ASSOCIATION OF CONSULTING ACTUARIES

Second Floor (206) ▪ 40 Gracechurch Street ▪ London EC3V 0BT
020 3102 6761 ▪ www.aca.org.uk

26 August 2026

pensions.surplusconsultation@DWP.gov.uk

The Department for Work and Pensions
4th floor, Caxton House
Tothill Street
London
SW1H 9NA

Dear all

Surplus Flexibilities for Defined Benefit Pension Schemes

Unlocking Value for employers and scheme members

I am writing on behalf of the Association of Consulting Actuaries in response to your consultation on surplus flexibilities for Defined Benefit (DB) Pension Schemes.

We welcome the opportunity to comment on the draft regulations and support the intention to implement the new surplus flexibilities from April 2027.

The Pension Schemes Act 2026 ensures that trustees are the decision-makers on any release of surplus under the new power. Guidance from the Pensions Regulator will be key in setting expectations for trustees and we look forward to the consultation on this guidance later this year. The guidance should take a balanced approach, focussing on appropriate member safeguards and allowing the specific history and circumstances of individual schemes, including historic and ongoing employer support, to be appropriately reflected in surplus release decisions. Any case studies would need careful consideration to avoid setting implied benchmarks or unfairly raising member expectations.

In our response to your consultation on 'Options for Defined Benefit schemes' in April 2024, we commented that if the funding threshold was based at a level lower than buy-out – then "the strength of the employer covenant should also be taken into consideration and only where the covenant is strong enough to support the remaining deficit relative to buy-out should it be permitted to extract surplus down to this level". This can be achieved by setting the legislative threshold based on low dependency – as is now proposed - provided appropriate guidance is set by the Pensions Regulator which achieves a balance between the interests of employers and other beneficiaries.

Our comments on your questions are set out in the Appendix. We would highlight the following key points:

- We do not believe the definition of "a low dependency funding basis", referenced in several places in the draft regulations, is adequate. (Q4)
- It would be helpful for the legislation to make clear that the payment made could be different to the amount originally proposed (even if the amount is capped at the proposed amount communicated to members at least three months in advance). (Q6)

- Our preference would be for the legislation to allow a 'formula approach', so that the notification to members could outline how the surplus to be distributed would be calculated, without providing a specific monetary amount (or amounts). (Q6)
- We think the 5 working day period is unnecessarily short and should be extended to a month or, as a minimum, 10 working days. (Q7)
- The proposed 3-year forward looking assessment wording should be revised to avoid ambiguity, which might be interpreted as requiring a stochastic assessment. (Q8)
- To ensure phased payment is a practical option, we think the regulations should be amended to allow for the member notification to cover a specified series of payments, for a phased release. (Q9)
- Trustees should have flexibility to shorten the three month notification period. (Q11)

More widely on use of surplus, we would welcome legislation clearly facilitating surplus to be used to fund future contributions in a separate arrangement, such as DC or CDC master trusts, stand-alone trusts (including other DB schemes) or Group Personal Pensions, subject to appropriate safeguards. We understand that legal views differ on whether this is possible under existing legislation.

We hope that you find the contents of this letter of assistance. We would be happy to discuss them further if that is helpful.

Yours sincerely

Peter Williams
Chair, ACA Pensions Schemes Committee
On behalf of the Association of Consulting Actuaries Limited
peter.williams@aon.com

Specific consultation questions

General questions

1: Draft regulation 2 defines 'appropriate advice'. Do you agree with this definition?

This term is used in two separate areas:

- in the context of the trustees informing the actuary of (a) the effective date to use in the actuarial assessment and (b) the value of scheme assets with appropriate adjustments (draft regulation 6);
- in the context of an earmarked scheme where the trustees are considering whether all liabilities have been secured with an insurance policy or paid in full (draft regulation 10).

The definition refers to those providing the advice having "appropriate knowledge" of investments and liabilities of trust schemes. Importantly, in the first context, we think this would allow (where advised this is appropriate by the actuary) the trustees to set the effective date as the effective date of the most recently completed actuarial valuation – and advise the actuary to use the asset valuation from that actuarial valuation (which appears to be consistent with the option specified in draft regulation 5(2)).

On this basis, the definition seems acceptable, provided the reference to "trust schemes" is sufficiently clear from a legal perspective. However, our preference would be for the legislation to explicitly state that taking the assets and low dependency liabilities from the most recently completed actuarial valuation is an acceptable approach for the actuarial assessment.

