Employer Debt – (Section 75 of the Pensions Act 1995)

Response to the consultation on draft regulations

December 2011

DWP Department for Work and Pensions

Contents

Introduction

1. The consultation on these regulations[1] began on 28 June and ended on 10 August 2011. Nearly 50 responses were received. Responses came from adviser bodies, representative organisations and from employers sponsoring pension schemes. A list of respondents is at Annex A.
2. The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2011 S.I. 2011/2973 are planned to come into effect on 27 January 2012.
3. The regulations are available at http://www.legislation.gov.uk/uksi/2011
4. The response to the consultation is available on the Department's website at http://www.dwp.gov.uk/consultations/2011/
5. The implementation stage Impact Assessment is also available on the Department's website at http://www.dwp.gov.uk/publications/impact-assessments/
6. A paper copy of this response to the consultation can be obtained from:

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7. This response to the consultation describes the policy underpinning the changes being made to the existing legislation. Any comments on the legislation should not be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a court.

[1] Employer Debt (Section 75 of the Pensions Act 1995) Consultation on draft regulations June 2011 http://www.dwp.gov.uk/consultations/2011/employment-debt.shtml

Consultation questions

Introduction

1. The consultation document sought the views of respondents on eight questions. This chapter summarises the responses to the consultation questions. Where respondents' comments are more relevant to a particular regulation, they are reported on in the chapter "Commentary on regulations".

Questions

Questions 1 – 3 Flexible apportionment arrangements

Question 1 – We would welcome your views on the Flexible Apportionment Arrangement proposal.

2. The flexible apportionment arrangement (FAA) proposal was welcomed by a large number of respondents. They said it would be a helpful addition to the methods of dealing with an employer debt; it would save time and resources and reduce actuarial costs; and it addressed some of the uncertainties that existed with scheme apportionment arrangements.
3. There were however some reservations about the FAA. Some respondents suggested it would have been better to have extended the existing options, particularly the scheme apportionment arrangement, rather than create a new option. Other respondents who represented pension schemes for charitable or voluntary employers were concerned that the FAA would not assist non-associated employers. Another respondent said it was essential that the trustees had to be satisfied about the arrangements before they could take effect. (Where "trustees" is used in this document it also means managers.)
4. **Response** A number of respondents raised issues about scheme apportionment arrangements; these are considered in the chapter "Commentary on regulations". Whilst the FAA will not assist non-associated schemes, some may be helped by the extension of the period of grace. Non-associated schemes are also discussed in the chapter "Other issues".

Question 2 – Do the proposals include sufficient protection for members?

5. The two key elements of protection are that the funding test must be satisfied and the trustees must consent to the arrangements. Most respondents said these should provide sufficient protection for members. Respondents drew parallels with

the scheme apportionment arrangement, where the funding test provided effective assurance to the members.

6. However there was a concern that with the FAA it would not be possible to make a part-payment of the debt. Respondents noted that part-payments of the debt were possible with scheme apportionment arrangements. They said that part-payments provided extra funding for the scheme and they recommended that the same flexibility should be extended to FAAs.

7. As a further safeguard, respondents suggested that when trustees entered into an FAA, it should be a notifiable event.

8. **Response** The regulations have now been amended to allow part-payments. Please see **new regulation 6E(2)(b)(i)** and **(e)** and **new regulation 6E(5)**. **New regulation 13** makes an amendment which provides that the FAA is a notifiable event.

Question 3 – Are the proposals easier for people to use than the restructuring easements?

9. Respondents were generally of the view that the new FAA would be easier to use than the existing restructuring easements. However there was a cautionary note that this would only be evident once real cases had been dealt with. Comparing the restructuring easements with the FAA, respondents noted that the flexibility in the latter more accurately reflected the reality of corporate restructurings. For example in corporate restructurings, it may be desirable for the leaving employer's assets to be transferred to more than one company in the group, but this was not reflected in the requirements of the restructuring easements.

10. Respondents also mentioned a problem they had encountered with the restructuring easements. Their original understanding had been that if a number of steps were successfully carried out, the transaction could go ahead without further trustee intervention. Respondents said that there was now some uncertainty as to whether the restructuring easements were actually contingent on trustee agreement. In particular there was a question as to whether trustee consent was needed where one employer was taking over the liabilities of another, either under a legally binding agreement or was to be treated as responsible where a legally enforceable agreement was impossible.

11. Another respondent said that the FAA may be easier to use than a scheme apportionment arrangement because of legal uncertainties around the latter. Uncertainties included whether the debt needed to be certified and whether it was amounts of debt or the liabilities that should be apportioned.

12. One respondent commented that the FAA would place a major responsibility on trustees and good guidance would be very helpful to them.

13. Mention was also made that in some schemes, before the trustees would enter into an FAA, they were likely to want an estimate of the debt. The respondent said it would be useful if the task of calculating a notional debt could be simplified.

14. **Response** In the restructuring easements' requirements, there is no requirement for trustee consent *per se*. But the regulations do require the trustees to play their part in carrying out some of the steps. The requirement for the receiving employer to take over the scheme liabilities of the exiting employer contains no specific role for the trustees. The legal advice which respondents have obtained may be that the trustees have to be parties to arrangements to transfer liabilities from one employer to another. The Government's view is that the trustees are responsible for the pension scheme and it is not unreasonable that they should have a say in these matters. Trustee involvement in these issues may take more time but should contribute to the maintenance of good relations between the parties in the scheme.
15. It should be noted that in the requirements for the FAA, **new regulation 6E(2)(b)** contains much the same requirement for the replacement employer to take over responsibility for the scheme liabilities of the leaving employer. One of the requirements for the FAA is that trustees must consent to the arrangements (**new regulation 6E(2)(c)(i)**) and in the consultation this was seen as one of the essential safeguards.
16. The Pensions Regulator intends to update its guidance "Multi-employer schemes and employer departures" to include material on the flexible apportionment arrangement.
17. In terms of the other comments made by respondents, scheme apportionment arrangements are discussed more fully in the chapter "Commentary on regulations". The Government has no plans to introduce any requirements on notional amounts of employer debt; this is a matter best left to schemes and their advisers.

