



Department  
for Work &  
Pensions

# Strengthening The Pensions Regulator's Powers: Notifiable Events (Amendments) Regulations 2021

---

8 September 2021

# Contents

- Introduction ..... 3
  - About this consultation ..... 3
- How we consult ..... 5
  - Consultation principles ..... 5
  - Feedback on the consultation process..... 5
  - Data Protection and Confidentiality ..... 5
- The Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021 ..... 7
  - Background ..... 7
  - Proposed provisions ..... 8
- Impact Assessment ..... 14
- Conclusion ..... 15
- Questions: ..... 15

# Introduction

This consultation seeks views from industry on the proposed drafting of regulations in relation to Part 3 of the Pension Schemes Act 2021.

Section 69 of the Pensions Act 2004 requires trustees and employers in relation to the scheme to notify The Pensions Regulator of prescribed events. The Government is extending the type of events that trustees and employers in relation to a scheme are required to notify The Pensions Regulator about. These draft regulations set out the proposed additional prescribed events and the removal of one existing prescribed event.

In addition to this, the Pension Schemes Act 2021 inserts new section 69A which introduces the duty for a relevant person to give notices and statements to The Pensions Regulator in respect of certain events. These statements will set out the implications for the scheme in relation to specified corporate events relating to the employer, and how any risks to the scheme will be mitigated. This information will be required at a later point in a corporate transaction than a notifiable event notification, when there is greater certainty as to whether the transaction is going ahead, its nature and the implications for the scheme. This new duty is proposed to apply to three events: the two proposed new notifiable events plus an existing one. The draft regulations set out these events.

## About this consultation

### Who this consultation is aimed at

Pension Industry bodies and professionals;  
Employers and representative organisations;  
Trustees and scheme managers;  
Pension Scheme members and beneficiaries; and  
Any other interested parties.

### Purpose of the consultation

The purpose of the consultation is to draw interested parties' attention to the proposed draft regulations and seeks views on any impacts, including any unintended consequences that the draft regulations might have on specific groups.

## Scope of consultation

This consultation applies to Great Britain.

Occupational pensions policy is a reserved matter for Great Britain and is a devolved matter for Northern Ireland. It is anticipated that Northern Ireland will make corresponding regulations.

## Duration of the consultation

The consultation period begins on 8 September 2021 and runs until 27 October 2021. This represents an appropriate timespan due to the targeted and technical nature of the issues being asked about. Please ensure your response reaches us by that date as any replies received after that date may not be taken into account.

## How to respond to this consultation

Please send your consultation responses to:

[pensions.consultations@dwp.gov.uk](mailto:pensions.consultations@dwp.gov.uk)

Due to Covid-19, dealing with hard copies of responses is more difficult than normal as our staff may be working from home. Where possible, please send responses to the email address above.

If you are unable to email and prefer to send your response by post, please address it to:

Defined Benefit: The Pensions Regulator Powers team

DWP Consultation Coordinator

4th Floor

Caxton House

Tothill Street

London

SW1H 9NA

## Government response

We will aim to publish the government response to the consultation on the [GOV.UK](https://www.gov.uk) website within 12 weeks.

# How we consult

## Consultation principles

This consultation is being conducted in line with the revised [Cabinet Office consultation principles](#) published in March 2018. These principles give clear guidance to government departments on conducting consultations.

## Feedback on the consultation process

We value your feedback on how well we consult. If you have any comments about the consultation process (as opposed to comments about the issues which are the subject of the consultation), including if you feel that the consultation does not adhere to the values expressed in the consultation principles or that the process could be improved, please address them to:

DWP Consultation Coordinator  
Legislative Strategy Team  
4<sup>th</sup> Floor, Caxton House  
Tothill Street  
London  
SW1H 9NA

Email: [caxtonhouse.legislation@dpw.gsi.gov.uk](mailto:caxtonhouse.legislation@dpw.gsi.gov.uk)

## Data Protection and Confidentiality

For more information about what we do with personal data, you can read DWP's [Personal Information Charter](#). The information you send us may need to be passed to colleagues within the Department for Work and Pensions, published in a summary of responses received and referred to in the published consultation report.

All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the 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 provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this.

To find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact the Central Freedom of Information Team: Email: [freedom-of-information-request@dpw.gov.uk](mailto:freedom-of-information-request@dpw.gov.uk).