2: Is the scope of the power sufficiently clear?

Yes.

3: Regulatory own funds schemes were included in the 2006 Regulations; is there a continued need for their inclusion within the Regulations?

It seems reasonable to 'carve out' any such arrangements from these provisions.

4: Do you have any comment on the considerations of factors to be taken into account for the assessment of assets and liabilities?

The provisions for the assessment of assets and liabilities under draft regulations 5, 6 and 7 seem reasonable in general.

We do not believe the reference to "a low dependency funding basis" (a LDFB) in 5(4)(b)(ii) (and in eight other places in the draft regulations) for the liabilities is adequate. Although "low dependency funding basis" is defined in draft regulation 2(1) by referencing the funding legislation requirements, we think that it would be preferable to make it clearer that the LDFB to be used should be consistent with the approach to setting the LDFB adopted by the trustees for the purposes of this funding legislation as set out in the latest Statement of Strategy – or intended to be adopted where the first new regime valuation has yet to be completed (i.e. the actuary's assessment must be consistent with any LDFB decisions made by the trustees and (where required) agreed with the employer, as set out in their most recent Statement of Strategy, rather than being able to adopt any LDFB which might be consistent with the legislation). See also our response to question 8 below, on defining the LDFB when considering funding over the next three years.

We would also suggest an amendment to 6(b)(iii), so it is a trustee decision. This could be achieved by amending the wording to exclude "any rights under an insurance policy, where the trustees consider it appropriate to exclude those rights having consulted the relevant actuary".

5: Do you have views on the proposed funding test, based on full funding on the low dependency funding basis?

In our response to your consultation on 'Options for Defined Benefit schemes' in April 2024, we commented that if the funding threshold was based on a level below buy-out – then "the strength of the employer covenant should also be taken into consideration and only where the covenant is strong enough to support the remaining deficit relative to buy-out should it be permitted to extract surplus down to this level". This can be achieved by setting the legislative threshold based on low dependency – as is now proposed - and providing guidance from the Pensions Regulator.

Under draft regulation 8(1)(b) the trustees cannot proceed if they do not receive an actuarial assessment showing that assets exceed liabilities on the LDFB. In principle, this seems reasonable (subject to our comment above, about the LDFB being appropriately defined).

We note that the amount that can be paid to the employer is not limited to the surplus at the date of the actuarial assessment. Effectively a separate consideration is made of whether the scheme will remain over 100% funded on the LDFB, under the actuarial certification (under draft regulation 9), just before any payment. If the scheme's funding position has improved since the date of the actuarial assessment, the legislation would allow the amount payable to the employer to reflect this improvement, at least until an amount is communicated to members in the notification. This seems reasonable.

6: Do you have any views on the proposed payment process as proposed in the regulations, including whether it is workable in practice and sufficiently clear? Please provide details

We note that the effective date of the actuarial assessment can be any date – there is no requirement for it to be within a certain period of the payment to the employer. This flexibility is helpful, although in our view there should be a time limit, with the actuarial assessment not being prior to the effective date of the last completed actuarial valuation. This, together with the further assessment for the actuarial certification just prior to payment would seem to provide adequate protection.

It would be helpful if the legislation could make it clear that the final payment to the employer could be different than the amount proposed under draft regulation 8 (even if the amount is capped at the proposed amount communicated to members under draft regulation 11). For example, just prior to the date of payment, because of market movements, the trustees might be more comfortable making a refund of 95% of the amount originally proposed. This should be possible without going through the process again, including a further minimum 3-month notification to members. This flexibility would be particularly valuable if it were possible for the notification to set a decision to make a sequence of payments over a period of time (see our response to question 9 below).

Our preference would be for the legislation to allow a 'formula approach', so that the notification to members could outline how the surplus to be distributed would be calculated, without providing a specific monetary amount (or amounts).

On a drafting detail, we think that draft regulation 9(2)(d) should refer to authorised member surplus payments (plural, not singular) as we expect the legislation will provide for each member to receive a separate payment.

7: Are the regulations clear on the process of obtaining actuarial certification and paying the employer within 5 working days?

We think the 5 working day period is unnecessarily short – which may cause practical difficulties in some cases - and the period should be extended to a month or, as a minimum 10 working days. In our view, there is no strong rationale for a very short period, since we would expect that trustees would not agree to a surplus payment if they had any material concern that the funding position could change to the extent of making a payment inappropriate within as little as 5 working days.