Questions 4 - 5 Period of grace provisions

Question 4 – We would welcome your views on the proposal to extend the period of grace to up to 36 months.

18. Most respondents said this extension would be helpful but others had reservations. Respondents said it was not clear why this extension was necessary. Others were concerned that it would allow an employer debt to be deferred for up to three years, during which the funding position of the scheme could deteriorate. To mitigate the risks, respondents suggested limiting the period to 24 months. Respondents noted that the way that trustees exercised this discretion would be very important and they suggested that guidance for trustees would be useful.
19. Other respondents commented that the period of grace was a little used provision and it might be simpler to just extend the 12 months to 24 months across the board, without the need for trustee discretion.

20. **Response** The period of grace is being extended in response to representations made to Government. However, as respondents note, there are risks in allowing an employer debt not to be paid for up to three years. The Government's view is that the best safeguard is trustee discretion. Trustees will have the flexibility to extend as they see fit eg if they are cautious, for 6 month or 9 month periods (to the maximum of 36 months). An across-the-board extension of the period of grace to 24 months would limit the period but would not entirely address the risks.

21. The Pensions Regulator has no plans to issue guidance on the period of grace. Currently queries about the requirement are rare. However if volumes of queries do increase, the Regulator will review the position.

Question 5 – We would welcome your views on the proposal to extend the period within which employers must write to trustees to two months.

22. Respondents considered it was reasonable to extend the notification period to two months. However some respondents argued for an extension to three months and one suggested six months. They said it may not be immediately apparent that an employment-cessation event[2] had occurred where schemes had lots of small employers, or where multiple pension arrangements were in place for employees.

23. **Response** The proposal to extend to two months arose out of concerns expressed to the Government about payroll cycles extending beyond one month. An extension to two months was considered appropriate to deal with these issues. Extending it to make further accommodations for other circumstances would increase the risk of employers and trustees losing sight of the debt event. The Government has therefore decided to continue with the proposal of a notification period of two months.

Questions 6 – 8 Impact Assessment

Question 6 – We would welcome your views on the Government's estimates.

24. Respondents suggested the estimates in the Impact Assessment for savings to business as a result of these Regulations might be underestimates, but no firm evidence was put forward to support this view. Respondents commented that the FAA would be easier to use than other procedures for dealing with employer debts and that some people would use the FAA where they would otherwise have used a scheme apportionment arrangement. One respondent suggested that there might be a greater use of the FAA in the early years after its introduction, because of employers who had been reluctant to restructure because of concerns about triggering an employer debt.

[2] An employment-cessation event occurs when an employer no longer employs any active members of the pension scheme, whilst other employers still employ active members.

25. **Response** The reactions to the question provide a helpful indication that the estimates are on the right lines.

Question 7 – We would welcome any additional data that you could supply to improve the robustness of the Government's estimates.

26. A couple of respondents provided some information about how employer debts were dealt with in their schemes.

27. **Response** Although the information provided was helpful and of interest, it could not be extrapolated to inform the estimates in the Impact Assessment.

Question 8 – Previous employer debt Impact Assessments have estimated the benefits of the policy as being the foregone interest payments on funds borrowed to meet the inappropriately-triggered debt. However, there is a benefit to the debt being paid off at the point it is crystallised, because liabilities no longer increase over time (as discounting unwinds). This needs to be netted off against the benefits of the foregone interest payments. Does this represent a reasonable methodology for estimating the benefits of the policy?

28. Some respondents said the methodology was a reasonable approach for an Impact Assessment. But they said that for different multi employer groups there could be a significant variation in effect because of taxation and accounting issues.

29. Other respondents suggested that the estimates of savings should focus on the opportunity costs as between the payment of the debt and the ability for extra investment in the business if the FAA was used. In a similar vein, one respondent commented that in a well funded scheme, the payment of an employer debt could represent a "trapped surplus" and the saving should be measured in terms of that amount.

30. By contrast, some respondents noted that not all employers borrowed to meet the debt. In some cases this was because they were unable to borrow; in other cases, they may prefer to pay out of cashflow.

31. One final point made by a couple of respondents was that the real savings afforded by the FAA would arise from the ability of companies to operate more efficiently, and from the administrative savings which the more straightforward FAA process would give rise to.

32. **Response** Some respondents provided quite detailed expositions of alternative methodologies. But respondents noted that the complexities of companies' business and financial arrangements meant that no one methodology could capture all the possible variations. In the event, the Government has decided to make no changes to the methodology as set out in the Impact Assessment.

33. However it should be noted that some changes have been made to the Impact Assessment which have the effect of increasing the saving to business. Since March 2011, when the consultation stage Impact Assessment was prepared, new

economic data has been published and this has now been factored into the calculations. In particular, the figures have been updated to take account of more recent information on scheme funding and the spread of AA yields over gilts. The effect of these revised figures is that the annual savings for business from these regulations have increased from £17 million to £28 million. This is because the recent losses in financial markets have increased scheme deficits and hence the amounts of employer debts that would be payable. The corollary is that if an employer debt does not need to be paid as a result of these regulations, the savings to employers increase.

