liabilities in a multi-employer scheme is the liability share unless any of the following three options apply: apportionment share, cessation agreement share or withdrawal arrangement share. All these options have their particular advantages for different employers and schemes. However as part of this consultation, we would be grateful to understand if any of the options are less useful to employers and schemes and whether there is scope for simplification by removing any of the options.
6. The consultation is primarily aimed at pension industry professionals, but views from the wider public are also welcome.
7. This document is available on the Department's website at:
<http://www.dwp.gov.uk/consultations/2007/index.asp>

Who should reply to this consultation?

8. This consultation seeks views on the attached paper. It is of a technical nature, and primarily aimed at employers, trustees or managers of pension schemes, pension scheme administrators, and their professional advisers such as pensions actuaries, pensions lawyers and pensions accountants. However, comments are welcomed from other interested parties and the wider public.
9. Because of the highly specialised nature of this consultation, Ministers have agreed that it is not appropriate to publish it under the provisions of the Cabinet Office Code of Practice on consultation. The main deviation being the period of consultation of eight weeks as opposed to the recommended twelve under the code. It does, however, apply best practice from the Code.
10. Please note that because of the Freedom of Information Act (2000), all information contained in your response, including personal information may be subject to publication or disclosure. By providing personal information for the purposes 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, and although we will try to respect this we cannot guarantee to do so. Similarly, we cannot guarantee confidentiality even if your IT system claims it automatically. We will, of course be happy to discuss any issues you have with you. Please use the contact details above. More information about the Freedom of Information Act can be

found on the website of the Department for Constitutional Affairs -
<http://www.dca.gov.uk/foi/guidance/exguide/index.htm>.

How and when to reply

11. The consultation period begins on **7th August 2007** and runs until **1st October 2007** ; please ensure that your response reaches us by **1st October 2007** at the latest. If you would like further copies of this consultation it can be found at www.dwp.gov.uk/consultation/2007.

12. Please send consultation responses to:

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Or e-mail: Winding-up@dwp.gsi.gov.uk

13. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make it clear whom the organisation represents, and where applicable, how the views of members were assembled.

14. A list of those consulted is attached. If you have any suggestions of others who may wish to be involved in this process please forward this document on to them or contact us.

DWP Website

15. This document is available on the Department's website at www.dwp.gov.dwp.uk/consultations/2007

16. DWP values feedback on how well it consults. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact the DWP Consultation Co-ordinator:

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Impact assessment

17. Our initial Impact Assessment for the Regulations, which is attached, sets out our cost/benefits analysis. It finds that the regulations deliver savings to business, charities and the voluntary sector.
18. However, there is very limited information on which to base reliable estimates of the costs and benefits of our proposals, and estimates must therefore be regarded with considerable caution. In determining the broad range of administrative costs we have drawn on some anecdotal evidence. We would be grateful for further information, which would improve the quality of this analysis.

Do you have any further information, data or analysis which would be useful for improving the quality of the analysis in the attached impact Assessment?

Background

19. The Occupational Pension Scheme (Employer Debt) Regulations 2005 (S.I. 2005/678) (“the Employer Debt Regulations”) came into force on 6th April 2005. At the same time the amendments made to the primary legislation, section 75 of the Pensions Act 1995, by section 271 of the Pensions Act 2004 (“Section 75”) also came into force. The Pensions Act 2004 made a number of far reaching amendments to the pension’s landscape as we knew it. In particular the compensation fund, the Pensions Protection Fund (“the PPF”), was established and the then regulator, the Occupational Pensions Regulatory Authority, was replaced with its successor body, the Pensions Regulator (“the Regulator”), which was given considerably more powers. Both the PPF and the Regulator are closely connected with Section 75 and the Employer Debt Regulations.
20. The Employer Debt Regulations were amended a few months after they came into force (by S.I. 2005/2224). These amendments allowed the Regulator to approve Withdrawal Arrangements which broadly allow an employer who leaves a multi-employer scheme to reduce the amount he must pay in relation to his share of the shortfall in the scheme’s assets.
21. Unfortunately it was not possible to consult on either the Employer Debt Regulations themselves or on the amendments made to introduce Approved Withdrawal Arrangements. Since the Employer Debt Regulations came into force in April 2005 we have received many letters from pension schemes and their advisers highlighting problems they face when applying the Employer Debt Regulations and Section 75. In more recent times we have had the De-Regulatory Review.³ The De-Regulatory Review spoke to many Industry representatives and after considering their comments about the operation of the Section 75 and the Employer Debt Regulations they made a number of recommendations. The case of *L v M* [2006] EWHC 3395 (ch) also focussed attention on the Employer Debt Regulations. Warren J commented in the *L v M* case on the regulations. In particular::

“20. The wording of sub-regulation (2) [of regulation 6 of the Employer Debt Regulations] is slightly curious because it refers to the apportionment of the debt or “that debt” as the wording appears in paragraph (b) whereas what is in fact being apportioned is the amount of the difference between assets and liabilities. The explanation for this is perhaps that the wording was lifted from an earlier set of regulations where the provision, as drafted, made perfectly good sense. Its sense, however, is absolutely clear in the context of the regulations and it is in fact referring to that difference.”

“65. There is a curious difficulty with the drafting which I need to explain. Regulation 7(1) [of the Employer Debt Regulations] provides for regulation 7 to apply in the circumstances set out in paragraphs (a) and (b) which I have set out already. Paragraph (b) appears to envisage a situation where an employment cessation event has already occurred and, as a result, a “debt calculated on the basis of assets and liabilities valued in accordance with regulation 5 is treated and due under section 75(4)”. According to Phoenix, the debt due under section 75(2)

³ The report can be found at: http://www.dwp.gov.uk/pensionsreform/deregulatory_review.asp

arises only on completion of the calculation. The same reasoning as led to that decision applies equally in relation to a debt due under section 75A.

66. Withdrawal arrangements are dealt with in schedule 1A. They are introduced by regulation 7(7) which, again, I have already set out. That Schedule applies where, and as I see it only where, the regulation applies by virtue of regulation 7(1) and thus only where paragraph (b) is fulfilled. So far as I am aware, regulation 7 and schedule 1A are the only provisions which expressly provide for the sanction by the Pensions Regulator of arrangements of this nature. Regulation 7(1) and schedule 1A are of course contained in the same set of regulations. They have to be construed together.

67. Paragraph 3(1) of schedule 1A provides that nothing in the schedule prevents the Pensions Regulator from approving as a withdrawal arrangement an agreement that will take effect only on an employment cessation event in relation to an employer. It seems therefore to envisage the possibility of a withdrawal arrangement being made before the circumstances have arisen, following which a debt has to be calculated. Where approval is given to a withdrawal arrangement, paragraph 3(2) provides that references in paragraphs 1 and 2 to that event and to that debt must be read accordingly.

68. Whatever the meaning of those provisions, what must be intended, I think, is that an arrangement made in advance of the employment cessation event is nonetheless to be treated as a withdrawal arrangement, although it is not easy to see precisely how those provisions operate. More importantly, it is entirely unclear how regulation 7(1) and schedule 1A in fact interrelate.

69. Neither Mr Newman nor Mr Simmonds was able to give an entirely satisfactory or, indeed, any answer and I cannot see one either. I fear that it is a case of two related provisions which simply did not hang together properly. The squaring of the circle must be left for a different occasion, but perhaps one solution is to say that the scope of the regulation is in fact extended by paragraph 3 so as to permit the making and approval of a withdrawal arrangement before an anticipated employment cessation event but conditional upon it actually occurring. Whatever the meaning and effect of these provisions, I do not gain any assistance from them either way in resolving the correct interpretation of Regulation 2(2) of the Entry Rules but I have, nonetheless, felt it necessary to address them at the length I have in the light of the arguments that were addressed.”

22. As a result of all of the above DWP has prepared the draft Occupational Pension Schemes (Employer Debt) (Amendment) and Pension Protection Fund (Multi-Employer and Entry Rules)(Amendment) Regulations 2007 (“the Amending Regulations”).

23. We are aware that there is some dissatisfaction with the tax treatment of payments by Guarantors under Approval Withdrawal Arrangements. We aim to discuss this with HMRC separately.

Summary of Effect of Each Amendment and Questions to Consider

Application of Employer Debt Regulations

1. **Regulation 3 of the Amending Regulations:** Amendments are made to substitute a new paragraph (3)(a) of regulation 1 of the Employer Debt Regulations. The object is to clarify that the legislation which applied to employer debts prior to 6th April 2005 will continue to apply to debts which were treated as arising under Section 75 before that date (i.e. under section 75 and the regulations made under that section, prior to amendments made by the Pensions Act 2004). Like all amendments in the Amending Regulations, this will not have retrospective effect (note: we do not have powers to make retrospective amendments).

Valuations of Assets and Liabilities

2. **Regulation 4 of the Amending Regulations:** Regulation 5 of the Employer Debt Regulations has been replaced. As a result of a few policy changes we decided it would be easier to replace regulation 5, make the policy changes and retain much of what appears in regulation 5 at the moment (we have taken the opportunity of making some paragraphs clearer). The policy changes are described below:
3. The role of the trustees or managers of scheme has been increased so that they are involved with decisions regarding calculating, determining and verifying assets and liabilities. In the case of a scheme's assets we have expressly provided that trustees must consult the scheme auditor. In the case of a scheme's liabilities we have expressly provided that the trustees/managers and the actuary have an equal role.

Do you foresee any problems with the trustees'/managers' new role in relation to valuations of assets and liabilities?

4. We have made provision for where in the event of an employment-cessation event new scheme accounts and scheme valuations may not be necessary. We recognised that in some cases there may be good reasons for commissioning new scheme accounts and scheme valuations in order that the debt calculation can be as accurate as possible. We have had many complaints about the cost of doing this. We have therefore given trustees or managers the option of simply updating scheme accounts and scheme valuations. They must however consult with the scheme auditor and an actuary. In addition this may only be done if the scheme accounts and scheme valuation are less than 12 months old (i.e. their effective date must be no more than 12 months before the "applicable time" which applies to the debt in question).

Do you think the ability to update scheme accounts or valuations will address problems which currently arise (as there is no flexibility to update figures)?

Do you think that the ability to update scheme accounts or valuations could have any unintended consequences, which might be detrimental to the parties involved?

Are there cost savings to be made for the parties involved through the ability to update scheme accounts or valuations? Please provide information and data.

5. We have excluded money purchase assets and liabilities from calculations. Elsewhere we have excluded from the Employer Debt Regulations employers who only offer accrual of money purchase benefits (see new paragraph (8) of Regulation 6 and new paragraph (2B) of Regulation 9 of the Employer Debt Regulations). Where this arises we do not want such employers to pay a debt under section 75. We understand that in some schemes which have not segregated money purchase assets there have been cases of such employers incurring a debt. The policy intention has always been that Section 75 should not apply to money purchase benefits.

Are there any others issues in addition to the possibility of money purchase only employers incurring a debt, you have encountered in relation to treatment of money purchase benefits and the operation of Section 75?

6. We have added new provisions to deal with where Actuaries estimate the cost of purchasing annuities. It has been pointed out to us that actuaries often experience problems getting quotes for such annuities. As a result we have allowed the flexibility for them to produce a quote "on terms consistent with those in the available market and which would be sufficient to satisfy the scheme's liabilities". If it is not practicable to make an estimate in such a manner we have provided that the actuary can make an estimate on such terms as he considers appropriate.

Do you foresee any problems with allowing Actuaries flexibility to estimate the cost of buy out along the lines set out in new paragraph (7) of Regulation 5 of the Employer Debt Regulations?

7. We have amended the provisions which apply to the calculation of assets and liabilities where there has been an Approved Withdrawal Arrangement. Where there is an Approved Withdrawal Arrangement and the assets and liabilities of the scheme fall to be calculated at any time after they came into force, the assets and liabilities attributable to an employer who was party to an Approved Withdrawal Arrangement must be disregarded. Any debts treated as due under an Approved Withdrawal Arrangement must also be disregarded. This is to prevent double counting of the same debt as the guarantee element (Amount B) (or indeed the withdrawal share

amount (Amount A) if it is still to be paid in full) is expected to cover that part of the debt in the future, if the need arises.