The Central FoI team cannot advise on specific consultation exercises, only on Freedom of Information issues. Read more information about the Freedom of Information Act.

# The Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021

This section provides background to and a commentary on these amending regulations. Specific questions are asked after each subsection, and also collated after the conclusion at the end of the document.

## Background

In 2018, the Government undertook the consultation '*Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator*', which covered enhancements to a range of The Pensions Regulator's powers. One area was that of 'Notifiable Events'. These are events which have the potential to cause harm to a pension scheme – for example, by increasing the chances of the sponsoring employer becoming insolvent or by impacting on the employer covenant. Legislation requires that The Pensions Regulator is notified by the employer when specified events take place. The consultation discussed whether all relevant transactions were covered at appropriate times and considered whether further types of transactions should become notifiable events.

The 2019 Government response to the above consultation set out proposals to improve The Pensions Regulator's powers so that, among other enhancements, it can be sighted and get involved where necessary ahead of time, before sponsoring employers make changes which could impact their ability to support the pension scheme.

The proposals were to take forward the introduction of two new employer-related notifiable events:

- (1) Sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20 per cent of the scheme's liabilities; and
- (2) Granting of security on a debt to give it priority over debt to the scheme.

Additionally, the Government confirmed it would remove the existing notifiable event of wrongful trading.

The Government also stated its intention to legislate for the introduction of what was then referred to as a Declaration of Intent for the above two new notifiable events and

one existing one, to be provided to The Pensions Regulator by the transaction's corporate planners.

This was legislated for in the Pension Schemes Act 2021 which inserted new section 69A into the Pensions Act 2004 (PA04). This introduces the duty for a relevant person to give notices and statements to The Pensions Regulator that set out the implications for the scheme in relation to certain corporate events relating to the employer, and how any risks to the scheme will be mitigated.

The notice and statement will be required at a later point in a corporate transaction than the notifiable event notification, when there is greater certainty as to whether the transaction is going ahead, its nature and the implications for the scheme. This new duty is proposed to apply to the three events listed in the Government response.

The draft regulations therefore insert:

- additional information and definitions;
- two new notifiable events under section 69 of PA04, slightly modified since the consultation response to apply to all employers when a decision in principle has been taken; and
- the three events which require a notice and statement under new section 69A;

## **Proposed provisions**

These regulations amend The Pensions Regulator (Notifiable Events) Regulations 2005 (SI 2005/900).

### **New definitions**

Regulation 2 of the draft regulations makes the following changes.

Paragraph (2) inserts definitions into existing regulation 1(2) (interpretation) for new terms used in the amendments, namely "assets", "decision in principle" and "sale".

"Decision in principle" is defined as "decision prior to any negotiations or agreements being entered into with another party". The "decision in principle" is intended to be the point at which the employer has made a decision to go ahead (for example, to sell the asset) and will then start to negotiate the specific terms and draw up the



contract. It is at that point, the company should start to consider the impact on the pension scheme and what mitigation will be required.

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

## **Removal of wrongful trading as a notifiable event**

Paragraph (3) removes wrongful trading from being a notifiable event by omitting regulation 2(2)(c). As explained in the 2019 Government response, this is not to diminish the seriousness of wrongful trading. It is an acknowledgement that the requirement is ineffective. A director is unlikely to admit wrongful trading, as such an admission may form the basis of a claim under the Insolvency Act 1986, with personal financial consequences. The Pensions Regulator has confirmed it has never received a notification under this provision. Furthermore, the introduction of the wider suite of powers for The Pensions Regulator introduced in the Pension Schemes Act 2021, provides far better protection for scheme members in terms of checks and balances against bad conduct.

## **Amendment of existing notifiable event**

As previously explained, the requirement under section 69A to issue a notice and statement at the point main terms have been proposed will apply to the existing notifiable event of where a controlling company decides to relinquish control of the employer company.

Paragraph (3) therefore makes minor amendments to existing regulation 2(2)(f) to make it clear that the existing notifiable event notification regarding relinquishing control should take place when a decision in principle is made and is now therefore the first stage in a two stage process (where stage two is the notice and statement).