Commentary on regulations

Introduction

1. The main changes made to the draft regulations are considered in this chapter. Other relevant issues raised in the consultation are also discussed.
2. In this document, the "Employer Debt Regulations" means the Occupational Pension Schemes (Employer Debt) Regulations 2005 S.I. 2005/678.
3. For ease of reference, the following terms are used:
   - **existing regulation AA** – refers to a regulation in the Employer Debt Regulations
   - **draft regulation BB** – refers to a draft regulation in the regulations issued for consultation
   - **new regulation CC** – refers to a regulation contained in the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2011 which have now been made and laid.

NEW REGULATION 4 [Amendment of regulation 2 of the Employer Debt Regulations]

4. **Draft regulation 4(3) - amending the definition of "receiving employer"** The definition of "receiving employer" was inserted into the Employer Debt Regulations in April 2010 by the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 S.I. 2010/725. In one of its reports, the Joint Committee on Statutory Instruments (JCSI) commented on the way sub-paragraph (b)(ii) of the definition was drafted. Sub-paragraph (b)(ii) provides that a receiving employer can be the new legal status of the exiting employer.
5. In the amendments proposed by **draft regulation 4(3)**, the intention was to amend the definition of "receiving employer" to address the concerns raised by the JCSI. It is now apparent that a more extensive amendment will be required. The amendment has therefore been withdrawn from these regulations. The Government will consider further and consult on a revised amendment in due course.
6. The amendment which was to have been made by **draft regulation 6E(5)**, and which similarly referred to a change of legal status, has also been withdrawn. This is discussed later under the heading "**Draft regulation 6E(5)**".
7. Apart from the above, respondents took the opportunity to raise a number of other queries about employers that change their legal status. One respondent wanted to know if the new employer, following its change of legal status, would count as

an employer for PPF entry purposes. Another respondent wanted confirmation that the purpose and intent of the amendment was to provide for cases where one legal entity ceases to exist and another legal entity is established which has substantially the same commercial identity as the old identity.

8. The reference in the definition of "receiving employer" to change of legal status does not of itself enable an employer to change its status. The definition merely reflects a change that an employer will have made elsewhere, under other legislative provisions. The wider effects of an employer changing its legal status will therefore have to be considered in the context of other relevant legislation. For example, where the effect on PPF entry is cited, the change of legal status would need to be considered in terms of the PPF entry requirements.

9. Finally one respondent wanted to know if the conversion of an existing employer into a European Company (Societas Europaea) would count as a change of legal status. In terms of the policy on the definition of "receiving employer", such a change is intended to count as a change of legal status for the purposes of that definition.

10. **New regulation 4(3) amending the definition of the "funding test"** A number of comments were made about the funding test, contained in **existing regulation 2(4A)** of the Employer Debt Regulations, as well as the amendments proposed to be made to it. Respondents raised a number of issues about how the funding test worked with scheme apportionment arrangements and how it would work with FAAs.

    a. **Definition of "scheme apportionment arrangement"** Respondents were confused by sub-paragraph (d) of the definition of "scheme apportionment arrangement" (contained in **existing regulation 2(1)** of the Employer Debt Regulations). Sub-paragraph (d) provides that an SAA "is entered into before, on or after the applicable time". Respondents were unclear as to whether "entered into" meant the same as the phrase "when the arrangement takes effect" which was used in the funding test. One respondent was of the view that the phrase "entered into" could mean the execution of a deed relating to the debt event.

    b. **Existing regulation 6B(1)** Respondents commented that **existing regulation 6B(1)** of the Employer Debt Regulations provides that the funding test must be met before the trustees enter into an SAA. They commented that this seemed at odds with sub-paragraph (d) of the definition of SAA, discussed above, which provides that an SAA may be "entered into before, on or after the applicable time".

    c. **Funding test and FAA** In relation to the proposed amendment to extend the funding test to the FAA, as set out in **draft regulation 4(4)(b)**, respondents commented that they thought there was a conflict between the requirements that the trustees should consider the position "when the arrangement takes effect" and "the date the trustees or managers expect a flexible apportionment arrangement to take effect".

11. In terms of the policy on scheme apportionment arrangements, the intention is that the arrangement should only take effect when all of the conditions in the definition of "scheme apportionment arrangement" are met; and when the cessation employer has ceased to be a former employer by virtue of the provisions of **existing regulation 9** of the Employer Debt Regulations. In carrying out the funding test, the trustees will need to look forward to the point when they expect all of these actions to have been completed and to consider whether, in the time beyond that point, the remaining employers will be reasonably likely to be able to fund the scheme etc. There is a further discussion of scheme apportionment arrangements later in this chapter.
12. In relation to the FAA, some minor amendments have been made to the definition of the "funding test" in order to incorporate references to the flexible apportionment arrangement.

NEW REGULATION 5 [Amendment of regulation 5 of the Employer Debt Regulations]

13. **New regulation 5(4) substituting existing regulation 5(15) of the Employer Debt Regulations** The purpose of this amendment is to clarify the way the requirement is drafted. One respondent acknowledged this but commented on the "all or nothing" nature of **existing regulation 5(15)**. The respondent interpreted the requirement such that the trustees could only take Amount B into account in the assets of the scheme where they were reasonably satisfied that the guarantors had sufficient financial resources to be able to pay all of it. In circumstances where the trustees were not satisfied the guarantors could pay all of Amount B, the respondent suggested it would be reasonable to allow part to be taken into account.
14. Including Amount B in the assets has the effect of reducing the amount of any new employer debt. If the trustees have concerns that Amount B will not be paid, the safest approach for the scheme, in terms of calculating new amounts of employer debt, is to assume that none of it will be paid. An additional consideration is that the Government understands that withdrawal arrangements are now little used. A new requirement to allow trustees to take into account part payments of Amount B would introduce further complexity into the arrangements but in the Government's view there would be no commensurate gain.

