

In Touch technical update

June 2018

Consultation on 'A Stronger Pensions Regulator'

- Expanded list of notifiable events, with employer 'Declaration of Intent' required in some circumstances
- New and bigger penalties for non-compliance and enhanced 'anti-avoidance' powers

The DWP has published the first of the consultations suggested in the Government's White Paper on Protecting Defined Benefit Pension Schemes. This consultation runs until 21 August and the Government is looking for views on the proposals outlined below.

Background

The proposals aim to improve the Pensions Regulator's powers so that they:

- Can be more proactive and get involved earlier when employers make changes which could impact the pension scheme;
- Can obtain the right information about a scheme and its sponsoring employer; and
- Are able to gain redress when things go wrong.

Notifiable events

The notifiable events framework requires trustees and employers to notify the Regulator if certain events occur, giving an early warning of potential problems. The consultation proposes a broader range of events requiring notification, adding the following:

- Sale of a material proportion of a business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme's liabilities;
- Granting of security on a debt to give it priority over debt to the scheme (excluding security for specific chattels financing, such as hire purchase financing for company vehicles);
- Significant restructuring of the employer's board of directors and certain senior management appointments (such as appointment of a chief restructuring/transformation officer, appointment to the board by external parties, or a change to two of Chairman/CEO/CFO within six months);
- Sponsoring employer taking independent pre-appointment insolvency/restructuring advice.

It is also proposed to extend the existing notifiable event for breach of banking covenant to include covenant deferral, amendment or waiver.

The consultation proposes to remove the existing notifiable event concerning wrongful trading of the sponsoring employer.

In addition, the consultation proposes changing the existing requirement to notify as soon as reasonably practicable after becoming aware of the event. For the following events the deadline will be brought forward:

- Sale of controlling interest in a sponsoring employer;
- Sale of the business or assets of a sponsoring employer; and
- Granting of security in priority to scheme debt.

The deadline for notifying these events is proposed to be when a Heads of Terms agreement is first put in place.

Declaration of Intent

For the following notifiable events, the employer will also need to issue a 'Declaration of Intent' setting out the implications of the transaction for the scheme and how any risks will be mitigated:

- Sale of controlling interest in a scheme employer;
- Sale of the business or assets of a scheme employer; and
- Granting of security in priority to scheme debt.

This declaration would be required after parties have completed due diligence and transaction financing has been finalised but before sale and purchase

contract signature – although the Government expects employers to engage with trustees at the earliest opportunity.

The declaration is intended to form part of an enhanced early warning system, so that all parties are aware of concerns and proposed mitigations earlier than is currently the case and have a clear record of all agreements reached. It should:

- Explain the nature of the planned transaction;
- Confirm that the corporate planner has consulted on its terms with the trustees and confirm the trustees' agreement (or otherwise) to the planned transaction; and
- Explain any detriment to the scheme and how this is to be mitigated.

The requirement for a declaration may also be dependent on the level of scheme funding.

Penalties

A more comprehensive regime will allow the Regulator/Courts to impose the most appropriate penalty from a suite of options:

- Existing civil penalties for low-level non-compliance;
- A new power to issue civil penalties of up to £1m for more serious breaches; and
- Criminal sanctions that would allow the courts to impose appropriate penalties – unlimited fines and/or custodial sentences - for wilful or grossly reckless behaviour, non-compliance with a Contribution Notice and failure to comply with the notifiable events framework.

The range of potential targets includes all those who have responsibility to the pension scheme – directors, sponsoring employers and any associated or connected persons, and in some circumstances trustees.

Anti-avoidance powers

The Regulator already has powers to issue Contribution Notices (CNs) and Financial Support Directions (FSDs). It is proposed to strengthen and improve this framework, including by:

- Amending the "reasonableness test" for CNs so there is a stronger focus on the loss or risk caused to the scheme by the event. (Currently there is a focus on the benefit the target (e.g. a Parent) has extracted from the sponsor.)
- Creating an additional limb to the 'material detriment test' for CNs, assessed by reference to the weakening of the employer rather than the prospect of benefits being paid in full.
- Amending the 'reasonableness test' for FSDs to make it clear that the actions of a target in creating or increasing risk are a relevant (but not necessary) factor; and
- Exploring how and whether the 'lookback' period for FSDs could be increased beyond two years.

Clearance

An employer can apply to the Regulator on a voluntary basis for 'Clearance' that it will not issue a CN or FSD in relation to a particular event. The Regulator will review its guidance on Clearance to clarify expectations.

About Aon

Aon plc (NYSE:AON) is a leading global provider of risk management, insurance brokerage and reinsurance brokerage, and human resources solutions and outsourcing services. Through its more than 72,000 colleagues worldwide, Aon unites to empower results for clients in over 120 countries via innovative risk and people solutions. For further information on our capabilities and to learn how we empower results for clients, please visit: <http://aon.mediaroom.com/>.

Aon Hewitt Limited
Registered in England & Wales No. 4396810
Registered office: The Aon Centre | The Leadenhall Building | 122 Leadenhall Street | London | EC3V 4AN

Follow us on twitter @aonhewittuk

Copyright © 2018 Aon Hewitt Limited. All rights reserved.
Aon Hewitt Limited is authorised and regulated by the Financial Conduct Authority.
Nothing in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. It should not be taken as financial advice and action should not be taken as a result of this document alone. Consultants will be pleased to answer questions on its contents but cannot give individual financial advice. Individuals are recommended to seek independent financial advice in respect of their own personal circumstances.

InTouch technical update