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

## **New Notifiable Events**

Paragraph (3) inserts two new notifiable events:

The first is the intended sale by the employer of a material proportion of its business or assets, in respect of which a decision in principle has been reached. This is done by the insertion of a new paragraph (2)(i) in existing regulation 2. A definition of “material proportion” is also inserted at new paragraph (5) and discussed below.

The rationale behind this is that these transactions can be significant because they frequently indicate a change in covenant support for a pension scheme, for example:

- The sale of a material part of a sponsoring employer's business may significantly reduce the ability of the sponsoring employer to support the pension scheme (lower turnover, lower profits and lower amounts of cash generated);
- Sales of assets / business activities within corporate groups can often be structured by way of inter-company debt which the scheme employer may not be able to realise for future funding of the scheme; and
- Sales structured as business and asset sales can be used to transfer the profit-generating activity from one legal entity to another whilst 'leaving behind' certain liabilities, including Defined Benefit pension schemes (separating them from available financial support).

The original intention, as confirmed in the 2019 Government response to the consultation was that this requirement would apply to employers responsible for 20 per cent or more of the scheme's funding. The 20 per cent threshold would only have applied to multi-employer schemes (a single employer will always be responsible for 100 per cent of the scheme's liabilities). The intention was to prevent unnecessary work for employers, schemes and The Pensions Regulator by not requiring the notification and statement where there was little likelihood of the transaction having a significant effect of the employer's ability to support the scheme.

However, the structures of multi-employer schemes can be complex and varied and the Government is now persuaded there are circumstances where that policy intention could not be met – and that it would be challenging for some schemes and employers to establish whether a particular threshold of liabilities had been met regarding one of the scheme employers.

The possibility that scheme trustees would be put under significant pressure and expense to try and establish in a short time whether the liability threshold had been met is also a factor to be considered.

Nor is it the Government's intention to impose significant extra work on an employer in a multi-employer scheme in order to see whether it falls within the scope of the regulation.

Therefore, the 20 per cent threshold has been removed in the draft regulations. This means that employers will only have to concern themselves with establishing whether the transaction affects a material part of their business or assets.

**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?**

The second new notifiable event is the intended granting or extending of a relevant security by the employer over its assets – a decision in principle by the employer to

grant or extend a relevant security over its assets, such that, should the employer become insolvent, the secured creditor would be ranked above the scheme in the order of priority for debt recovery. This is achieved by inserting new paragraph (2)(j) in existing regulation 2. Relevant security is defined in new paragraph (4) and discussed below.

The rationale behind adding this new event, is that the granting of security on a debt to give it priority over debt to the scheme means that, in the event of debt recovery should the employer become insolvent, the scheme is more likely to receive a smaller amount of debt than if the security wasn't in place.

## Notice and Statement

Paragraph (3) also inserts a new paragraph (3) into existing regulation 2 which lists the three events where a notice and statement must be given to The Pensions Regulator under section 69A PA04. The notice and statement must be given when the main terms of the relevant event have been proposed, and the statement must indicate the impact on the scheme of the transaction and what action is being taken to mitigate any detrimental effects.

The events are:

- (a) the intended sale by the employer of a material proportion (which is defined in new paragraph (5)) of its business or assets, in respect of which the main terms have been proposed;
- (b) the intended granting or extending of a relevant security by the employer over its assets which would result in the secured creditor being ranked above the scheme in the order of priority for debt recovery, in respect of which the main terms have been proposed; and
- (c) where the employer is a company, the intended relinquishing of control by a controlling company of the employer company, in respect of which the main terms have been proposed, or where the controlling company relinquishes such control without a decision to do so having been taken, the relinquishment of control of the employer company by the controlling company.

The intention is to balance the desirability of The Pensions Regulator and the trustee having the relevant information as early in the transaction as possible with the acknowledgement that full details of the transaction and any mitigation in respect of the scheme may not be available until nearer the end of the process.

Section 69A(10) confirms that a copy of the notice and statement must be given to the trustees or managers of the scheme at the same time.

**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?**

## **Meaning of “relevant security”**

Paragraph (3) additionally inserts a new paragraph (4) into existing regulation 2 which gives the meaning of “relevant security” for the new notifiable event of granting security over an asset.

New paragraph (4) explains that a relevant security is a security granted or extended by the employer, or one or more subsidiaries of the employer, comprising more than 25 percent of either the employer’s consolidated revenues or its gross assets.