8. The exception to this is where the assets and liabilities are being calculated because the scheme was winding-up at the applicable time. In such a case the debt guaranteed may not be recoverable from the guarantor or may not be sufficient to cover the proportion of the liabilities to which it relates. In such cases all the assets and liabilities should be used to calculate the debt. The same provision is made for Cessation Agreements which are in force.

Are there any other issues you have encountered where there are calculations of assets and liabilities after one or more Approved Withdrawal Arrangements have come into force?

9. **Regulation 5 of the Amending Regulations:** This replaces paragraphs (2) to (5) of Regulation 6 of the Employer Debt Regulations

Calculation of share of the difference in scheme shortfall and liabilities attributable to an employer

10. Where an employer's share of the difference between the assets and liabilities in a multi-employer scheme fall to be calculated paragraph (2) of Regulation 6 is amended to provide the default debt is calculated using the liability share unless any of the following apply: the apportionment share, the cessation agreement share or the withdrawal arrangement share.
11. The "liability share" broadly means the employer's share of the difference which is calculated by reference to liabilities attributable to the employer. This has always appeared in Regulation 6 of the Employer Debt Regulations (see definition in new paragraph (3) of Regulation 6). New paragraph (4) of Regulation 6 sets out how liabilities attributable to an employer are to be calculated. Broadly, the policy intention is that any liabilities, which arose during pensionable service with an employer, should be attributable to him. This should include where a member's benefits from another scheme were transferred in during his pensionable service. Where a member has been employed by more than one employer in relation to the scheme, then the liabilities should be divided up. We acknowledge that many schemes' records may be inadequate and that this may not be possible to do, or where it is possible the cost may be disproportionately high. As a result we have set out that in such cases all liabilities attributable to a member should be attributable to the last employer. If it is not possible to ascertain the last employer then the liabilities will not be attributable to any employer.

Will the provisions in new paragraph (4) of Regulation 6 of the Employer Debt Regulations make it easier to attribute liabilities to different employers? Are there any further provisions which could be made? Are there any problems with the approach we have taken in paragraph (4)? In

particular are the provisions in sub-paragraph (b) required (all liabilities relating to a member attributable to last employer in certain cases)?

Definition of employment-cessation event

12. We have re-defined the term employment cessation event and moved it to the application and interpretation section of the Employer Debt Regulations (see regulation 3(2)(b) of the Amending Regulations). Some of the amendments are to clarify the existing definition i.e. the express reference to ceasing to employ any person who is an active member of the scheme. The policy intention is that the amended definition will apply where some or all of the employers simultaneously withdraw from the scheme.
13. New paragraphs (6) and (7) of Regulation 6 of the Employer Debt Regulations provides a 12 month period of grace where an employer has no active members but expects to have one within that period. The employer will have to notify the trustees/managers of this. If he no longer intends during the 12 month period to employ an active member he must notify them of this. If an insolvency event occurs in relation to him during the 12 month period the debt triggered will be as at the first day of the 12 months period.

Do you agree that this change will give employers, particularly small employers, enough flexibility to avoid unintentionally triggering the debt? Are there any unintended consequences for schemes or employers?

We originally considered having a six month period of grace but have been persuaded this was not enough time to be of benefit to employers. Do you have any views on this, bearing in mind we reluctantly extended this to 12 months and would prefer six months if possible?

Do you agree that introducing a 12 month period of grace before triggering the debt will reduce costs for schemes and employers? Please send us any information or data.

Apportionment shares: Scheme Apportionment Arrangements and Regulated Apportionment Arrangements

14. **Regulation 6 of the Amending Regulations:** This adds new regulations 6A, 6B and 6C. The provisions which apply to the apportionment share calculation are set out in new regulation 6A to the Employer Debt Regulations.
15. An apportionment share must be set out in either a Scheme Apportionment Arrangement or a Regulated Apportionment Arrangement. The aim is to frustrate any attempts to use apportionment as a method to abandon a scheme, whilst retaining its flexibility for employers in corporate transactions and restructurings.

16. A Scheme Apportionment Arrangement introduces a new requirement for trustees or managers to approve the proportion, which will be the employer's share of the debt. This will act as a legislative override ensuring that trustees or managers are always involved and approve of apportionments.
17. In addition, the trustees or managers must also be satisfied that the test in sub-paragraphs (b) and (c) of regulation 6A(3) is satisfied. The policy intention behind this test is that trustees or managers should not agree to an Scheme Apportionment Arrangement unless they are satisfied that the remaining employers in the scheme do intend to bear the debt in the future and are, and will continue to be, capable of doing so. Thus, our policy intention is to prevent debt being apportioned to weak employers or shell employers, whilst allowing maximum scope for apportionment in corporate restructurings and reorganisations.
18. It is our policy intention also to allow a Scheme Apportionment Arrangement to be used where the scheme is in deficit and a recovery plan is in place, as long as the trustees or managers are content that the remaining employers will be able to meet the schedule of contributions and the requirements of the recovery plan.
19. After careful consideration, we do not refer to a weakening of the employer's covenant in the test because we believe that it would be difficult to define on a practical level and apply and may be too restrictive for the purposes of corporate restructuring. We would be grateful for comments and views as to whether our test (set out below) meets our policy intention.
20. Trustees and managers do not have to satisfy the test (in paragraphs (b) and (c) of new regulation 6A (3)), if the debt arising under the Scheme Apportionment Arrangement is higher than it would have been if the liability share mechanism had been used.

New Regulation 6A (3)

;(b) be satisfied that at the date of the agreement the remaining employers will be able and willing to fund the scheme so that it will have sufficient and appropriate assets to cover its technical provisions after the relevant event or employment-cessation event, and

(c) be satisfied that at the date of the agreement the remaining employers will be able and willing to make payments to the schedule of contributions and any recovery plan in place in relation to the scheme after the relevant event or employment-cessation event."

21. Where a Scheme Apportionment Arrangement is proposed the above test will not apply in certain cases. These are where:
- the employer's debt is higher than it might otherwise have been under the liability share mechanism;

- at the date of the agreement the scheme has commenced winding-up and the employer's share is lower than it might otherwise have been under the liability share mechanism – the trustees or managers must be satisfied that the employer is likely to be unable to pay the debt which would have been payable under the liability share mechanism;

Do you think the test in paragraph (3) of new regulation 6A meets the policy intention outlined above? If not, what changes need to be made to the drafting to meet the policy intention? Can you identify any problems or unintentional consequences in the current drafting? Will the test, which will apply, make it easier or harder to use apportionment?

Do you foresee any problems with the operation of Scheme Apportionment Arrangements (see paragraphs (2) to (5) of new regulation 6A of the Employer Debt Regulations)? Will the test, which will apply, make it easier or harder to use apportionment?

Do you agree that Scheme Apportionment Arrangements will meet our policy aim of frustrating abandonment without restricting the ability of employers to restructure and take forward corporate transactions?

Do you agree that the changes to the operation of apportionment with the introduction of Scheme Apportionment Arrangements will not add to the costs of using apportionment? Please send any supporting information or data.

22. An apportionment share may in very limited circumstances be calculated in trust schemes using a Regulated Apportionment Arrangement. Approval is required before a debt may be treated as due under Section 75. This is an arrangement which the Regulator approves and the PPF has agreed to. These arrangements are not expected to be used very often. They have been added because we recognise that there are instances where it is in the best interests of scheme members and the PPF for the apportionment to take place, even when the trustees cannot be satisfied of the willingness and ability of the remaining employers to cover the scheme's technical provisions.

23. A Regulated Apportionment Arrangement will apply where the trustees are satisfied that it is likely the scheme will enter into an assessment period in the next 12 months. The Regulator may approve such an arrangement if it is of the opinion that the arrangement will result in better funding for the scheme than if an insolvency event occurred in relation to one of the employers. The Regulator will consider any matters it considers relevant and it will in particular consider the likelihood of an insolvency event occurring in relation to the employer to save him will have on the company's creditors and shareholders.

Do you agree that Regulated Apportionment Arrangements will meet our policy aim of frustrating abandonment without restricting the ability of employers to restructure and take forward corporate transactions?

Cessation Agreements

24. One of the four mechanisms for calculating an employer's share of the difference in a scheme's assets and liabilities is the cessation agreement share. This share will be set out in a Cessation Agreement, which is agreed by the trustees or managers and the employer. The Cessation Agreement will provide the amount of the employer's debt (i.e. the cessation agreement share), when it should be paid etc. A guarantor or guarantors will be party to the agreement and he or they shall be liable to pay Amount B (the difference between the cessation agreement share and the amount of the debt arising if the liability share calculation mechanism had been used).
25. The trustees or managers may agree to a Cessation Agreement where they are satisfied that the test in paragraph (3) of new regulation 6B is satisfied. The test is that they must be satisfied that:
- “(a) at the date of the agreement the remaining employers' ability and willingness to fund the scheme is not adversely affected by the payment of the cessation agreement share and the existence of a guarantee for amount B, rather than the payment of the liability share by the cessation employer;*
- (b) at the date of the agreement, the guarantors have sufficient financial resources to be likely to pay amount B or, where sub-paragraph (b) of paragraph (5) applies, the amount which is the likely amount B.”*
26. The test in paragraph (3)(a) of new regulation 6B is intended to be less prescriptive than the test for Scheme Apportionment Arrangements (new regulation 6A (3) (b) & (c) see paragraphs 16 to 19 above). This is because a guarantor explicitly stands behind the element of the debt represented by amount B, whereas in the case of the Scheme Apportionment Arrangement the debt is apportioned to the remaining employers. We would, however welcome comments and views as to whether there is good reason to align the two tests.
27. The trustees or managers must agree to a guarantor or guarantors who have sufficient resources to pay Amount B.
28. The cessation agreement share can be reduced by a “relevant transfer deduction”; this means that the debt can be adjusted if any of the liabilities attributable to the employer are transferred out of the scheme in the 12 month period after the employment-cessation event. Amount B can be a fixed or floating amount, in the same way as for Approved Withdrawal Arrangements.
29. The trustees or managers can agree to a Cessation Agreement before or after an employment-cessation event occurs in relation to an employer.

Do you agree that Cessation Agreements will achieve the policy intention of offering a simpler alternative to Approved Withdrawal Arrangements?

Do you agree with our policy of having a different test for Cessation Agreements than for Scheme Apportionment Arrangements?

Do you agree that the costs of entering into a Cessation Agreement are lower than entering into an Approved Withdrawal Arrangement? Please send any supporting information or data.

Are there any unintended consequences for employers or schemes who enter into Cessation Agreements? Will Cessation Agreements be used more often than Approved Withdrawal Arrangements?

Calculation of Amount A for the purposes of withdrawal arrangement share and cessation agreement share

30. The cessation agreement share and the withdrawal arrangement share (other than the alternative amount) are calculated in the same way. This is set out in new regulation 6C of the Employer Debt Regulations. It is the amount of the employer's debt calculated as if the liability share applied but using the assumptions in the Scheme Funding Regulations (or where the scheme is not yet subject to them, the assumptions which apply to PPF Valuations). The resulting amount can be reduced by the "relevant transfer deduction". The purpose of this deduction is to take account of where any of the liabilities attributable to the employer are transferred out.