NEW REGULATION 6 [Amendment of regulation 6 of the Employer Debt Regulations]

15. **Draft regulation 6(a) of the consultation regulations** A number of respondents commented on this amendment. Some respondents read the amendment as

bringing scheme apportionment arrangements (SAA) to an end, so that in future it would not be possible to use them at all. Other respondents thought that the effect of the amendment would be to prevent SAAs (and regulated apportionment arrangements (RAA)) from being used to reapportion liabilities. Some of these respondents suggested that the SAA should be amended so that it specifically allowed the reapportionment of liabilities.

16. Clarification was also sought on whether SAAs could be a fixed or floating amount, as in withdrawal arrangements. One respondent wanted to know if a debt needed to be certified if an SAA was to be used to apportion the liabilities.

17. The Government's main message in response to these concerns is that it has no plans to revoke the requirements for the SAA or the RAA. The amendment proposed by **draft regulation 6(a)** of the consultation regulations is being withdrawn. Respondents will therefore be able to continue using SAA and RAA in the manner they consider appropriate.

18. In the consultation it was clear that respondents had different interpretations of the legislation and there seemed to be differences in the way that certain terms were understood. In order to facilitate a discussion of these issues in this section, the following terms are taken to have these meanings:

    a. **a "fixed" amount of debt** is taken to mean the amount of the employer debt calculated as at the applicable time.

    b. **a "floating" amount of debt** is taken to mean the apportionment of the liability proportion of the departing employer (eg 1/10th of the liabilities) to another employer. At some future date that proportion would be applied to the deficit that exists at that time. (At that later date, the amount of the debt so calculated may be smaller or larger than the "fixed" amount of debt calculated as at the applicable time.)

    c. **the reapportionment of liabilities** is taken to mean the reattribution of the departing employer's scheme liabilities and obligations to another employer remaining in the scheme. This is often referred to as one employer "standing in the shoes" of another.

19. The Government's policy towards scheme apportionment arrangements was set out in a consultation document in 2009[3]. Paragraph 27 of that consultation document made clear the Government's view that an SAA meant the reapportionment of an amount of debt, not the reapportionment of the underlying liabilities of the departing employer. The draft regulations contained in that consultation document were intended to provide the methodology for the calculation of a "floating" amount of debt.

[3] Employer Debt – Consultation on draft regulations September 2009 [pages 22 – 24] http://www.dwp.gov.uk/docs/consultation-employer-debt-draft-regs.pdf

20. In the event, the amendments on the "floating" amount of debt were not carried forward into the regulations which were laid and made[4]. In the response to the consultation[5] (paragraph 17, page 4), the Government made clear its reasons for not proceeding with the amendments.

21. In the intervening period, work has been undertaken to see whether a methodology can be developed for the calculation of a "floating" amount of debt which addresses all the issues which were raised in the 2009 consultation. The first conclusion from the work is that the methodology for the calculation of a "floating" amount of debt would need complex regulatory requirements. The second conclusion however is that notwithstanding this complexity, it is quite possible that other, new issues might come to light requiring a series of further ongoing amendments.

22. In the event therefore, the Government has decided not to regulate to provide for the apportionment of a "floating" amount of debt. Instead the focus of efforts has been on developing regulations on the new flexible apportionment arrangement. Many respondents to the consultation said they wanted to be able to reapportion liabilities as a means of dealing with an employer debt, and this is what the flexible apportionment arrangement will deliver.

23. The Government has also considered whether to make any amendments to the scheme apportionment arrangements in relation to the issues raised around the apportionment of liabilities. It is clear from the consultation responses that many respondents have taken the view that scheme apportionment arrangements do allow the reapportionment of liabilities.

24. The Government has not received any reports that this interpretation of the scheme apportionment arrangement requirements has had any detriment to members. And of course, the new flexible apportionment arrangement provides for the reapportionment of liabilities.

25. The Government has therefore decided not to amend the requirements on scheme apportionment arrangements. But additionally it does not intend to make any amendments to address issues that arise from the interpretation that SAAs can be used to reapportion liabilities. The Government considers that the best way forward is to work on the successful introduction of the FAA. Employers and schemes can then use the FAA to apportion liabilities as a means of dealing with an employer debt.

26. Therefore to reiterate the points made above at the start of this discussion: scheme apportionment arrangements are not being abolished; and the

[4] The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 S.I. 2010/725.

[5] Employer Debt – Government response to the consultation on draft regulations March 2010 http://www.dwp.gov.uk/docs/employer-debt-draft-regs-response.pdf

amendment proposed by **draft regulation 6(a)** of the consultation regulations is being withdrawn.

27. **New regulation 6(b) substituting regulation 6(4)(b) of the Employer Debt Regulations** One respondent could not understand the purpose of this amendment. Another respondent wanted to know if it was a clarificatory or substantive amendment.

28. The **existing regulation 6(4)(b)** applies to "pensionable service with more than one employer". An issue was raised with Government about a member whose pensionable service was with only one employer. The policy intent is, and always has been, that all of the service of that member should be attributed to that employer. This is common sense and there seems no other rational outcome. The amendment makes that policy clear.

29. A further comment on this draft regulation was in relation to the treatment of transfers into the scheme. The policy is that where a member is employed by Employer A and, during that period of service, a transfer payment is received by the scheme in respect of that member, the liabilities that the transfer payment represents are to be attributable to Employer A.

