ASSOCIATION OF CONSULTING ACTUARIES

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DWP
Caxton House
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London
SW1H 9NA

Dear Sir / Madam

Strengthening the Pensions Regulator's Powers: Notifiable Events (Amendments) Regulation 2021

I am writing on behalf of the **Association of Consulting Actuaries** in response to the consultation on the above Notifiable Events (Amendments) Regulations 2021.

Overall, we support the direction being taken by the new Notifiable Events regime. Our answers to specific questions are included in an Appendix to this letter. However, there are areas where the current regime appears to have weaknesses, which might be replicated to some degree in the amended regime. This seems an opportunity for them to be considered.

- Under the current regime, employer-related notifiable events apply to the "employer in relation to the scheme". Regulation 1(3) of the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005 (the PPF Multi employer regulations) make clear that, in certain circumstances the insolvency of a "former" employer could also result in schemes becoming entitled to PPF compensation. It seems to us (we are not lawyers) that these "former" employers are not also in scope of the Notifiable Events regime, although they are explicitly caught in other cases, in particular the Occupational Pension Schemes (Employer Debt) Regulations 2005. The resulting legal obligations can strengthen the covenant available to the scheme. If the intention is that these former employers should be included in the notifiable events regime, this seems an opportunity to make that clear.
- Similarly, the current regime imposes the duty to report existing Notifiable Events on the "employer in relation to the scheme" and the possibility of prescribing other "appropriate persons" hasn't been used. Using the same logic we have applied to the scope of the notifiable events, if the definition of "employer" for the purposes of determining whether a notifiable event has occurred is expanded then we believe that the definition of those employers that should report notifiable events should also be expanded in the same way.
- The consultation mentions that the Pensions Regulator will update its Code of Practice and accompanying guidance. Comprehensive guidance is absolutely essential given the increased prominence of the notifiable events regime and the significant penalties for non-compliance.

- It would also be helpful if TPR took the opportunity to amend some of its directions as to when events should be notifiable. For example, because of the way interest rates have fallen since the directions were first published in 2005, the £1.5 million threshold for reporting particular member related events has resulted in far more events being reportable, which is onerous for administrators and trustees. It could be appropriate to consider increasing the threshold (which would require legislative change), to retain parity with the original intention, or for directions to achieve a similar objective by setting out how liabilities should be assessed (for example, the directions could make it clear that liabilities could be assessed on a technical provisions basis, rather than a buy-out basis, and/or perhaps require notification only when certain specific conditions are met).

We hope that you find the contents of this letter of assistance. We would be happy to discuss them further if that is helpful. In that event, please contact me on 01372 733763 or at peter.williams@aon.com.

Yours faithfully

Peter Williams
Chairman, Pension Schemes Committee
On behalf of the Association of Consulting Actuaries Limited

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APPENDIX

ACA response to Strengthening the Pensions Regulator's Powers: Notifiable Events (Amendments) Regulation 2021

Specific consultation questions

Question 1: do you think that the definitions capture the policy intention? If not, please explain why.

It seems possible that the definition of "decision in principle" is too loose and would include, for example, decisions taken where no action is intended unless a particular trigger occurs. We believe it would be more consistent with the policy intention to define a decision in principle to include only decisions where a commitment has been made to invite tenders from, or enter into negotiation with a third party. TPR guidance could also help here by defining what a "decision in principle" is in more detail.

Question 2: can you see any unintended consequences of these amendments?

We have no issue with removing the wrongful trading event.

However, we do have concerns about the amendment to the notifiable event concerning relinquishing control:

- Our understanding is that the definitions in amended regulation f(ii) and in new sub paragraph (3)(c)(ii) are intended to apply to the same event, just at different stages of the process. However, while f(ii) refers only to <u>the employer company</u> not making a decision in principle in relation to the event, the definition in (3)(c)(ii) would include situations where the controlling company has not made a decision. These are not consistent.
- In addition, the current f(ii) notifiable event applies when a controlling company has relinquished control without a decision. The amendment will change this to situations when the employer has not made a decision (narrower), but it relates to the offer made, which would normally be to the controlling company. A solution to this issue may be to simply delete the reference to "the employer company" in f(ii).
- It is possible that the employer might not know when a controlling employer has made a decision in principle to relinquish control of the employer, or received an offer (i.e. the events covered by amended regulation f(i) and f(ii)). This is also the case for the (3)(c)(i) and (ii) events. Since the requirement to notify the event is as soon as reasonably practical after becoming aware of the event, it is possible that, in some cases, the notification will not achieve its purpose.