Approved Withdrawal Arrangements

31. **Regulation 7 of the Amending Regulations:** This replaces regulations 7, 7A, 7B and 8 of the Employer Debt Regulations. The provisions which relate to Approved Withdrawal Arrangements are contained in regulations 7, 7A, 7B of, and Schedule 1A to, the Employer Debt Regulations. Regulations 7, 7A and 7B have been replaced because we were making so many amendments. We have also taken the opportunity to clarify certain parts of those regulations.
32. The concept of having a Withdrawal Arrangement which must be approved is set out in regulation 7 of the Employer Debt Regulations. The policy intention is the same i.e. that the employer must notify the Regulator that he proposes to enter into a Withdrawal Arrangement, the Regulator may then issue directions etc.
33. New provisions have been added to regulation 7 of the Employer Debt Regulations to expressly cover that an employer may enter into an Approved Withdrawal Arrangement in advance of an employment-cessation event occurring. Further provisions to deal with this are contained in paragraph 3 of Schedule 1A to the Employer Debt Regulations. The existing provisions in that paragraph have been replaced, the intention being to clarify the procedure of approving a Withdrawal Arrangement in advance of an employment-cessation event.

34. New provisions have been added to regulation 7 of the Employer Debt Regulations to refer to the new concept of a withdrawal arrangement share. Regulation 7A of the Employer Debt Regulations has been replaced as there have been a number of policy changes. The concept of withdrawal arrangement share has been added (this replaces what used to be referred to as “Amount A”).
35. Another policy change has been to provide two options for the calculation of the withdrawal arrangement share – Amount A and the alternative amount.
36. Amount A shall be the debt which arises if the liability share calculation mechanism was used, full buy out did not apply and the assumptions in the Scheme Funding Regulations were used (or where the Scheme Funding Regulations do not apply to the scheme, the assumptions in the PPF Valuations Regulations are used). The scheme funding amount can be reduced by the “relevant transfer deduction”. The purpose of this deduction is to take account of where any of the liabilities attributable to the employer are transferred out.
37. The alternative amount can be an amount which the trustees or managers and the employer agree, but this is subject to approval by the Regulator (this approval will occur at the same time as when the Regulator approves the Withdrawal Arrangement).

The “alternative amount” calculation for the purposes of the withdrawal arrangement share was made in particular to allow for circumstances where a lower share might be appropriate for certain employers with a good covenant/guarantor but low liquidity. It is not intended to undermine the Amount A calculation for the purposes of the withdrawal arrangement share – the intention is that this will be used in most cases. Does this amendment achieve its policy aim? Are there any unintended consequences?

38. The policy regarding the calculation of Amount B has not changed – it can be either a fixed or floating amount. Some consequential amendments have been made to regulation 7B of the Employer Debt Regulations to reflect changes made to the calculation of debts under regulation 6 of those Regulations.
39. The requirements in Schedule 1A to the Employer Debt Regulations which apply to Withdrawal Arrangements have also been amended by **regulation 12 of the Amending Regulations**. The requirements which apply to the content of such arrangements have been amended as follows:
- removal of the requirement that the agreement must be subject to the law of England and Wales only;
 - clarification that the withdrawal arrangement share and Amount B may be paid in instalments;
 - where a relevant transfer deduction will apply to a withdrawal arrangement share (which is calculated under the scheme funding

amount method), details of the transfer must be provided in the agreement i.e. timing of transfers, date on which the final amount of the withdrawal arrangement share will be available;

40. The test which must be applied by the Regulator when approving withdrawal arrangements has been replaced (see paragraph 2(4)(b) of Schedule 1A to the Employer Debt Regulations). The test now requires the Regulator to consider matters which are relevant to the application for approval of the withdrawal arrangement. The matters which the Regulator will consider shall include all of the following:

- “(i) the potential effect of the employment-cessation event on the scheme’s level of technical provisions;*
- (ii) the financial circumstances of the proposed guarantor;*
- (iii) the amount of the cessation debt;*
- (iv) the amount of the withdrawal arrangement share (or an estimate of amount A where there will be a relevant transfer deduction); and*
- (v) the effect of the proposed withdrawal arrangement on the likelihood that all members will receive full benefits from the scheme.”.*

41. New provision has been made in sub-paragraph (5) of paragraph 2 of Schedule 1A. This allows the Regulator to withdraw approval of a Withdrawal Arrangement where the circumstances described in the application for approval are not the same as the actual circumstances. Any differences must be material.

Do you agree that the new test which the Regulator will apply will make it easier for schemes to enter into Approved Withdrawal Arrangements? Do you foresee any problems with the new test?

We have now set out four options for calculating an employer’s share of the difference between assets and liabilities in a multi-employer scheme: liability share, apportionment share, cessation agreement share, withdrawal arrangement share. All these options have their particular advantages for different employers and schemes. However as part of this consultation, we would be grateful to understand if any of the options are less useful to employers and schemes and whether there is scope for simplification by removing any of the options.

Treatment of sections and parts in segregated schemes

42. Regulation 8 of the Employer Debt Regulations 2005 is replaced however much of the substance of what appeared in the old regulation 8 has been retained. New provisions have been added to cater for where after an insolvency event a segregated part is created and the debt will only relate to that segregated part. This is so that the Employer Debt Regulations are consistent the provisions relating to scheme failure notices.

Former Employers

43. **Regulation 8 of the Amending Regulations:** Amendments are made to clarify regulation 9 of the Employer Debt Regulations (which applies to the treatment of former employers). We have also clarified that where the employer participates in a multi-employer scheme and offers money purchase benefits only, he will not be included as an employer for the purposes of the Employer Debt Regulations.

Do you agree that the changes to regulation 9 have clarified the definition of former employers and will now make the provisions of regulation 9 easier to operate? Are there any other amendments which would make the treatment of former employers more workable?

Multi-employer money purchase schemes

44. **Regulation 9 of the Amending Regulations:** Consequential amendments are made to regulation 12 (multi-employer money purchase schemes) to reflect other changes to the Employer Debt Regulations.

Modification of schemes

45. **Regulation 10 of the Amending Regulations:** Regulation 16 of the Employer Debt Regulations has been replaced. The policy intention is to give trustees of trust schemes powers to modify the scheme for the purposes of allowing apportionment. References to Approved and Scheme Apportionment Arrangements have been added.

In view of the changes made to apportionment is the power to amend scheme rules still required?

Actuarial Certificates

46. **Regulations 11 and 13 of, and Schedules 1 and 2 to, the Amending Regulations:** The schedules to the Employer Debt Regulations have been replaced.
47. Schedule 1 will continue to apply where a valuation is done under regulation 5 of the Employer Debt Regulations.
48. Schedule 1C will now apply to multi-employer schemes where an employer's share of the difference in assets and liabilities is calculated i.e. liability share, apportionment share, cessation agreement share and withdrawal arrangement share.
49. A new Schedule 1 D has been added. It will apply where an Amount B is calculated for the purposes of a Cessation Agreement or Approved Withdrawal Arrangement.

Do you believe that the actuarial certificates provide the right information in order for the policy aim of the regulations to be effectively met? Is there any other information they should contain? Should actuarial certificates be given in any other circumstances?

50. Regulation 12 of the Amending Regulations: See paragraph 39 to 41.

Notifiable Events

51. Regulation 13 of the Amending Regulations: This adds new Schedule 1B which makes provision in relation to events in relation to guarantors party to a Cessation Agreement or Approved Withdrawal Arrangement which must be notified to the Pensions Regulator.

The Regulator's functions under the Employer Debt Regulations

52. Regulation 14 of the Amending Regulations: This makes consequential amendments so that the Regulator's powers to approve Regulated Apportionment Arrangements is treated as a regulatory function.

Amendment of the PPF Entry Rules

53. Regulation 15 of the Amending Regulations: This amendment allows scheme failure notices to be issue following an insolvency event which occurs to an employer in relation to a non-segregated scheme or section of a scheme. The intention is that the status of contingent employer debts under section 75(4) will be confirmed more quickly. This is because a scheme failure notice can now be issues after each insolvency event rather than after the last insolvency event in relation to the scheme or section.

Amendment of the PPF Multi-Employer Regulations

54. Regulation 16 of the Amending Regulations: This amendment ensures that Cessation Agreements, Regulated Apportionment Arrangements and Scheme Apportionment Arrangements are not treated as Compromise Agreements for the purpose of the PPF. Provision has already been made to this effect for Approved Withdrawal Arrangements.

Pensions Regulator (Financial Support Directions etc.) Regulations 2005

55. Regulation 17 of the Amending Regulations: This makes consequential amendments to regulation 15 of the the Pensions Regulator (Financial Support Directions etc.) Regulations 2005.

List of questions raised in this consultation document

Impact Assessment

1. Do you have any further information, data or analysis which would be useful for improving the quality of the analysis in the attached impact Assessment?

Valuations of Assets and Liabilities

2. Do you foresee any problems with the trustees/managers new role in relation to valuations of assets and liabilities?
3. Do you think the ability to update scheme accounts or valuations will address problems which currently arise (as there is no flexibility to update figures)?
4. Do you think that the ability to update scheme accounts or valuations could have any unintended consequences, which might be detrimental to the parties involved?
5. Are there cost savings to be made for the parties involved through the ability to update scheme accounts or valuations? Please provide information and data.
6. Are there any others issues in addition to the possibility of money purchase only employers incurring a debt, you have encountered in relation to treatment of money purchase benefits and the operation of Section 75?
7. Do you foresee any problems with allowing actuaries flexibility to estimate the cost of buy out along the lines set out in new paragraph (7) of Regulation 5 of the Employer Debt Regulations?
8. Are there any other issues you have encountered where there are calculations of assets and liabilities after one or more Approved Withdrawal Arrangements have come into force?

Calculation of share of the difference in scheme shortfall and liabilities attributable to an employer

9. Will the provisions in new paragraph (4) of Regulation 6 of the Employer Debt Regulations make it easier to attribute liabilities to different employers? Are there any further provisions which could be made? Are there any problems with the approach we have taken in paragraph (4)? In particular are the provisions in sub-paragraph (c) required (all liabilities relating to a member attributable to last employer in certain cases)?

Definition of employment-cessation event

10. Do you agree that this change will give employers, particularly small employers, enough flexibility to avoid unintentionally triggering the debt? Are there any unintended consequences for schemes or employers?
11. We originally considered having a six month period of grace but have been persuaded this was not enough time to be of benefit to employers. Do you have any views on this, bearing in mind we reluctantly extended this to 12 months and would prefer six months if possible?
12. Do you agree that introducing a 12 month period of grace before triggering the debt will reduce costs for schemes and employers? Please send us any information or data.

Apportionment shares: Scheme Apportionment Arrangements and Regulated Apportionment Arrangements

13. Do you think the test in paragraph (3) of new regulation 6A meets the policy intention outlined above? If not, what changes need to be made to the drafting to meet the policy intention? Can you identify any problems or unintentional consequences in the current drafting? Will the test, which will apply, make it easier or harder to use apportionment?
14. Do you foresee any problems with the operation of Scheme Apportionment Arrangements (see paragraphs (2) to (5) of new regulation 6A of the Employer Debt Regulations)? Will the test, which will apply, make it easier or harder to use apportionment?
15. Do you agree that Scheme Apportionment Arrangements will meet our policy aim of frustrating abandonment without restricting the ability of employers to restructure and take forward corporate transactions?
16. Do you agree that the changes to the operation of apportionment with the introduction of Scheme Apportionment Arrangements will not add to the costs of using apportionment? Please send any supporting information or data.

Cessation Agreements

17. Do you agree that Cessation Agreements will achieve the policy intention of offering a simpler alternative to Approved Withdrawal Arrangements?
18. Do you agree with our policy of having a different test for Cessation Agreements than for Scheme Apportionment Arrangements?

19. Do you agree that the costs of entering into a Cessation Agreement are lower than entering into an Approved Withdrawal Arrangement? Please send any supporting information or data.
20. Are there any unintended consequences for employers or schemes who enter into Cessation Agreements? Will Cessation Agreements be used more often than Approved Withdrawal Arrangements?

Approved Withdrawal Arrangements

21. The “alternative amount” calculation for the purposes of the withdrawal arrangement share was made in particular to allow for circumstances where a lower share might be appropriate for certain employers with a good covenant/guarantor but low liquidity. It is not intended to undermine the amount A calculation for the purposes of the withdrawal arrangement share – the intention is that this will be used in most cases. Does this amendment achieve its policy aim? Are there any unintended consequences?
22. Do you agree that the new test which the Regulator will apply will make it easier for schemes to enter into Approved Withdrawal Arrangements? Do you foresee any problems with the new test?