30. The respondent instances two cases which they think seem to fall outside the requirements. Both of the cases seem to arise out of bulk transfers. In the first case, the member's service is only with Employer A; but by the time the transfer-in payment arrives, the member has retired. In the second case, the member has service with several employers in the group. A transfer payment has been received during a period of service with one of the employers, but scheme records do not allow the relevant employer to be identified. The respondent suggests that the liabilities should be attributed to Employer A in the first case, and in the second case, to the member's first employer in the scheme.

31. The respondent sought an amendment to address these two cases. Any amendment which affects attributions under existing regulation 6(4) may well have significant financial implications for employers affected by it. The Government would not want to make any substantive amendment to regulation 6(4) unless it had been consulted on first. The second point however is whether Government should seek to cover every eventuality by means of regulation. Arguably in these two cases, reasonable attributions could be made in the light of the existing regulation and scheme circumstances. The Government has not therefore included any amendment on these issues in the regulations. If there are further representations in future about other circumstances and cases, the Government will look at this again.

32. **Existing regulation 6(4)(c)(i)(aa) &(bb)** One respondent commented that they still found it unclear whether sub-paragraphs (aa) and (bb) were alternatives or whether the former had to be applied before the latter. The respondent also found it was unclear whether both sub-paragraphs (aa) and (bb) only applied where the member's last employer was unknown; or whether sub-paragraph (bb) applied on its own where the member's last employer was not known.

33. No amendments have been included in the regulations on these issues. Because this regulation can have a significant effect on the amount of employer debt an employer is liable to pay, the Government would not want to make any changes without a proper consultation on draft amendments.

NEW REGULATION 7 [Amendment of regulation 6ZA of the Employer Debt Regulations]

34. **Existing regulation 6ZA** defines the term "employment-cessation event". **New regulation 7** adds a new paragraph (7) into the definition. It provides that an employment-cessation event does not occur where two requirements are met. Firstly the conditions of **new regulation 6E(2)** are met. Secondly the leaving employer ceases to employ any active member of the scheme, in the terms of **existing regulation 6ZA(1)**, and this occurs before the end of a period of 28 days beginning with the day on which the conditions of **new regulation 6E(2)** are met.
35. The intention behind this amendment is to address an issue raised in the consultation. Respondents noted that the FAA could take effect but the leaving employer could continue to employ active members of the scheme indefinitely. Whilst this is unlikely to occur in most cases, it is anomalous and could cause uncertainty. The regulations have now been amended to address this issue. One amendment is as described above. **New regulation 6E(1)(b)(ii)** now provides that the FAA takes effect at the point where the conditions in **new regulations 6E(2)** and **6ZA(7)** are met. In effect therefore, in order for the FAA to take effect, the leaving employer must have ceased to employ any active members of the scheme.

NEW REGULATION 8 [Amendment of regulation 6ZB of the Employer Debt Regulations]

36. **Existing regulation 6ZB(17)** lists different categories of liabilities. **New regulation 8** has been amended to make clear that "liabilities" include contingent as well as actual liabilities.

NEW REGULATION 9 [Amendment of existing regulation 6A of the Employer Debt Regulations – "periods of grace"]

37. Respondents were concerned about the practicalities of extending the period of grace and in particular the notifications to be sent between the employers and trustees. Respondents noted that the regulation only provided for the extension of the period. It made no provision about how to apply for an extension; or for any notification from the trustees to say it had (or had not) been granted; and there was no provision as to how an employer should apply for further extensions to the period. The new period of grace requirement is essentially an arrangement between the trustees and employers about the payment of a debt. The legislation enables periods of grace to be put in place, but the Government's view is that the scheme arrangements to give effect to the easement are best left to trustees and employers. In particular it would be over-prescriptive to set out in regulations the details of all of the notifications required to be used in the arrangements.

38. One respondent wanted an amendment to the draft regulation to provide for the right of appeal to the Pensions Regulator if the trustees unreasonably refused to extend the period of grace. It is to be expected that trustees will sometimes refuse to extend the period of grace. Usually there will be good grounds for them to do so. The Government expects it will be very rare that trustees will make unreasonable decisions. As such, it would be disproportionate to introduce a new Regulator-based appeals mechanism and the Government has no plans to do so. In the first instance if there is a dispute between the trustees and an employer on this issue, it would be best if it could be resolved by discussion or mediation within the scheme.

39. **New regulation 9(2) amending existing regulation 6A(1)** Respondents suggested that the phrase "as soon as possible" was confusing. The regulation has been amended to remove the phrase.

NEW REGULATION 10 [Insertion of regulation 6E into the Employer Debt Regulations – "flexible apportionment arrangements"]

40. **Summary** Following the consultation, some changes have been made to the requirements on flexible apportionment arrangements. The main changes are as follows:

- **Frozen schemes** The FAA can be used in certain frozen schemes (provided for in **new regulation 6E(1)(b)(iii);** in the definitions of "leaving" and "replacement" employers in **new regulation 6E(7)**; and in the amendment made to **existing regulation 9** by **new regulation 11(2)(b)**).
- **Part-payments** It will be possible to make a part-payment in respect of the employer debt (**new regulation 6E(2)(b)(i), (e) and (5)**).

- **Active member** As part of the FAA taking effect, the leaving employer must cease to employ an active member of the scheme (**new regulation 6E(1)(b)(ii)** and **new regulation 6ZA(7)**).

These changes are discussed in more detail below.

41. **General** A number of general points were made about the draft regulation. One respondent said it would be useful if liabilities could be reattributed amongst employers outside of the occurrence of an employment-cessation event. If and when a debt was triggered in the future, the employer to whom the liabilities had been attributed would be responsible for them in the debt calculation. This would effectively allow employers to decide the attribution of liabilities for the purposes of **existing regulation 6(4)**. It would certainly introduce additional flexibility but it could for example have the effect of allowing all the liabilities to be reattributed to a single employer. In part it has been addressed by the extension of the FAA to certain frozen schemes. But to go further would be beyond the scope of this consultation.