A ‘relevant security’ includes both a fixed charge or floating charge over assets of the employer or the wider employer group, and an all assets floating charge which gives the charge-holder the right to appoint an administrator. It does not include the refinancing of an existing debt, security for specific chattels, or financing for company vehicles.

The Pensions Regulator will provide more information in its code of practice and accompanying guidance.

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

## **Meaning of ‘material proportion’**

Paragraph (3) also inserts a definition of “material proportion” at new paragraph (5). For these regulations, a material proportion of the business of the employer is one that accounts for more than 25 per cent of its annual revenue and a material proportion of the assets of the employer is one that accounts for more than 25 per cent of the gross value of its assets.

Revenue and assets in this context are either those recorded in the most recent annual accounts within the meaning given in section 471 of the Companies Act 2006, or where the employer is not required to file annual accounts, its accounting records.

Material proportion was not defined in the Government response. However, the aim is to capture significant changes and the Government believes that 25 per cent of revenue or assets provides a simple way of assessing this. Using criteria such as the size of the corporate group, the pension scheme, the deficit or the amount needed to keep the scheme sustainable would add significant complexity for an employer when trying to assess if the transaction fell within the regulations. The threshold of 25 per cent will capture significant transactions, whereas a much lower threshold might create considerable additional work for employers, trustees and The Pensions Regulator in cases where the transaction would not have a significant effect on the employer’s ability to support the scheme.

However, several smaller transactions, when taken together, could have the same effect on the employer’s ability to support the scheme as one large event. There may be rational reasons for a restructuring to involve more than one transaction but it may also be a missed opportunity to consider the impact on the pension scheme. It also opens up the possibility of an unscrupulous employer deliberately arranging a series of lower level transactions to avoid scrutiny.

The definition of ‘material proportion’ will therefore include other disposals made or agreed in the 12 months prior to the date of the notifiable event.

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

**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?**

**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.**

## **Contents of accompanying statement**

Section 69A(9) of the 2021 Act provides a non-exhaustive list of information that the statement may contain but shows that the information will be prescribed. Paragraph (3) inserts a new paragraph (6) into the existing regulation 2 to describe the information that the statement must contain. This information is predominately based on that in section 69A(9) but additionally includes any adverse effects on the employer's ability to meet its legal obligations to support the scheme. The five requirements are as follows:

- (i) a description of the event, including the main terms proposed,
- (ii) a description of any adverse effects of the event on the eligible scheme,
- (iii) a description of any adverse effects of the event on the employer's ability to meet its legal obligations to support the scheme,
- (iv) a description of any steps taken to mitigate those adverse effects, and
- (v) a description of any communication with the trustees or managers of the eligible scheme about the event.

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

## Meaning of material change

The Pension Schemes Act 2021 also introduces a requirement at section 69A in prescribed cases for the appropriate person to notify The Pensions Regulator of a material change in the event or the mitigation. Therefore, paragraph (3) also inserts into existing regulation 2, a new paragraph (7) which defines 'material change' as a change in the terms of the intended sale, the intended granting or extension of security or the relinquishing control, or a change in the steps taken to mitigate any adverse effects of the event.

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

## Impact Assessment

The impact assessment for the Pension Schemes Act 2021 assessed that businesses will incur costs at the familiarisation stage of under £1 million. The ongoing costs will be under £1 million per annum, these are comprised of; the cost of preparing the statements and notices, the cost of assessing the effect of the transaction or event on the pension scheme and the cost of putting mitigations in place. There are no material changes to the costs since the Pension Schemes Act 2021 assessment. Consideration of impacts will be conducted as part of this consultation. These policies will be kept under review to ensure that they remain relevant and capture issues most likely to be of detriment to the pension scheme.

# Conclusion

These draft regulations, alongside the changes to primary legislation inserted by the Pension Schemes Act 2021 deliver on our manifesto commitment to equip The Pensions Regulator with powers to be sighted on specific events enabling it to get involved where sponsoring employers intend to make changes which could significantly impact the pension scheme.

This consultation seeks views on the proposed drafting of the regulations for The Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021. It is a targeted consultation and we welcome your comments and suggestions on the questions raised below:

## Questions:

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

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

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?

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?

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

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

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?

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.

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

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