Options

23. We have now set out four options for calculating an employer’s share of the difference between assets and liabilities in a multi-employer scheme: liability share, apportionment share, cessation agreement share, withdrawal arrangement share. All these options have their particular advantages for different employers and schemes. However as part of this consultation, we would be grateful to understand if any of the options are less useful to employers and schemes and whether there is scope for simplification by removing any of the options.

Former Employers

24. Do you agree that the changes to regulation 9 have clarified the definition of former employers and will now make the provisions of regulation 9 easier to operate? Are there any other amendments which would make the treatment of former employers more workable?

Actuarial Certificates

25. Do you believe that the actuarial certificates provide the right information in order for the policy aim of the regulations to be effectively met? Is there any

other information they should contain? Should actuarial certificates be given in any other circumstances?

Annex A: List of organisations included in the consultation exercise:

Ashurst
Association of British Insurers
Association of Consulting Actuaries
Association of Corporate Trustees
Association of Independent Financial Advisers
Association of Pension Lawyers
Board of Actuarial Standards
Cabinet Office
CMS Cameron McKenna
Confederation of British Industry
Department of Social Development (Northern Ireland)
Dickinson Dees
Faculty and Institute of Actuaries
Financial Ombudsman Service
Financial Services Authority
Ford Pension Scheme
Government Actuary's Department
Hewitt
HM Revenue & Customs
Institute of Chartered Accountants
Institute of Chartered Accountants in Scotland
Institute of Directors
Investment Management Association
John Lewis Pension Scheme
Lovells
MacFarlanes
Mayer Brown Rowe
Mercers
National Association of Pension Funds
Pension Protection Fund
Pensions Management Institute
Pensions Ombudsman
Scotland Office
Slaughter and May
Society of Pension Consultants
Tesco Pension Scheme
The Charities Commission
The Law Society
The Law Society of Scotland
The Pensions Advisory Service
The Pensions Regulator
The Pensions Trust
Thompson Local Pension Scheme
Trades Union Congress

Watson Wyatt

Annex B: The Draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2007

Consultation Draft

STATUTORY INSTRUMENTS

2007 No. []

PENSIONS

The Occupational Pension Schemes (Employer Debt) (Amendment) and Pension Protection Fund (Multi-Employer Schemes and Entry Rules) (Amendment) Regulations 2007

Made - - - - []

Laid before Parliament []

Coming into force - - []December 2007

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 68(2)(e), 75(1)(b), (5) and (10), 75A, 118(1)(a) and (b), 119, 124(1), 174(2) and (3), of the Pensions Act 1995⁽⁴⁾ and sections 93(2)(q), 126(5), 307(1)(b), 315(2) to (4) and 318(1) of, and paragraph 21(e) of Schedule 1 to, the Pensions Act 2004⁽⁵⁾.

In accordance with section 120(1) of the Pensions Act 1995 and section 317(1) of the Pensions Act 2004 the Secretary of State has consulted such persons as he considers appropriate before making these Regulations.

Citation, commencement and interpretation

—a) These Regulations may be cited as the Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2007 and shall come into force on [] December 2007].

References in these Regulations to—

““2004 Act” means the Pensions Act 2004;

⁽⁴⁾ 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 there given to “prescribed” and “regulations”.

⁽⁵⁾ 2004. c.35. Section 318(1) is cited for the meaning there given to “prescribed” and “regulations”.

the Employer Debt Regulations” shall mean the Occupational Pension Schemes (Employer Debt) Regulations 2005⁽⁶⁾;

“the Multi-Employer Regulations” shall mean the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005⁽⁷⁾

“the Entry Rules Regulations” shall mean the Pension Protection Fund (Entry Rules) Regulations 2005⁽⁸⁾.

“the FSD Regulations” means the Pensions Regulator (Financial Support Directions etc.) Regulations 2005⁽⁹⁾.

Amendment of the Employer Debt Regulations

The Employer Debt Regulations are amended in accordance with the provisions of regulations 3 to 13.

Application and interpretation of the Employer Debt Regulations

—b) For regulation 1(3)(a) of the Employer Debt Regulations (citation, commencement, application and extent) substitute—

“(a) any scheme in relation to any debt which has been treated as due under section 75(1) of the 1995 Act to the trustees or managers of the scheme before that date.”.

In regulation 2(1) of the Employer Debt Regulations (interpretation)—

(a) in the definition of “employer” after “and regulations” insert “6,”;

(b) for the definition of “employment-cessation event” substitute—

““employment-cessation event” means in relation to a multi-employer scheme an event which is not a relevant event and which occurs on the date on which—

(a) an employer has ceased to employ any person who is an active member of the scheme, and

(b) where paragraph (6) of regulation 6 has applied in relation to the employer, that paragraph has ceased to apply.”.

(c) for the definition of “multi-employer scheme” substitute—

““multi-employer scheme” means a scheme in relation to which there is more than one employer (or a section or part of a scheme treated pursuant to regulation 8 as a separate scheme);”.

(d) insert in the appropriate alphabetical places—

““actuarial valuation” has the same meaning as for the purposes of the scheme funding requirements in Part 3 of the 2004 Act;

“apportionment share” means an amount that is equal to such proportion of the total difference between the value of the assets and the amount of the liabilities in a scheme that is apportioned to an employer in accordance with a scheme apportionment arrangement or a regulated apportionment arrangement which satisfies the relevant conditions in regulation 6A;

“assessment period” has the meaning given in section 132 of the 2004 Act (assessment periods);

⁽⁶⁾ S.I. 2005/678, amended by S.I. 2005/993, 2224, 3377 and 3378, 2006/467 and 558 and 2007/60.

⁽⁷⁾ S.I. 2005/441, the relevant amending instrument is S.I. 2005/2113.

⁽⁸⁾ S.I. 2005/590, the relevant amending instruments are S.I. 2005/993 and 2153, 2006/580 and 2007/782.

⁽⁹⁾ S.I. 2005/2188.

“cessation date” means the date on which an employer ceases to employ at least one person who is an active member of a scheme;

“cessation agreement share” means an amount that is—

- (a) equal to the amount (“amount A”) calculated in accordance with regulation 6C; and
- (b) payable by a cessation employer pursuant to a cessation agreement under regulation 6B;

“cessation employer” means an employer who has had an employment-cessation event in relation to a scheme;

“cessation expenses” are all expenses which, in the opinion of the trustees or managers of a scheme, are likely to be incurred in connection with an employment-cessation event occurring to an employer in relation to the scheme;

“the corresponding assets” means the assets transferred in connection with the transfer from the scheme of any relevant transfer liabilities;

“guarantors” means such one or more of the parties to an approved withdrawal arrangement or a cessation agreement who are specified in the arrangement or agreement as the persons who have given guarantees in relation to amount B for the purposes of the arrangement or agreement;

“the guarantee time” means, for the purposes of an approved withdrawal arrangement, the earliest time when an event specified in paragraph 1(3) of Schedule 1A to these Regulations occurs;

“liability proportion” means “K/L” where—

- (a) “K” equals the amount of a scheme’s liabilities attributable to an employer in accordance with paragraph (4) of regulation 6; and
- (b) “L” equals the total amount of the scheme’s liabilities attributable to employment with the employers;

“liability share” means the amount of an employer’s share of the difference between the value of the assets and the amount of the liabilities of a scheme that is determined in accordance with paragraphs (3) to (5) of regulation 6;

“PPF” means the Pension Protection Fund established under Part 2 of the 2004 Act;

“the PPF Valuation Regulations” means the Pension Protection Fund (Valuation) Regulations 2005⁽¹⁰⁾;

“protected liabilities” has the same meaning as for the purposes of a valuation under section 179 of the 2004 Act (valuations to determine scheme underfunding);

“recovery plan” means a recovery plan that complies with the requirements in section 226 of the 2004 Act and the Scheme Funding Regulations;

“relevant accounts” means the audited accounts for the scheme that comply with the requirements imposed under section 41 of the 1995 Act (provision of documents to members)⁽¹¹⁾;

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

“the relevant transfer liabilities” means the liabilities in respect of members of the scheme that are transferred to an occupational or personal pension scheme or are otherwise secured and the transfer occurs during the period commencing with the day of the employment-cessation event and ending on the day that is twelve months later or, in the case of an approved withdrawal arrangement, such longer period as the Authority approves;

⁽¹⁰⁾ S.I. 2005/672, amended by S.I. 2005/993 and 2113, 2006/580 and 2007/782.

⁽¹¹⁾ Section 41 was amended by section 1 of the Employment Rights (Dispute Resolution) Act 1998 (c.8), paragraph 12(1) of Schedule 5 to the Child Support Pensions and Social Security Act 2000 (c.19), paragraph 52 of Schedule 12 to the Pensions Act 2004 and S.I. 2005/2053.

“schedule of contributions” means the most recent schedule of contributions that is required for the purposes of the scheme funding requirements in Part 3 of the 2004 Act and complies with the requirements in section 227 of that Act and the Scheme Funding Regulations;

“the Scheme Funding Regulations” means the Occupational Pension Schemes (Scheme Funding) Regulations 2005⁽¹²⁾;

“the technical provisions” has the same meaning as for the purposes of the scheme funding requirements in Part 3 of the 2004 Act;

“updated actuarial valuation” means an update (whether or not audited) of the actuarial valuation which takes account of any alteration in the value of the scheme’s liabilities between the effective date of the actuarial valuation and the applicable time;

“updated asset valuation” means an update of the relevant accounts which takes account of any alteration in the value of the assets of the scheme between the date by reference to which those accounts are prepared and the applicable time;

“withdrawal arrangement share” means an amount that is—

- (a) equal to the amount calculated in accordance with regulation 7A(1); and
- (b) payable by a cessation employer pursuant to a withdrawal arrangement;”.

Valuation of assets and liabilities

For regulation 5 of the Employer Debt Regulations (calculation of the value of scheme liabilities and assets: defined benefit schemes) substitute—

“Calculation of the value of scheme liabilities and amount of scheme assets

5.—(1) The liabilities and assets of a scheme which are to be taken into account for the purposes of section 75(2) and (4) of the 1995 Act and their amount or value must be determined, calculated and verified as follows.

(2) The value of the assets shall be determined, calculated and verified by the trustees or managers after consultation with the scheme auditor.

(3) Subject to paragraphs (4), (5), (12) and (14), the assets to be taken into account are those referred to in regulation 3 of the Scheme Funding Regulations (determination of assets and liabilities).

(4) The assets shall not include assets representing the value of any rights to money purchase benefits under the scheme.

(5) Where by virtue of an employment-cessation event section 75(4) of the 1995 Act applies and the most recent relevant accounts apply to a period which ends 12 months, or less than 12 months, before the applicable time, the trustees or managers may decide, after consultation with the scheme auditor that for the purposes of paragraph (3) an updated asset valuation shall be used instead of the relevant accounts.

(6) The liabilities in respect of pensions or other benefits are to be determined, calculated and verified by the trustees or managers and the actuary on the assumption that they will be discharged by the purchase of annuities of the kind described in section 74(3)(c) of the 1995 Act (discharge of liabilities; annuity purchase) and for this purpose the actuary must estimate the cost of purchasing annuities.

(7) The actuary must estimate the cost of purchasing the annuities—

- (a) on terms consistent with those in the available market and which he considers would be sufficient to satisfy the scheme’s liabilities in respect of pensions or other benefits, or

⁽¹²⁾ S.I. 2005/3377, amended by S.I. 2005/3380, 2006/1733 and 2007/60 and 814.

(b) where the actuary considers that it is not practicable to make an estimate in accordance with sub-paragraph (a), in such manner as the actuary considers appropriate in the circumstances of the case.