42. There was another proposal in the consultation responses that the FAA should be extended to single employer schemes. Under the proposal, the employer's pension liabilities towards the scheme would be transferred to another employer with another pension scheme, but in the same corporate group. Again this proposal goes well beyond the scope of the consultation.

43. One respondent noted that in the FAA requirements there was no provision as to when the employer debt was to be paid. The respondent said that the requirements for scheme apportionment arrangements and withdrawal arrangements both state when the debt should be paid. The FAA policy on this issue is that the debt will be triggered in the usual circumstances, in particular when the replacement employer, who has taken on the liabilities, undergoes a debt event.

44. **Draft regulation 6E(1)** A number of concerns were expressed about the phrase "takes effect". The concerns were primarily around cases where the employer intending to leave the scheme has not yet ceased to employ an active member. Respondents noted that the FAA could take effect when the leaving employer still employed active members of the scheme. No significant issues were raised about cases where an employment-cessation event had already occurred and the FAA was being put in place to deal with it. The following discussion is therefore about issues arising from the first category.

45. Respondents noted that **draft regulation 6E(1)** used the phrase "takes effect" but were unclear at what point an FAA would take effect. Another respondent wanted to know if the conditions in **draft regulation 6E(1)** had to be met simultaneously in order for the FAA to take effect.

46. These concerns are addressed by the amendments made to **new regulation 6E(1)**. The amended regulation now identifies three categories of cases:

(i) cases within **new regulation 6E(1)(b)(i)** where an employment-cessation event has already occurred, or occurs before all the conditions in **new regulation 6E(2)** are satisfied;

(ii) cases within **new regulation 6E(1)(b)(ii)** where the employer has not yet ceased to employ any active member of the scheme by the date that all the conditions in **new regulation 6E(2)** are satisfied;

(iii) cases within **new regulation 6E(1)(b)(iii)** where the leaving employer has ceased to employ an active member, but this did not trigger an employment-cessation event because of the scheme becoming a frozen scheme. In other words, all the employers in the scheme ceased to employ active members at the same time.

47. For category **(i)** cases, the policy is that the FAA takes effect on the date where all the conditions in **new regulation 6E(2)** are satisfied. For category **(ii)** cases, the policy is that the FAA takes effect where all the conditions in **new regulation 6E(2)** are satisfied and the employer has ceased to employ any active members of the scheme within the terms of **new regulation 6ZA(7)**. The date on which the FAA takes effect is therefore the date on which the employer ceases to employ any active members within the terms of **new regulation 6ZA(7)**. For category **(iii)** cases, the policy is that the FAA takes effect on the date where all the conditions in **new regulation 6E(2)** are satisfied. In this respect, category **(i)** and **(iii)** cases are the same.

48. In terms of the other issues raised, there is no need for the conditions in **new regulation 6E(2)** to be met for the first time on the same day; there is also no requirement for the conditions to be met in any particular order. But the full list of conditions must be met and in place on the same day. For example, it does not matter if the trustees, the leaving employer and the replacement employer all give consent on a different day; the condition is met on the day the last one gives consent (as long as the others have not withdrawn consent).

49. For cases where **new regulation 6E(1)(b)(ii)** applies, it would make sense for the trustees and employers to plan to meet the conditions by reference to the date the employer is expected to cease to employ an active member. For example if an employer intended to cease to employ its last active on a date in August, it would be prudent for trustees to conduct the funding test in the period shortly before that date. Similarly it would be good practice for trustee consent to be given only where they were satisfied that all of the conditions were met and at a time adjacent to the date at which the employer is expected to cease to employ an active member. It is not the policy intention that trustees should sign up in advance to carte blanche arrangements for the use of FAAs. Each instance in which an employer intends to cease to employ any active member and an FAA is to be used should be considered on its own merits.

50. **New regulation 6E(2)(a)** In carrying out the funding test, the policy is that the trustees should consider the position after the FAA takes effect. This is reflected by the amendments being made to the funding test by **new regulation 4(3)**.

51. **New regulation 6E(2)(b)** A number of issues were raised about this regulation. Respondents were concerned about the meaning of the phrase “all the liabilities”; they wanted to know if it meant only section 75 liabilities; or all statutory liabilities; or all statutory and non-statutory liabilities. There was also concern that the phrase “at the relevant time” would not allow contingent liabilities to be taken into account. On the other hand there was a proposal that the requirement should be amended so that it referred to “some or all” of the liabilities, thus allowing the leaving employer to continue to be responsible for some of the liabilities.

52. In terms of the meaning of the phrase “all the liabilities”, the policy is that once the leaving employer ceases to be a former employer by virtue of the amendments being made by **new regulation 11(2)(b)** and **(3)**, there should be a clean break and the employer should have no further obligations towards the scheme. The policy is therefore that all of the leaving employer’s liabilities towards the scheme, actual and contingent, should be passed over to the replacement employer. The liabilities are as they stand immediately before the FAA takes effect. The phrase “at the relevant time” has been removed from the regulations.

53. For the purposes of **new regulation 6E(2)(b)**, liabilities are defined by **existing regulation 6ZB(17)**. To clarify that “liabilities” includes contingent as well as actual liabilities, an amendment is being made to **existing regulation 6ZB(17)** by **new regulation 8**.

54. On another issue, respondents also wanted clarification about the situation where two or more replacement employers took over responsibility for a leaving employer’s liabilities. They wanted to know if there was a requirement that this must be a mutual responsibility on a joint and several basis for all the liabilities. The policy is that each replacement employer becomes individually responsible for those liabilities they agree to take on.