Question 3: are there any unintended consequences of this approach? What is the impact on multi-employer schemes and the employers? Is there a simple way of apportioning liabilities which would work for all multi-employer schemes?

We understand the reasoning for removing the 20% threshold based on scheme funding responsibility. It seems more straightforward to concentrate on the effect on individual employers' covenants, in assessing materiality, as proposed. However, we note that this approach is likely to increase the number of notifiable events submitted and some of these will relate to employers that will have a minimal impact on the relevant scheme's overall employer covenant. (An alternative approach would be to retain a threshold based on scheme funding responsibility – and allow this to be assessed at each valuation.)

In addition, the "covenant" available to the scheme does not only rest on those who are currently "employers in relation to the scheme". Consistent with the suggestions in our covering letter, the ambit should be extended to include any employers who were formerly employers in relation to the scheme and who continue to have a legal obligation towards the scheme (for example, their insolvency could trigger a section 75 debt, or a PPF assessment period).

Question 4: do you agree that "when the main terms have been proposed" is an appropriate point for the notice and statement to be issued? Can you see any unintended consequences of using this definition? At what point would it be reasonable for employers to have discussions with the trustees about the intended transaction?

While supporting what the amendments are trying to achieve, we have the following concerns about how the section 69A notifiable events regime will operate:

- The term "main terms" is open to interpretation.
- It is potentially confusing for section 69 and section 69A to use the same terms (in particular, "notifiable event" and "appropriate person") but define them differently. We expect it is too late to amend the Pensions Act 2004 to introduce new definitions (e.g. a s69A notifiable event), but this could perhaps be tidied up at some stage.
- As mentioned in our answer to question 2, some section 69A notifiable events are not defined consistently with their associated section 69 event.
- Section 69A defines the "appropriate person" (that is, the person required to report a section 69A notifiable event) as the employer and also persons associated with or connected to the employer. The implication is that all parties have an obligation to notify the event, but we expect it would be satisfactory if the obligations of all the parties is met provided one of the parties makes the report. Could the regulations be used to clarify this?

Question 5: Does the definition of relevant security meet the intention that it will apply to granting of security which may affect the employer's ability to support the scheme? Are there any unintended consequences? Should other specific types of security be included or excluded?

We agree that the definition should extend to employers that are subsidiaries of the employer in relation to the scheme, since their actions could affect the employer's covenant, but that the threshold should relate to the employer (and its subsidiaries) as a whole – so that only material securities will be in scope. However, consistent with the suggestions we made in our covering letter, it would also be reasonable to include any employers who continue to have a legal obligation towards the scheme (for example, their insolvency could trigger a section 75 debt, or a PPF assessment period).

Is it appropriate to specify a 25 per cent threshold by reference to revenues or assets as proposed?

25% seems quite large but its significance to the scheme will depend on the scheme's size relative to that of the employer and how it is funded. Provided the Regulator takes these into account appropriately and consistently when regulating the regime, there should be no unintended consequences.

Question 6: do you agree this is a reasonable definition of revenue and assets? If, not, how do you consider they should be defined?

There seems to be a disconnect between the period over which similar events have to be considered, when determining whether they meet the materiality threshold (i.e. 12 months before the notifiable event) and the recording of those events (i.e. over the 12 months covered by the most recent annual accounts). Although we appreciate the need to find a transparent and proportionate measurement, the result could be that the report relied on is more than a year out of date. Perhaps if interim accounts have been published more recently than the annual accounts, these should be taken into account?

Question 7: do you consider that 25 per cent of the revenue or assets is an appropriate level? If not, please indicate what you think is an appropriate level and why?

See comment on Q5

Question 8: do you agree that disposals which have taken place or agreed within 12 months of the date of the notifiable event should be taken into account when calculating the 25 per cent threshold? If not, please explain why.

Yes – also, in determining the 25% subject to a charge or lien, it seems appropriate to include any assets over which a charge or lien has been made in the previous 12 months

Question 9: does this list provide all the information which should be notified to The Pensions Regulator? If not, what else should be included?

Yes. However, we expect many employers will not consider their legitimate business activities have adverse effects on the pension scheme, since they are largely intended to improve the company's profitability. Would it be clearer to require details of the potential for any adverse effects?

Question 10: Do you think that this meets the policy intention or are there any unintended consequences?

Overall we agree the regulations broadly meet the policy intention. However, the first two bullet points in our covering letter point out what seems to us to be an inconsistency in the current regime. If this was addressed, we believe the new notifiable events would have more success in meeting the policy intention.

We would be happy to discuss them further if that is helpful. In that event, please contact me on 01372 733763 or at peter.williams@aon.com.

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