(8) Subject to paragraphs (6), (9), (10), (11), (12) and (14), the liabilities to be taken into account shall be those referred to in regulation 3 (determination of assets and liabilities) and regulation 4 (valuation of assets and determination of the amount of liabilities) of the Scheme Funding Regulations.

(9) The liabilities shall include all expenses (except the cost of the annuities) which, in the opinion of the trustees or managers of the scheme, are likely to be incurred in connection with the winding-up of the scheme.

(10) The liabilities shall not include liabilities in respect of any money purchase benefits under the scheme.

(11) Where by virtue of an employment-cessation event section 75(4) of the 1995 Act applies and the effective date of the most recent actuarial valuation is 12 months, or less than 12 months, before the applicable time, the trustees or managers may decide, after consultation with the actuary that the liabilities shall be determined in accordance with an updated actuarial valuation.

(12) If at the applicable time the scheme has not commenced winding-up, the assets, liabilities and debts set out in paragraph (13) shall not be taken into account in any calculations under paragraphs (2) to (11) if—

- (a) the Authority had previously approved a withdrawal arrangement for an employer in relation to the scheme who had an employment-cessation event; or
- (b) a cessation agreement had, before the applicable time, come into force in relation to the scheme.

(13) For the purposes of paragraph (12), the following shall not be taken into account in any calculations under paragraphs (2) to (11)—

- (a) liabilities of the scheme that are attributable to employment with an employer who in relation to the scheme had an employment-cessation event and is party to the approved withdrawal arrangement or cessation agreement,
- (b) the proportion of the assets of the scheme that are attributable to employment with that employer, and
- (c) the debts treated, as a result of the approved withdrawal arrangement or cessation agreement, as due under section 75(4) of the 1995 Act.

(14) GN 19 shall apply so far as that guidance applies for the purposes of these regulations.

(15) Where in these Regulations (or in the Scheme Funding Regulations as applied by this regulation) there is a reference to the amount of any liability being calculated or verified in accordance with the opinion of the actuary or as he thinks appropriate, he must comply with any relevant provision in the guidance given in GN 19 in making that calculation or verification.

(16) The amount of the liabilities of a scheme which are to be taken into account for the purposes of section 75(2) and (4) of the 1995 Act must be certified by the actuary in the form set out in Schedule 1 to these Regulations.

(17) For the purposes of this regulation—

- (a) references in regulations 3 and 4 of the Scheme Funding regulations to “Part 3 of the 2004 Act” shall be taken as references to “section 75(2) or (4) of the 1995 Act”;
- (b) reference in regulation 4(4) of the Scheme Funding Regulations to “by reference to the same date” shall be taken as a reference to “by reference to the applicable time”.

Amendment of regulation 6 of the Employer Debt Regulations

For paragraphs (2) to (5) of regulation 6 (multi-employer schemes: general) of the Employer Debt Regulations substitute—

“(2) For the purposes of paragraph (1), an employer’s share of the difference is the liability share unless any of the following apply—

- (a) the apportionment share (see regulation 6A);
- (b) the cessation agreement share (see regulation 6B); or
- (c) the withdrawal arrangement share (see regulation 7).

(3) The liability share means an amount equal to the liabilities proportion of the total difference between the value of the assets and the amount of the liabilities of the scheme.

(4) For the purposes of paragraph (3), the liabilities attributable to employment with any employer (“Employer A”) shall be determined by the trustees or managers and the actuary as follows—

- (a) subject to sub-paragraph (b), where liabilities to or in respect of any member arose as a result of pensionable service with one or more employer, the liabilities attributable to Employer A in respect of any such member shall only include liabilities which arose during or as a result of pensionable service with Employer A (including any liabilities transferred into the scheme during that period or periods of pensionable service); and
- (b) where the trustees or managers are unable to determine the exact liabilities which are attributable to Employer A or they may be able to determine them but expect disproportionate costs will be incurred to do so—
 - (i) if Employer A is the last employer of any member, all of the liabilities to or in respect of any such member shall be attributable to Employer A, or
 - (ii) if the trustees or managers are unable to determine whether or not Employer A is the last employer of any member, the liabilities attributable to any such member shall not be attributable to any employer.

(5) For the purposes of paragraph (3)—

- (a) the liability proportion and the liabilities attributable to any employer shall be determined in the opinion of the actuary after consultation with the trustees or managers of the scheme in accordance with the guidance given in GN 19; and
- (b) a determination under this paragraph must be certified by the actuary as being in accordance with that guidance.

(6) For the purposes of an employment-cessation event, where on a cessation date an Employer (“A”) notifies the trustees or managers of the scheme that he intends to employ at least one person who will be an active member of the scheme (and that scheme is not, or will not be, closed to new active members), A will be treated for a period of twelve months commencing on the cessation date (“the twelve month period”) as if he employed a person who is an active member of the scheme, but—

- (a) if by the last day of the twelve month period A does not employ, and has not employed in the twelve month period, a person who is an active member of the scheme, A will be treated as if on the cessation date he ceased to employ any person who is an active member of the scheme;
- (b) if at any time during the twelve month period A no longer intends to employ any person who will be an active member of the scheme, A must notify the trustees or managers of the scheme and A will be treated as if he ceased on the cessation date to employ any person who is an active member of the scheme;
- (c) if during the twelve month period an insolvency event occurs in relation to A, A will be treated as if on the cessation date he ceased to employ any person who is an active member of the scheme.

(7) Where in accordance with paragraph (6) an employer is treated for a period of up to twelve months as if he employed at least one person who is an active member of the scheme, he will for the purposes of these Regulations be treated during that period as if he were an employer in relation to the scheme.

(8) Where the liabilities attributable to an employer only include money purchase benefits under a scheme, he shall not be included as an employer in relation to the scheme for the purposes of this regulation.”.

Apportionment arrangements and cessation agreements

After regulation 6 of the Employer Debt Regulations insert—

“Apportionment Shares

6A.—(1) This regulation sets out the requirements which apply to the following arrangements which specify an employer’s apportionment share—

- (a) a scheme apportionment arrangement (see paragraphs (2) to (5)), or
- (b) a regulated apportionment arrangement (see paragraphs (6) to (9)).

(2) A scheme apportionment arrangement is an arrangement which—

- (a) consists of an agreement to which the trustees or managers of a scheme and the employer are parties;
- (b) may be made before or after the applicable time; and
- (c) sets out the amount which is the proportion of the total difference which will be the employer’s share of the difference.

(3) Subject to paragraph (4), before entering into a scheme apportionment arrangement the trustees or managers of the scheme must—

- (a) agree the proportion which will be the employer’s share of the difference,
- (b) be satisfied that at the date of the agreement the remaining employers will be able and willing to fund the scheme so that it will have sufficient and appropriate assets to cover its technical provisions after the relevant event or employment-cessation event, and
- (c) be satisfied that at the date of the agreement the remaining employers will be able and willing to make payments to the schedule of contributions and any recovery plan in place in relation to the scheme after the relevant event or employment-cessation event.

(4) Sub-paragraphs (b) and (c) of paragraph (3) shall not apply where—

- (a) the apportionment share is higher than the liability share and the trustees or managers are satisfied that the employer is and will be able to pay the apportionment share;
- (b) at the date of the agreement the scheme had commenced to wind-up, the apportionment share is lower than the liability share and the trustees or managers are satisfied that it is likely that the employer would be unable to pay the liability share if it applied.

(5) For the purposes paragraph (3), where at the applicable time the trustees or managers of the scheme have not received its first actuarial valuation under Part 3 of the 2004 Act, that paragraph shall apply as if for sub-paragraphs (b) and (c) there were substituted—

“(b) at the date of the agreement be satisfied that, after taking account of the financial resources of the remaining employers, the scheme apportionment arrangement does not adversely affect the likelihood of all members receiving full benefits from the scheme after the relevant event or employment-cessation event.”.

(6) A regulated apportionment arrangement is an arrangement that meets the conditions in paragraph (7).

(7) The conditions are as follows—

- (a) the arrangement consists of an agreement to which the trustees and an employer are parties;
- (b) the arrangement applies to a trust scheme where the trustees are aware that there is a reasonable likelihood of an assessment period commencing in relation to the scheme within the following twelve months;

- (c) the arrangement sets out the amount which is the proportion of the total difference which will be the employer's share of the difference;
 - (d) the trustees of the scheme agree to the arrangement; and
 - (e) the arrangement and any amendments to the arrangement are approved by the Authority.
- (8) An application to the Authority for approval of a regulated apportionment arrangement must be—
- (a) made by an employer;
 - (b) made before the applicable time; and
 - (c) accompanied by supporting information with the application and such information must include information relating to matters the Authority considers under paragraph (9).
- (9) The Authority may approve a regulated apportionment arrangement if—
- (a) the proposed regulated apportionment arrangement meets the conditions in subparagraphs (a) to (d) of paragraph (7);
 - (b) an application is made by an employer in accordance with paragraph (8);
 - (c) the PPF agrees to the proposed regulated apportionment arrangement;
 - (d) it is of the opinion that the proposed regulated apportionment arrangement may result in a higher level of funding for the scheme than if an insolvency event occurred in relation to an employer; and
 - (e) it has considered other relevant matters including—
 - (i) the likelihood of an insolvency event not occurring in relation to the employer as a result of the proposed arrangements for the employer, including the proposed regulated apportionment arrangement; and
 - (ii) the financial effects of the proposed arrangements for the employer, including the proposed regulated apportionment arrangement, would have on creditors and shareholders of the employer;
- (10) If the Authority decides to approve a proposed regulated apportionment arrangement, the Authority must issue a notice of approval.
- (11) The Authority may withdraw approval if—
- (a) the actual circumstances in relation to which the approval was given are not the same as the circumstances described in the application made by the employer, and
 - (b) it considers the difference in those circumstances is material.
- (12) Where under paragraph (11) the Authority withdraws approval it must issue a notice to that effect.
- (13) The amount of the liabilities of a scheme which are to be taken into account for the purposes of determining an apportionment share must be certified by the actuary in the form set out in Schedule 1C to these Regulations.

Cessation agreements

6B.—(1) A cessation agreement is an agreement that meets the conditions specified in paragraph (2).

- (2) For the purposes of paragraph (1) the conditions are that the agreement—
- (a) has the trustees or managers, the cessation employer and the guarantors as parties;
 - (b) provides that the cessation employer will pay an amount equal to or higher than the cessation agreement share and the guarantors are liable for an amount (“amount B”) calculated in accordance with paragraph (5);
 - (c) specifies the amount payable by the cessation employer, when that amount will be paid, and where it will be paid in instalments, the dates for payment of such instalments;

- (d) provides all details of any relevant transfer deduction which may apply, the proposed relevant transfer liabilities, the corresponding assets and the date when the amount of the relevant transfer deduction will be finalised;
 - (e) specifies the date on which it is to come into force;
 - (f) specifies whether amount B is to be calculated under either sub-paragraph (a) or (b) of paragraph (5) and the circumstances in which amount B will be paid;
 - (g) specifies where there is more than one guarantor, whether the guarantors are jointly or jointly and severally liable;
 - (h) provides that one or more of the parties to the agreement, other than the trustees or managers of the scheme, are to meet any expenses incurred by the parties in connection with—
 - (i) the making of the agreement, or
 - (ii) the making of any calculations by the actuary for the purpose of the agreement.
- (3) The trustees or managers of the scheme may only enter into a cessation agreement where they are satisfied that—
- (a) at the date of the agreement the remaining employers’ ability and willingness to fund the scheme is not adversely affected by the payment of the cessation agreement share and the existence of a guarantee for amount B, rather than the payment of the liability share by the cessation employer;
 - (b) at the date of the agreement, the guarantors have sufficient financial resources to be likely to pay amount B or, where sub-paragraph (b) of paragraph (5) applies, the amount which is the likely amount B.
- (4) A relevant transfer deduction applies where some or all of the cessation employer’s relevant transfer liabilities are transferred during the period commencing with the date of the employment-cessation event and ending on the date that is twelve months later.
- (5) For the purposes of this regulation, amount B may be calculated in accordance with either sub-paragraph (a) or (b)—
- (a) if the cessation agreement so provides, amount B is equal to the amount (if any) that would be the amount of the liability share due from the cessation employer under section 75(4) of the 1995 Act if—
 - (i) the employment-cessation event had occurred at the payment date;
 - (ii) the cessation employer had not entered into a cessation agreement; and
 - (iii) there were no cessation expenses attributable to the cessation employer.
 - (b) if the cessation agreement does not provide for amount B to be the amount provided for under sub-paragraph (a), amount B is equal to the amount of the liability share that would have been treated as due from the cessation employer under section 75(4) of the 1995 Act if the cessation employer had not entered into a cessation agreement, less the sum of—
 - (i) the amount that is the cessation agreement share;
 - (ii) if the amount that the cessation agreement provides for the cessation employer to pay exceeds the cessation agreement share, an amount equal to the excess; and
 - (iii) any relevant transfer deduction which applied.
- (6) For the purposes of this regulation the “payment date” means the date which is the earlier of date on which—
- (a) the scheme commences winding-up;
 - (b) an event occurs as a result of which there is no person who is an employer in relation to the scheme for the purposes of these Regulations in relation to whom a relevant event has not occurred for the purposes of section 75 of the 1995 Act (see section 75(6A) of that Act); or

(c) amount B is paid.