55. Some respondents questioned the need for the agreement to be a legally enforceable agreement. The apportionment will apply for the purposes of **existing regulation 6(4)**. In any future debt events, the replacement employer will be responsible for these liabilities. If there should be any dispute, the legally enforceable agreement will provide a safeguard for the trustees.

56. Another issue raised in the consultation was that respondents wanted the facility to be able to make part-payments in respect of the debt. They commented that this was possible with scheme apportionment arrangements. “Part-payments” are now referred to in **new regulation 6E(2)(b)(i)** and **(e)**, and provided for by **new regulation 6E(5)**.

57. **New regulation 6E(2)(b)(ii)** Respondents were concerned about the use of the term “impossible”. Respondents wanted to know more about the scenarios the regulation was intended to address. They also noted that very few situations were “impossible”. In a similar vein, another respondent said that there was an uncertainty of application about the regulation which might lead to abuse.

58. The term “impossible” and the provision in **new regulation 6E(2)(b)(ii)** are drawn from **existing regulation 6ZB(13)(b)(ii)** (the “general easement”). During the

consultation on the regulations which introduced the general easement, some respondents said that it might not be possible to use a legally enforceable agreement. The regulations on the general easement therefore provided an alternative. The intention was that legally enforceable agreements should be used where at all possible. An amendment to the "general easement" regulation as a result of the consultation on those regulations provided a narrow alternative that can only be used where it really is not possible to use a legally enforceable agreement.

59. In commenting on **new regulation 6E(2)(b)(ii)**, respondents suggested that instead of "impossible" some other term should be used, for example "legally ineffective". However such a term is potentially unclear, could create problems and would weaken the requirement to use legally enforceable agreements as the main option. The policy for FAAs is that where at all possible, the reapportionment of liabilities should be carried out by a legally enforceable agreement. In very rare cases, this might not be possible; the regulation therefore makes provision for where this is "impossible". The term is a normal English word and is intended to have its normal meaning.

60. It should be noted that **new regulation 6E(2)(b)(ii)** has not been amended to reflect part-payments. As mentioned above, it is expected the regulation will rarely be used and to make additional provision for part-payments would represent an unnecessary complication.

61. Other respondents were concerned about how **new regulation 6E(2)(b)(ii)** would actually work. They commented that the regulation refers to a state where the replacement employer is treated as responsible for the liabilities; but the regulation does not itself prescribe any mechanism by which that state is to be attained. Respondents suggested the regulations needed to prescribe some mechanism via which the replacement employer could become treated as responsible for the liabilities. The circumstances in which a legally enforceable agreement cannot be used are likely to be rare. Prescribing a mechanism to address these circumstances would be difficult. Instead, if it is impossible for a legally enforceable agreement to be used and the employers have no alternative mechanism, then perhaps the employers need to consider some other way of dealing with the employer debt. But again it is expected that these cases will rarely arise.

62. **New regulation 6E(2)(c)** Respondents commented that there were a number of situations where the leaving employer may not be able to give consent. For example in a frozen scheme, some employers may have been merged with others. Another respondent noted that where an employer was changing legal status and the FAA was to be used to deal with a potential debt event, the leaving employer and replacement employer would not exist at the same time. The FAA can be used in respect of debts that have already triggered. But the policy intention is that these events should have occurred relatively recently and the leaving employer should in most cases still be around. It is not intended that the FAA should be used to ratify or frank debt arrangements that were made some

time ago, for example a merger in which the debt obligation was included in the contractual arrangements. The debt is the debt of the leaving employer and it is therefore important that that employer's consent should be given to the treatment of that debt.

63. In terms of a change of legal status, the requirement of **new regulation 6E(2)** is that all of the conditions of that paragraph must be met. But they do not have to be met simultaneously. Provided that all the conditions are in place on a date, the FAA requirements are met. Thus the leaving employer can give their consent on one date (and that consent will continue to be valid unless withdrawn) and the replacement employer can give their consent on another date.

64. **New regulation 6E(2)(d)** One of the conditions for an FAA to take effect is that the leaving employer must not be in a period of grace within regulation 6A. One respondent was not clear why there was this exclusion. The period of grace applies where an employer temporarily ceases to employ an active member but intends to employ such a member in the future. On the other hand the FAA is for cases where the employer has permanently ceased to employ actives. If an employer is in a period of grace and decides that in fact he does not intend to employ any actives in future, he can give notice to the trustees to end the period of grace under the provisions of **existing regulation 6A(1)(b)**. The debt will then be triggered and can be dealt with under the FAA or one of the other options.

65. **Draft regulation 6E(1)(e)(i)** The draft regulation provided that an FAA could only be used in respect of an employer debt occurring on or after the coming-into-force date of the regulations. A number of respondents suggested that it should be possible to use FAAs in respect of debts that had triggered before that date. The Government accepts these arguments and the provision has been removed from the regulations.

66. **New regulation 6E(2)(e)** The requirements where a part-payment has been made towards an employer debt are set out in **new regulation 6E(5)**. **New regulation 6E(2)(e)** provides that the requirements of **new regulation 6E(5)** must be met where a part-payment has been made. See also **new regulation 6E(2)(b)(i)**.

67. **New regulation 6E(2)(f)** The regulation has been amended to clarify that the scheme must not be in the process of being wound up.

68. **New regulation 6E(2)(g)** This regulation provides that the trustees must be satisfied that an assessment period will not begin in relation to the scheme within the next 12 months. One respondent argued the requirement was unnecessary as the funding test had to be satisfied. The requirement was originally included in **existing regulation 6B** (scheme apportionment arrangements). It arose out of a specific case and the requirement was seen as being an additional safeguard to the funding test. The Government considers it is reasonable to include the same requirement for the FAA.