We think that draft regulation 9(5), which states that the payment "must be paid" within the 5-day period could be better worded. This could be read as imposing a requirement on the trustees once the certificate has been given (under draft regulation 9(4)). We think the regulation should state that the trustees can make a payment only if it is made within 5 (or 10) working days period of the certificate being given.

8: Do you have any comments on the proposed 3-year forward-looking assessment in Condition 2?

The proposed 3-year forward looking assessment requires amendment to avoid ambiguity. Our understanding is that the wording "at any given time during a three year period… the value of the scheme's assets is at least as likely as not to be greater than the amount of the scheme's liabilities…" should allow a deterministic approach to certification. However, it has been suggested that the wording is ambiguous and could be read as requiring onerous stochastic projections. In particular, "*at any given time during*" the period could be interpreted as meaning "*throughout*" the period – clearly it would be a much more onerous test if the requirement was to be expected to remain above the threshold on *every* day of the period, allowing for typical levels of volatility under a stochastic model.

We think it would be clearer – and consistent with our reading of your current drafting - if the wording used was similar to the well-established wording used for certifying a schedule of contributions for scheme funding purposes (See Schedule 1 of SI2005/3377) where the actuary certifies that "the statutory funding objective *can be expected to continue to be met for the period* for which the schedule is to be in force". We would therefore suggest, Regulation 9(3) should be re-drafted as:

> *"for the three year period beginning with the date that the actuarial certificate is given, the value of the scheme's assets can be expected to continue to be greater than the amount of the scheme's liabilities on a low dependency funding basis, after considering – "*

It would help if the response to consultation could explain why this wording has been adopted – to avoid any suggestion that a stochastic approach is required, and to follow the well-established wording used for certifying schedules of contributions on a deterministic basis.

If our understanding is incorrect, and the intention is to require a stochastic analysis for the forward-looking test, our strong view is that this is disproportionate and would present a rather higher bar to allowing surplus repayments than we believe the government intends.

We think draft regulation 9(3)(a) should reference "paragraph (2)(a) to (d)" rather than "paragraph (2)(b) to (d)" to make it clear that in considering possible funding changes over the three years following certification, the starting point should reflect material developments up to the date of the certification.

The reference to "a low dependency funding basis" in this test requires consideration as per our comments under question 4 above. In this context, the issue is complicated by the fact that the actuary is considering the LDFB for the next three years. This should be addressed by the regulations making it clear that the LDFB used should be consistent with the approach to setting the LDFB adopted by the trustees, as set out in their most recent Statement of Strategy, at the date of the certification.

9: Do you agree that the process proposed in the regulations is sufficiently flexible to enable a phased release of scheme surplus over a number of years, while preserving member benefits via certification of each individual payment?

The process would appear to allow a phased release of scheme surplus over a number of years with individual certification for each payment, and therefore incentivising fewer, larger payments – in particular, with the trustee proposal (draft regulation 8), member notification (draft regulation 11) and actuarial certification (draft regulation 9) being carried out multiple times. It is not clear whether the references to "phased release" in the consultation envisaged notification to members being undertaken once, setting out a series of payments (or a methodology for determining payments) to the employer, each requiring certification. We note that a series of payments could be considered appropriate – perhaps over months or years – for various reasons, including with regard to reducing risk to the scheme. In our view to ensure phased payment is a practical option, we think the regulations should be amended to explicitly allow for a single member notification of such (perhaps in restricted circumstances) by amendment to draft regulation 11.

With potentially lengthy time periods in mind, our comment in response to question 6, about flexibility to make a lower payment than envisaged in the original notification, or to define the payment by reference to a formula or percentage rather than a nominal amount, becomes particularly pertinent.

10: Should earmarked schemes be included in the scope of these regulations?

No comment.

11: Do you think the notification requirements in regulation 11 are sufficiently clear?

A three month period may be appropriate in some cases but we think that trustees should have flexibility to shorten this period - perhaps down to one month – where the trustees consider a shorter period to be in the best interests of the scheme's beneficiaries. Alternatively, the regulations could refer to "reasonable notice", allowing the Regulator to set out expectations in guidance.