(7) Once a cessation agreement comes into force section 75(4) of the 1995 Act shall apply as if amount B is treated as a debt due on the payment date from the guarantors who are party to the cessation agreement and where there is more than one guarantor, the guarantors shall be jointly liable unless the cessation agreement provides that they shall be jointly and severally liable.

(8) The amount of the liabilities of a scheme which are to be taken into account—

- (a) to determine the cessation agreement share must be certified by the actuary in the form set out in Schedule 1C to these Regulations;
- (b) to determine amount B for the purposes of a cessation agreement must be certified by the actuary in the form set out in Schedule 1D to these Regulations.

(9) Schedule 1B makes provision for events in relation to guarantors which shall be notifiable events.

Calculation of amount A for purposes of withdrawal arrangement share and cessation agreement share

6C.—(1) For the purposes of paragraph (2) of regulation 7A and regulation 6B, amount A means an amount equal to the liability proportion of—

- (a) where a relevant transfer deduction does not apply, the scheme shortfall amount; or
- (b) where a relevant transfer deduction does apply, the adjusted scheme shortfall amount.

(2) For the purposes of these Regulations—

- (a) the scheme shortfall amount is the amount of the difference between the value of the assets and the amount of the liabilities of the scheme, and
- (b) the adjusted scheme shortfall amount is an amount equal to the scheme shortfall amount adjusted to reflect the relevant transfer deduction.

(3) For the purposes of paragraph (2), the amount or value of the assets and liabilities of the scheme and, for the purposes of the relevant transfer deduction, the relevant transfer liabilities and corresponding assets must be calculated—

- (a) where at the applicable time the trustees or managers of the scheme have received its first actuarial valuation under Part 3 of the 2004 Act, in accordance with regulation 5, but disregarding paragraphs (6), (7) and (9) of regulation 5;
- (b) where at the applicable time the trustees or managers of the scheme have not received its first actuarial valuation under Part 3 of the 2004 Act, in accordance with paragraph (4).

(4) Where sub-paragraph (b) of paragraph (3) applies, the amounts or value of the assets and liabilities of a scheme and, for the purposes of the relevant transfer deduction, the relevant transfer liabilities and corresponding assets must be determined, calculated and verified by the trustees or managers of the scheme and the Actuary at the application time in accordance with—

- (a) regulation 3 (excluded assets), regulation 4 (contribution notices etc), regulation 5 (valuation of assets), regulation 6 (valuation of protected liabilities) and regulation 7 (alternative valuation of assets and protected liabilities in specific cases) of the PPF Valuation Regulations; and
- (b) guidance issued by the Board of the PPF;

(5) For the purposes of paragraph (4), in the PPF Valuation Regulations—

- (i) references to “section 143 valuations” and provisions which relate to section 143 valuations shall be disregarded;
- (ii) references to “relevant time” shall be read as if they were references to “applicable time”; and
- (ii) references to “section 179 valuations” shall be read as if they were references to a valuation for the purposes of section 75(4) of the 1995 Act.

(6) The amount of the liabilities of a scheme which are to be taken into account for the purposes of determining amount A must be certified by the actuary in the form set out in Schedule 1C to these Regulations.”.

Amendment of regulations 7 to 8 of the Employer Debt Regulations

For regulation 7 (multi-employer schemes: employment- cessation events and withdrawal arrangements), regulation 7A (calculation of amounts due from cessation employer by virtue of regulation 7), regulation 7B (calculation of amounts due from guarantors by virtue of regulation 7) and regulation 8 (multi-employer schemes: sectionalised schemes) of the Employer Debt Regulations substitute—

“Multi-employer schemes: employment-cessation events and withdrawal arrangements

7.—(1) An approved withdrawal arrangement is an arrangement that meets the conditions specified in Schedule 1A and regulations 7A and 7B shall apply for the purposes of calculating the cessation employer’s withdrawal arrangement share and the guarantors’ amount B.

(2) An approved withdrawal arrangement may be entered into in advance of an employment-cessation event occurring (see paragraph 3 of Schedule 1A) or following the occurrence of such an event.

(3) If a cessation employer notifies the Authority in writing that he proposes to enter into a withdrawal arrangement the Authority may issue directions that—

- (a) a debt which may be treated as due under section 75(4) of the 1995 Act is to be unenforceable for such period (“suspension period”) as the Authority may specify in the direction; and
- (b) the suspension period is to be extended by such further periods as it specifies.

(4) If the Authority issues the directions referred to in paragraph (3) and an approved withdrawal arrangement comes into force before the end of the suspension period—

- (a) the cessation employer’s share of the difference between the value of the assets and the amount of the liabilities of the scheme shall, for the purposes of regulation 6(2), be the withdrawal arrangement share, and
- (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, or if the approved withdrawal arrangement provides, jointly and severally liable.

(5) The Authority may issue a direction that amount B is not to be treated as a debt due from the guarantors under section 75(4) of the 1995 Act and any such direction must be issued—

- (a) before the guarantee time, and
- (b) if the Authority considers that the approved withdrawal arrangement is no longer required.

(6) Schedule 1B makes provision for events in relation to guarantors which shall be notifiable events.

Calculation of the withdrawal arrangement share

7A.—(1) For the purposes of regulation 7 the withdrawal arrangement share shall be either of the following—

- (a) amount A calculated in accordance with regulation 6C; or
- (b) where the conditions in paragraph (4) are satisfied, the alternative amount.

(2) When calculating amount A for the purposes of this regulation, a relevant transfer deduction applies where some or all of the cessation employer’s relevant transfer liabilities are

transferred during the period commencing with the date of the employment-cessation event and ending on the date that is twelve months later, or such longer period as the Authority approves

(3) The alternative amount means the sum of—

- (a) the cessation expenses attributable to the cessation employer; and
- (b) an amount which may be higher or lower than amount A.

(4) For the purposes of sub-paragraph (b) of paragraph (1) the alternative amount may be used instead of amount A where—

- (a) the trustees and the cessation employer have agreed the alternative amount;
- (b) they provide supporting information to the Authority; and
- (c) the Authority approves the alternative amount (when approving a withdrawal arrangement),

(5) The amount of the liabilities of a scheme which are to be taken into account for the purposes of determining the withdrawal arrangement share must be certified by the actuary in the form set out in Schedule 1C to these Regulations.

Calculation of amount B for the purposes of an approved withdrawal arrangement

7B.—(1) For the purposes of regulation 7 amount B must be calculated in accordance with either paragraph (2) or (3).

(2) Where an approved withdrawal arrangement provides amount B is to be calculated in accordance with this paragraph, amount B is equal to the amount (if any) that would be the amount of the liability share due from the cessation employer under section 75(4) of the 1995 Act if—

- (a) the employment-cessation event had occurred at the guarantee time;
- (b) the cessation employer had not entered into an approved withdrawal arrangement; and
- (c) there were no cessation expenses attributable to the cessation employer.

(3) Where the approved withdrawal arrangement provides for amount B to be calculated in accordance with this paragraph, amount B is equal to the amount that would be the amount of the liability share that would have been treated as due from the cessation employer under section 75(4) of the 1995 Act if the cessation employer had not entered into an approved withdrawal arrangement, less the sum of—

- (a) the withdrawal arrangement share;
- (b) if the amount that the approved withdrawal arrangement provides for the cessation employer to pay exceeds the withdrawal arrangement share, an amount equal to the excess; and
- (c) any relevant transfer deduction which applied.

(4) The amount of the liabilities of a scheme which are to be taken into account for the purposes of determining amount B must be certified by the actuary in the form set out in Schedule 1D to these Regulations.

Single employer sections, multi-employer sections, segregated parts etc

8.—(1) Where section 75 of the 1995 Act and these Regulations (apart from this regulation) apply to a scheme in relation to which there is more than one employer they shall apply to each of the following sections or parts of that scheme as if the section or part were a separate scheme—

- (a) a section of a segregated scheme with one employer in relation to the section;
- (b) a section of a segregated scheme with more than one employer in relation to the section;
- (c) a death benefits section of a segregated scheme;
- (d) a closed section of a segregated scheme;

- (e) a segregated part of a segregated scheme;
 - (f) a segregated part of a section of a segregated scheme;
- (2) For the purpose of paragraph (1)—
- (a) subject to sub-paragraph (b), a “segregated scheme” means a multi-employer scheme which is divided into two or more sections where—
 - (i) any contributions payable to the scheme by an employer in relation to the scheme or by a member are allocated to that employer’s or member’s section; and
 - (ii) a specified proportion of the assets of the scheme is attributable to each section of the scheme and cannot be used for the purposes of any other section;
 - (b) When determining whether a scheme is a segregated scheme there shall be disregarded any provisions of the scheme which—
 - (i) permit contributions or transfers of assets to be used to provide death benefits;
 - (ii) permit any assets of a section or a scheme to be used for the purpose of another section in the event of the winding-up of the scheme or a section;
 - (c) a “death benefits section of a segregated scheme” shall mean a section—
 - (i) which provides death benefits only; and
 - (ii) to which contributions or transfers of assets may only be made for the purpose of providing death benefits;
 - (d) a “closed section of a segregated scheme” shall mean a section—
 - (i) which applies only to members who are no longer in pensionable service in relation to the section; and
 - (ii) where the scheme rules have not been amended to prevent the scheme from otherwise being a segregated scheme;
 - (e) a “segregated part” shall mean a part which—
 - (i) is created by the trustees or managers of the scheme after an employer (“withdrawing employer”) ceases to participate in the scheme or section of the scheme (where the scheme rules either require this or make it optional), and
 - (ii) consists of the assets of the scheme or section which are attributable to the liabilities to or in respect of members who qualify for a pension or other benefits as a result of employment attributable to the withdrawing employer.”.

Former employers

- In regulation 9 of the Employer Debt Regulations (former employers)—
- (d) for sub-paragraph (b) of paragraph (2) substitute—
 - “(b) subject to paragraphs (2A) and (2B), any person who on or after 6th April 1997 was an employer.”;
 - (e) after paragraph (2) insert—
 - “(2A) For the purposes of paragraphs (1) and (2) a person shall not be included as an employer where he—
 - (a) ceased to be an employer by virtue of a relevant event or an employment-cessation event before the applicable time, and
 - (b) condition A, B, BB, BC, C or D is met in relation to that person.
 - (2B) Where the liabilities attributable to any person only consist of money purchase benefits under the scheme, he shall not be included as an employer for the purposes of paragraphs (1) and (2).
 - (f) for paragraph (4A) substitute—

“(4A) Condition BB is that such a debt was treated as becoming due from him under an approved withdrawal arrangement and has been paid by him before the applicable time.

(4B) Condition BC is that such a debt was treated as becoming due from him under a cessation agreement and has been paid by him before the applicable time.”;

(g) after paragraph (7) add—

“(8) For the purposes of sub-paragraph (a) of paragraph (2A)—

(a) “employment-cessation event” shall include where before 6th April 2005 section 75(1) of the 1995 Act⁽¹³⁾ applied when a scheme was not being wound-up and an employer ceased to be a person employing persons in the description or category of employment to which the scheme related at a time when at least one other person continued to employ such persons (see the event described in section 75(3)(b)(i) of the 1995 Act as substituted by the modification in regulation 4(3) of the 1996 Regulations), and

(b) “relevant event” shall include a “relevant insolvency event” for the purposes of section 75(1) of the 1995 Act as it applied before 6th April 2005.”.

Multi-employer money purchase schemes

In regulation 12(1) of the Employer Debt Regulations (multi-employer money purchase schemes)—

(h) for sub-paragraph (b) of paragraph (1A), as substituted for paragraph (1) of regulation 10 of the Employer Debt Regulations, substitute—

“(b) the apportionment share set out in a scheme apportionment arrangement that satisfies the relevant conditions in regulation 6A.”;

(i) for sub-paragraph (b) of paragraph (1B), as substituted for paragraph (1) of regulation 10 of the Employer Debt Regulations, substitute—

“(b) the amount of the liabilities attributable to employment with any one employer, are such amounts as are determined, calculated and verified by the actuary in accordance with regulation 6(4) and the guidance given in GN 19; and a determination under this paragraph must be certified by the actuary as being in accordance with that guidance”.

Modification of schemes

For regulation 16 of the Employer Debt Regulations (Modification of schemes: apportionment of section 75 debt) substitute—

“(1) This regulation applies to a trust scheme (whether or not a money purchase scheme) for the purposes of section 68(2)(e) of the 1995 (power of trustees to modify schemes by resolution for prescribed purposes).

(2) The trustees of such a trust scheme may by resolution modify the scheme for the purposes of enabling a scheme apportionment arrangement or regulated apportionment arrangement to apply to the scheme.

(3) For the purposes of this regulation a “scheme apportionment arrangement” and a “regulated apportionment arrangement” means an arrangement that complies with the relevant conditions in regulation 6A.”.

Form of actuary’s certificate

Schedule 1 to the Employer Debt Regulations (form of Actuary’s certification) shall be substituted with the Schedule specified in Schedule 1 to these Regulations.

⁽¹³⁾ That is, as it applied before it was amended by section 271 of the Pensions Act 2004 (c.35).

Withdrawal arrangements: approval

—c) Schedule 1A to the Employer Debt Regulations (multi-employer schemes: employer cessation events and approved withdrawal arrangements) shall be amended as follows.

In paragraph 1—

- (j) for paragraphs (b) and (c) of sub-paragraph (2) substitute—
 - “(b) the agreement is enforceable under the law of England and Wales or Scotland;
 - (c) the agreement provides that at or before a time specified in the agreement the cessation employer will pay an amount or amounts equal to or greater than the amount that is the withdrawal arrangement share;”;
- (k) for head (i) of sub-paragraph (2)(d) substitute—
 - “(i) provides that if an event specified in sub-paragraph (3) occurs while the agreement is in force the guarantors (who may be or include the cessation employer) will pay an amount or amounts equal to the amount that is amount B for the purposes of regulation 7 (but without prejudice to their powers to make a payment on account of that amount at any earlier time);”
- (l) for head (iii) of sub-paragraph (2)(d) substitute—
 - “(iii) provides whether or not amount B is to be provided for under regulation 7B(2) or (3);”;
- (m) in paragraph (e) of sub-paragraph (2) for “an amount” substitute “any amount”;
- (n) in paragraph (f) of sub-paragraph (2) for “bear any expenses” substitute “meet any expenses”;
- (o) after paragraph (g) of sub-paragraph (2) add—
 - “(h) where there will be a relevant transfer deduction, details of the proposed relevant transfer liabilities and the corresponding assets, the date when the amount of the relevant transfer deduction and the final amount of the withdrawal arrangement share (after adjusting for the relevant transfer deduction) will be provided to the Authority.”;
- (p) for paragraph (c) of sub-paragraph (3) substitute—
 - “(c) the Authority issue a notice to the parties to the agreement stating that it considers that an amount or amounts amount referred to in sub-paragraph (2)(d)(i) should be paid.”.

For paragraphs 2 and 3 substitute—

“2.—(1) Approval by the Authority of an agreement as a withdrawal arrangement is to be given in a notice issued by the Authority.

(2) Such an approval may be given subject to such conditions as the Authority considers appropriate.

(3) A withdrawal arrangement may be approved by the Authority where it is proposed that there will be a relevant transfer deduction, provided that the transfer or transfers are completed on or before the date which is twelve months after the employment-cessation event or within such longer period as the Authority approves.

(4) The Authority may not approve an agreement as a withdrawal arrangement unless it is satisfied that—

- (a) the agreement meets the conditions in paragraph 1(2); and
- (b) it is reasonable to do so having regard to such matters as the Authority considers relevant including the following—
 - (i) the potential effect of the employment-cessation event on the scheme’s level of technical provisions;
 - (ii) the financial circumstances of the proposed guarantors;
 - (iii) the amount of the cessation employer’s share of the difference if the liability share had applied;

- (iv) the amount of the withdrawal arrangement share (or where there will be a relevant transfer deduction, an estimate); and
 - (v) the effect of the proposed withdrawal arrangement on the likelihood that all members will receive full benefits from the scheme.
- (5) The Authority may withdraw approval if—
- (a) the circumstances in relation to which the approval was given are not the same as the circumstances described when approval was sought, and
 - (b) the difference in those circumstances is material.
- (6) Where under sub-paragraph (5) the Authority withdraws approval it must issue a notice to that effect.

3.—(1) A withdrawal arrangement may be approved under paragraph 2 by the Authority in advance of an employment-cessation event occurring in relation to an employer.

(2) For the purposes of approving a withdrawal arrangement prior to an employment-cessation event occurring in relation to an employer, references in this Schedule and regulations 7, 7A and 7B to “cessation employer”, “withdrawal arrangement share”, “amount B” and “relevant transfer deduction” shall be read accordingly.

(3) Where an approved withdrawal arrangement has been approved prior to an employment-cessation event regulation 7 shall apply as if—

- (a) following an employment-cessation event occurring in relation to the employer who is party to the approved withdrawal arrangement, the employer gave the notice required under regulation 7(3);
- (b) the Authority issued the directions under regulation 7(4);
- (c) at the time when the approved withdrawal arrangement comes into force regulation 7(4) applies and the withdrawal arrangement share and amount B are treated as debts due.”.

In paragraph 4—

- (q) in sub-paragraph (2), sub-paragraph (3)(a) and sub-paragraph (4)(a) for “regulation 7(2)” substitute “regulation 7(4);
- (r) in sub-paragraph (3)(b) for “regulation 7(3)(b), (4) and (6)” substitute “regulation 7(1), (2) (4), (5)(b)”.

Omit paragraph 5.

Form of actuary’s certificate: scheme funding basis debts in approved withdrawal arrangement cases and notifiable events

Schedule 1B to the Employer Debt Regulations shall be substituted with the Schedules specified in Schedule 2 to these Regulations.

The Pensions Regulator’s functions under the Employer Debt Regulations

—d) The following functions are regulatory functions of the Pensions Regulator for the purposes of Part 1 of the 2004 Act—

- (s) the power to issue a notice under section 6A(10) of the Employer Debt Regulations;
- (t) the power to issue a notice under section 6A(12) of the Employer Debt Regulations.

Omit paragraph (2) of regulation 3 of the Occupational Pension Schemes (Employer Debt etc) (Amendment) Regulations 2005⁽¹⁴⁾.

⁽¹⁴⁾ S.I. 2005/2224.

Amendment of the Multi-Employer Regulations

Omit regulations 15(3)(a) and 62(3)(a) of the Multi-Employer Regulations (multi-employer sections: approval notices under section 122)⁽¹⁵⁾.

Amendment of the Entry Rules Regulations

For paragraph (4) of regulation 2 of the Entry Rules Regulations (schemes which are not eligible schemes) substitute—

“(4) Paragraph (2) shall not apply in relation to an eligible scheme where before the beginning of an assessment period in relation to the scheme any of the following are in place—

- (a) a scheme apportionment arrangement which complies with regulation 6A of the Occupational Pension Schemes (Employer Debt) Regulations 2005⁽¹⁶⁾;
- (b) a regulated apportionment arrangement which complies with regulation 6A of those Regulations;
- (c) a cessation agreement which complies with regulation 6B of those Regulations;
- (d) an approved withdrawal arrangement which complies with regulation 7 of, and Schedule 1A to, those Regulations.”.

Amendment of the FSD Regulations

In regulation 15 of the FSD Regulations (former employers) for sub-paragraph (aa) of paragraph (2) substitute—

“(aa) condition AA is that—

- (i) such a debt became due;
- (ii) under regulation 7 of the Occupational Pension Schemes (Employer Debt) Regulations 2005 an approved withdrawal arrangement came into force and the debt treated as due, as a result of that arrangement, is the withdrawal arrangement share; and
- (iii) the withdrawal arrangement share has been paid.

(ab) condition AB is that—

- (i) such a debt became due;
- (ii) under regulation 6B of the Occupational Pension Schemes (Employer Debt) Regulations 2005 a cessation agreement came into force and the debt treated as due, as a result of that arrangement, is the cessation agreement share; and
- (iii) the cessation agreement share has been paid.”.

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

[date]

Name
Minister of State,
Department for Work and Pensions

⁽¹⁵⁾ regulations 15 and 62 were substituted by S.I. 2005/2113.

⁽¹⁶⁾ S.I. 2005/678, amended by S.I. 2005/993, 2224, 3377 and 3378, 2006/467 and 558 and 2007/60.

SCHEDULE 1

Regulation 9

Amendment of the Employer Debt Regulations

For Schedule 1 to the Employer Debt Regulations substitute the following—

“SCHEDULE 1

Regulation 5(16)

Actuary's Certificate of Scheme Shortfall

Given for the Purposes of Regulation 5 of the Occupational Pension Schemes (Employer Debt) Regulations 2005

Name of scheme

Date used as applicable time for purposes of calculations

1 Comparison of value of scheme assets with amount of scheme liabilities

In my opinion, at the above date the value of the assets of the scheme was less than the amount of the liabilities of the scheme.

The amount of the liabilities was

The amount of the difference between the assets and the liabilities was

2 Valuation principles

The scheme's assets and liabilities are valued in accordance with section 75(5) of the Pensions Act 1995, the Occupational Pension Schemes (Employer Debt) Regulations 2005 and the guidelines on winding-up and scheme asset deficiency (GN 19) (so far as those guidelines are applicable).

Signature

Date

Name

Qualification

Address

Name of employer

(if applicable)

Note:

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 not commenced winding-up on the applicable date].”

SCHEDULE 2

Regulation 11

Amendment of the Employer Debt Regulations

For Schedule 1B to the Employer Debt Regulations substitute the following—

“SCHEDULE 1B

Regulations 9B(9) and 7(6)

Notifiable Events

1.—(1) Where an approved withdrawal arrangement or a cessation agreement is in force in relation to a scheme, each relevant person must give notice to the Authority if such an event as is mentioned in sub-paragraph (3) occurs in relation to that person.

(2) For the purposes of this paragraph each of the guarantors is a relevant person.