We considered whether there should be a new legislative requirement to inform members if the payment does not go ahead as planned (either not at all, or if a different amount is paid). The legislation for the annual Summary Funding Statement already includes a requirement to inform members of whether there has been any payment to the employer under section 37 of Pension Act 1995. We think this is sufficient.

On drafting detail:

- Regulation 11(1)(b) should refer to the payment amount as being "provisional".
- Regulation 11(1)(c) should also include reference to authorised member surplus payments.

12: Do you think the notification requirements in regulation 12 are sufficiently clear?

It should be clarified that the information in 12(a), (b) and (c) is all intended to be taken from the actuarial assessment under draft regulation 5.

The draft regulations require notification within "one week". It would be preferable for this to be "10 working days" or "as soon as reasonably practical" with guidance from the Regulator providing further information.

On a drafting detail, as per our comment on draft regulation 9(2)(d) under question 6 above, we think draft regulation 12(f) should refer to authorised member surplus payments (plural).

13: Are the proposed rules for sectionalised schemes and employer consent workable and clear?

These seem reasonable, and consistent with other legislation including paragraph 1 of Schedule 2 of the Occupational Pension Schemes (Scheme Funding) Regulations 2005.

14: Are the draft regulations clear for excluded schemes? If not, where would further clarity be helpful?

No comment.

15: Are the draft Regulations clear on revaluation of deferred awards?

Our preference is for trustees and employers to have flexibility in the form of deferred benefit awarded to members under NMPA, including a lump sum option. We are unclear as to why the DWP has chosen to specify the revaluation levels as set out. Is the intention to effectively require the lump sum to be (broadly) subject to the final salary revaluation method but with date of leaving replaced by date of award (including for members in pensionable service) and all benefits assumed to be attributable to pensionable service on or after 6 April 2009? How does preservation apply? Would a payment made after NMPA need to be increased by a late retirement factor? Schemes will want flexibility to revalue to Normal Pension Age and clarity on how the preservation requirements are to be applied. We are not sure the current drafting achieves this.

The detailed drafting (which assumed the benefit would be provided on a defined benefit basis) would appear to need some refinement.

Inserted Regulation 5A(1) refers to “Chapter 2 of the Act” without referencing which Chapter 2 of the Act is being amended. (There are several Chapter 2s in the Pension Schemes Act 1993 - the given title “reduction in social security….” suggests the reference should be to Chapter II of Part III of the Act. However, our comments above assume the cross reference to be to Chapter II of Part IV (Revaluation of accrued benefits) as this appears more closely related.)

In Regulation 5A(2), we think the reference to “paragraph (1) of Schedule 3 to the Act” should be to paragraph 1, or perhaps paragraph 1(1).

In Regulation 5A(3), there is another reference to “Chapter 2 of the Act” to which our comments above apply.

16: Are the draft Regulations clear on how deferred awards affect members’ statutory right to take a transfer value?

No comment.

17: Do you foresee any issues or concerns arising from proceeding without transitional provisions following the revocation of the 2006 Regulations? If so, please provide details.

Transitional provisions may be required where an actuarial valuation has not yet been completed in which the funding and investment strategy has been set. In our response to question 4 above, we note that the definition of low dependency funding basis should refer to consistency with the approach to setting the LDFB adopted by the trustees for the purposes of this funding legislation as set out in the latest Statement of Strategy – or intended to be adopted where the first new regime valuation has yet to be completed. This may require consideration of transitional provisions.

18: Do you foresee any issues with revoking regulations 36 to 39 of the 2014 Regulations?

No comment.

19: Does the proposed certificate in the Schedule capture all the relevant details that will be required?

Two of our comments above are relevant to the descriptions of the information required in the certificate:

- the reference to "a low dependency funding basis" (see under questions 4 and 8)
- the request to re-draft Condition 2 under Regulation 9(3) which would feed through to revised drafting in 1(h)(ii) of this schedule. (see under question 8).

For clarity, we would suggest that the reference to "the effective date of the actuarial assessment" refers to "the effective date of the actuarial assessment previously carried out under Regulation 5(1) of the OPS (Payments to Employer) Regulations 2027" – this is to avoid any suggestion that the certification can be based on an assessment at an earlier date.

In addition, we note that paragraph 1(h) includes two references to "any amount specified in accordance with sub-paragraphs (e) to (g)". There is no requirement for the "details" under in (f) or (g) to include amounts, so this could helpfully be reworded to refer to the amount specified in (e) and the details set out in (f) and (g).