(3) The following are the events referred to in sub-paragraph (1)—

(a) any decision by the relevant person to take action which will, or is intended to, result in a debt which is or may become due—

(i) to the trustees of the scheme, or

(ii) if the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 of the 2004 Act, to the Board,

not being paid in full;

(u) a decision by the relevant person to cease to carry on business (including any trade or profession) in the United Kingdom or, if the relevant person ceases to carry on such business without taking such a decision, his doing so;

(v) where applicable, receipt by the relevant person of advice that the person is trading wrongfully within the meaning of section 214 of the Insolvency Act 1986 (wrongful trading), or circumstances occurring in which a director or former director of the company knows that there is no reasonable prospect that the company will avoid going into insolvent liquidation within the meaning of that section, and for this purpose section 214(4) of that Act applies;

(w) any breach by the relevant person of a covenant in an agreement between the relevant person and a bank or other institution providing banking services, other than where the bank or other institution agrees with the relevant person not to enforce the covenant;

(x) any change in the relevant person's credit rating, or the relevant person ceasing to have a credit rating;

(y) where the relevant person is a company, a decision by a controlling company to relinquish control of the relevant person or, if the controlling company relinquishes such control without taking such a decision, its doing so;

(z) two or more changes in the holders of any key relevant person posts within a period of 12 months;

(aa) where the relevant person is a company or partnership, the conviction of an individual, in any jurisdiction, for an offence involving dishonesty, if the offence was committed while the individual was a director or partner of the relevant person;

(bb) an insolvency event occurring in relation to the relevant person for the purposes of Part 2 of the 2004 Act (see section 121 of that Act: insolvency event, insolvency date and insolvency practitioner).

(4) A notice under sub-paragraph (1) must be given in writing as soon as reasonably practicable after the relevant person becomes aware of the event.

(5) No duty to which a relevant person is subject is to be regarded as contravened merely because of any information or opinion contained in a notice under this paragraph.

(6) But sub-paragraph (5) does not require any person to disclose protected items within the meaning of section 311 of the 2004 Act (protected items).

(7) Section 10 of the 1995 Act (civil penalties) applies to any relevant person who without reasonable excuse fails to comply with an obligation imposed on him under this paragraph.

(8) In this paragraph—

“control” has the meaning given in section 435(10) of the Insolvency Act 1986 (meaning of "associate" meaning of "control") and "controlling company" is to be read accordingly;

“director” has the meaning given in section 741(1) of the Companies Act 1985 (meaning of "director" and "shadow director");

“key relevant person posts” means the Chief Executive and any director or partner responsible in whole or in part for the financial affairs of the relevant person.

SCHEDULE 1C

Regulation 6(5), 6A(13), 6B(8)(a), 6C(6), 7A(7)

Actuary’s Certificate for Multi-Employer Schemes

Given for the Purposes of Regulations 6, 6A, 6B, 6C and 7A of the Occupational Pension Schemes (Employer Debt) Regulations 2005

Name of scheme

Date used as applicable time for purposes of calculations

1 Comparison of value of scheme assets with amount of scheme liabilities

In my opinion, at the above date the value of the assets of the scheme was less than the amount of the liabilities of the scheme.

The amount of the liabilities was

The amount of the difference between the assets and the liabilities was

2 Shortfall attributable to employers

At the above date the share of the difference between the value of the assets and the amount of the liabilities attributable to an employer is as follows:

Employer A

[add employers as necessary]

The share of the difference was calculated for Employer A in accordance with the requirements for [liability shares /apportionment shares/withdrawal arrangement shares/cessation agreement shares] [delete as appropriate]

[add employers as necessary]

3 Valuation principles

The value of the scheme's assets and the amount of the liabilities are valued in accordance with section 75(5) of the Pensions Act 1995, the Occupational Pension Schemes (Employer Debt) Regulations 2005 and the guidelines on winding-up and scheme asset deficiency (GN 19) or Guidance of the Board of the PPF (so far as those guidelines are applicable).

Signature

Date

Name

Qualification

Address

Name of employer

(if applicable)

Note:

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 at applicable time scheme had not commenced winding-up].

SCHEDULE 1D

Regulation 6B(8)(b) and 7B(4)

Actuarial Certificate for Multi-employer schemes

Given for the Purposes of Regulations 6B and 7B of the Occupational Pension Schemes (Employer Debt) Regulations 2005

Name of scheme

Date used for purposes of calculations

1 Comparison of value of scheme assets with amount of scheme liabilities

In my opinion, at the above date the value of the assets of the scheme was less than the amount of the liabilities of the scheme.

The amount of the liabilities was

The amount of the difference between assets and liabilities attributable to the cessation employer was

The amount of amount B is

2 Valuation principles

The value of the scheme's assets and the amount of the liabilities are valued in accordance with section 75(5) of the Pensions Act 1995, the Occupational Pension Schemes (Employer Debt) Regulations 2005 and the guidelines on winding-up and scheme asset deficiency (GN 19) (so far as those guidelines are applicable).

Signature

Date

Name

Qualification

Address

Name of employer

(if applicable)

Note:

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 at applicable time scheme had not commenced winding-up].”.

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 Employer Debt Regulations”) and also make consequential amendments to other sets of Regulations. The Employer Debt Regulations apply to where after 5th April 2005 there is a shortfall between the assets and liabilities of an occupational pension scheme and a debt may be treated as a debt due from one or more employers in relation to a scheme. A debt may be treated as arising where a scheme winds-up or an employer has an insolvency event. In the case of multi-employer occupational pension schemes, a debt may also be treated as arising where an employer withdraws from the scheme.

Regulation 3 adds new defined terms to the Employer Debt Regulations. It also replaces regulation 1(3)(a) of the Employer Debt Regulations (citation, commencement, application and extent). This clarifies that the regulations which applied before 6th April 2005 to debts treated as due from employers will, after 6th April 2005, continue to apply to such debts (and not the whole scheme).

Regulation 4 replaces regulation 5 of the Employer Debt Regulations (calculation of the value of scheme liabilities and assets: defined benefit schemes). It specifies how to value the assets and liabilities of a scheme, where the calculation is required for the purpose of calculating the total scheme shortfall. The role of the trustees or managers of schemes has been increased so that they are involved with decisions regarding calculating, determining and verifying assets and liabilities. Provision has been made so that in some cases updates of scheme accounts and valuations may be used in the event of an employment-cessation event. Money purchase assets and liabilities are now excluded from calculations under regulation 5. New provisions have been added to deal with where Actuaries estimate the cost of purchasing annuities. The provisions which apply to the calculation of assets and liabilities, where there has been an Approved Withdrawal Arrangement, have been amended.

Regulation 5 replaces parts of regulation 6 of the Employer Debt Regulations (multi-employer schemes: general). Where an employer’s share of the difference between the assets and liabilities in a multi-employer scheme falls to be calculated, paragraph (2) of regulation 6 is amended to provide that an employer’s share is the liability share unless the apportionment share, the cessation agreement share or the withdrawal arrangement share apply.

The term employment-cessation event has been redefined and moved to regulation 2 of the Employer Debt Regulations (interpretation section). Some of the amendments are to clarify the existing definition i.e. the express reference to ceasing to employ any person who is an active member of the scheme. New paragraphs (6) and (7) of regulation 6 of the Employer Debt Regulations provides a 12 month period of grace where an employer has no active members but notifies the trustees or managers that he expects to have one within that period.

Regulation 6 adds new regulations 6A, 6B and 6C. New regulation 6A sets out the provisions which apply to apportionment share calculations. An apportionment share must be set out in either a scheme apportionment arrangement or a regulated apportionment arrangement. A scheme apportionment arrangement introduces a new requirement for trustees or managers to approve the proportion which will be the employer’s share of the difference. This will act as a legislative override ensuring that trustees or managers are always involved and approve of apportionments. An apportionment share may in very limited circumstances be calculated using a regulated apportionment arrangement. This is an arrangement which the Regulator approves and the PPF has agreed to.

The provisions which will apply to cessation agreement shares are set out in new regulation 6B of the Employer Debt Regulations. This cessation agreement share will be set out in a Cessation Agreement, which is agreed by the trustees or managers and the employer. The Cessation Agreement will provide the amount of the employer’s debt (i.e. the cessation agreement share), when it should be paid etc. A guarantor or guarantors will be party to the agreement and he or they shall be liable to pay Amount B.

The cessation agreement share and the withdrawal arrangement share are calculated in the same way. This is set out as amount A in new regulation 6C of the Employer Debt Regulations.

Regulation 7 replaces all of regulations 7(multi-employer schemes: employment- cessation events and withdrawal arrangements), 7A (calculation of amounts due from cessation employer by virtue of

regulation 7), 7B (calculation of amounts due from guarantors by virtue of regulation 7) and 8 (multi-employer schemes: sectionalised schemes) of the Employer Debt Regulations.

New provisions have been added to regulation 7 of the Employer Debt Regulations to refer to the new concept of a withdrawal arrangement share and to expressly cover that an employer may enter into an Approved Withdrawal Arrangement in advance of an employment-cessation event occurring. Further provisions are contained in paragraph 3 of Schedule 1A to the Employer Debt Regulations, which is amended by regulation 12(3).

New provisions have been added to regulation 7A of the Employer Debt Regulations which provide two options for the calculation of withdrawal arrangement shares – amount A and the alternative amount.

Some consequential amendments have been made to regulation 7B of the Employer Debt Regulations to reflect changes made to the calculation of debts under regulation 6 of those regulations.

New provisions have been added to regulation 8 of the Employer Debt Regulations to cater for where after an insolvency event a segregated part is created in a scheme so that the debt will only relate to that segregated part. This is so that the Employer Debt Regulations are consistent the provisions relating to scheme failure notices from the Board of the Pension Protection Fund (“PPF”), which was established under Part 2 of the Pensions Act 2004 (c.35).

Regulation 8 makes amendments to clarify regulation 9 of the Employer Debt Regulations (former employers). New provision is made so that where an employer participates in a multi-employer scheme and only offers money purchase benefits, he will not be included as an employer for the purposes of the Employer Debt Regulations.

Regulation 9 makes consequential amendments to regulation 12 of the Employer Debt Regulations (multi-employer money purchase schemes).

Regulation 10 replaces regulation 16 of the Employer Debt Regulations (Modification of schemes: apportionment of section 75 debt), which gives trustees of trust schemes powers to modify the scheme for the purposes of allowing apportionment.

Regulation 11 replaces the actuarial certificate in Schedule 1 to the Employer Debt Regulations.

Regulation 12 amends the requirements in Schedule 1A to the Employer Debt Regulations (multi-employer schemes: employer cessation events and approved withdrawal arrangements) which apply to Withdrawal Arrangements. The test which must be applied by the Pensions Regulator when approving withdrawal arrangements has been replaced. The test now requires the Pensions Regulator to consider particular matters which are relevant to the application for approval of the withdrawal arrangement. New provision has been made to allow the Pensions Regulator to withdraw approval of a Withdrawal Arrangement where the circumstances described in the application for approval are not the same as the actual circumstances. Any differences must be material.

Regulation 13 replaces the actuarial certificate in Schedule 1B to the Employer Debt Regulations with two new actuarial certificates. It also adds a new schedule which deals with notifiable events.

Regulation 14 provides that the Pensions Regulator’s power to approve approved withdrawal arrangements is to be treated as a regulatory function under Part 1 of the Pensions Act 2004.

Regulation 15 amends regulations 15(3)(a) and 62(3)(a) of the Pension Protection Fund (Multi-Employer Schemes)(Modification) Regulations 2005 (multi-employer sections: approval notices under section 122) (S.I. 2005/441). This amendment allows scheme failure notices to be issued by the board of the PPF following an insolvency event which occurs to an employer in relation to a non-segregated scheme or section of a non-segregated scheme.

Regulation 16 amends paragraph (4) of regulation 2 the Pension Protection Fund (Entry Rules) Regulations 2005 (schemes which are not eligible schemes) (S.I. 2005/590) so that cessation agreements, regulated apportionment arrangements, approved withdrawal arrangements and scheme apportionment arrangements are not treated as compromise agreements for the purpose of the PPF.

Regulation 17 makes consequential amendments to regulation 15 of the Pensions Regulator (Financial Support Directions etc.) Regulations 2005 (S.I. 2005/2188).

A full regulatory impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from [].