69. Another respondent asked how the requirement applied in a segregated scheme; that is whether the trustees only needed to consider the requirement in respect of

the specific section of the scheme within which the FAA was intended to be used. The policy is that each section in a segregated scheme should be treated as a scheme in its own right. **Existing regulation 8** makes provision for the treatment of sections in segregated schemes.

70. **New regulation 6E(4)** This regulation provides for circumstances where a single funding test can be used for two or more FAAs. Respondents were concerned that there was no time element specified in the requirement. One respondent commented that the draft regulation did not meet the policy intent as set out in the consultation document, that a single funding test may be used where "a number of employers cease to employ active members of the scheme at broadly the same time"[6] . The regulation has now been amended so that it refers to "the same as or similar to the time".

71. The regulation has also been amended to clarify that the trustees must be satisfied that the funding test would be satisfied if it was carried out again.

72. One respondent wanted to know if the scheme apportionment requirements were to be amended to allow the same flexibility. The Government has no plans to amend the regulations in this way (please see the discussion above about scheme apportionment arrangements).

73. **Draft regulation 6E(5)** In the consultation document, this draft regulation provided that the leaving employer may become the replacement employer following a change of legal status. Following further consideration, it is not now clear that there is a need for a special provision of this kind for FAAs and it has been removed from the regulations. The leaving employer and, in its changed legal status, the replacement employer, should be able to address all of the conditions in the regulation.

74. **New regulation 6E(5)** This is a new regulation about part-payments. Respondents to the consultation wanted the ability to pay an amount to the pension scheme in respect of the employer debt. There are two specific requirements. Firstly the payment must be in addition to any amount required to be paid under the schedule of contributions. Secondly the trustees must make a reduction of the liabilities of the leaving employer. The reduction made to the liabilities must relate to the amount of the payment. Those reduced liabilities will be the liabilities that the replacement employer agrees to take on under the legally enforceable agreement as provided for by **new regulation 6E(2)(b)(i)**.

75. The regulation does not prescribe any methodology by which the trustees are to reduce the liabilities. In the consultation, a couple of methodologies were suggested; both would have imposed extra complications and burdens on schemes and employers. Instead the intention is that trustees, together with the scheme actuary, should develop their own methodology.

[6] Employer Debt (Section 75 of the Pensions Act 1995) Consultation on draft regulations June 2011 - Paragraph 9 on page 10 http://www.dwp.gov.uk/consultations/2011/employment-debt.shtml

76. **New regulation 6E(6)** As a result of a comment by a respondent, a minor amendment has been made to this regulation to make clear that the leaving employer and replacement employer may both be responsible for costs.

77. **New regulation 6E(7)** This regulation defines two terms: "leaving employer" and "replacement employer". In the regulations issued for consultation, the term "relevant time" was also defined in this regulation. In the event, the way the regulations have been developed following the consultation responses means the term is no longer required and it has been removed from the regulations.

78. The issues raised about these definitions are considered in the following paragraphs.

79. **Frozen schemes** A number of respondents suggested that it would be useful if the FAA could be used in frozen schemes, that is, in schemes where there are no active members. Respondents said that the requirement in the draft regulations that the "leaving employer" and "replacement employer" must employ an active member precluded this. Respondents instanced cases where all the employers in a scheme had ceased to employ actives at the same time; they said that in such circumstances an employment-cessation event did not occur. However these employers were then in a limbo situation. They became former employers but could not then gain a discharge from that status under **existing regulation 9**. If the corporate group wanted to dispose of one of these employers, special arrangements often had to be adopted to deal with section 75 obligations. Respondents suggested that it would be better if this issue could be dealt via legislation.

80. In the light of these comments the Government has decided to amend the regulations to assist employers in frozen schemes. **New regulation 6E(1)(b)(iii)** makes provision for the circumstances in which an FAA can take effect in a frozen scheme. Paragraph (c)(ii) of the definition of "leaving employer" has been amended so that it no longer refers to any debt becoming due. In the definition of "replacement employer", paragraph (b)(ii) now allows an employer to be a replacement employer where they lost their last active member and no amount was treated as a debt due to the trustees. **Existing regulation 9** is being amended by **new regulation 11(2)(b)** to provide that a leaving employer in respect of whom an FAA takes effect ceases to be a former employer.

81. **"Relevant event"** Both the definitions of "leaving employer" and "replacement employer" include a condition that they must not have suffered a "relevant event". Some respondents said that the occurrence of a relevant event did not preclude the use of scheme apportionment arrangements and regulated apportionment arrangements and argued that the same flexibility should be extended to FAAs.

82. The policy driver for the development of FAAs is to help corporate groups of companies to deal with employment-cessation events where they are restructuring. Debt events arising out of an employer's insolvency or the winding up of the scheme are qualitatively different. The issue in these cases is the arrangement for the payment of the debt. **Existing regulation 6B** (scheme

apportionment arrangements) and **existing regulation 7A** (regulated apportionment arrangements) make limited provision for the apportionment of amounts of debt where the scheme is winding up or is about to wind up. The FAA however provides for the apportionment of liabilities, not amounts of debt. It is not clear what benefits to the scheme there would be in extending the FAA in this way. Additionally the requirements for the FAA would need to be reviewed to see whether any further safeguards were needed. The Government is therefore not convinced of the need to extend the FAA for use where the employer debt arises as a result of a relevant event.

83. **Ceasing to be a "leaving employer"** There was some discussion by respondents about the point at which the employer leaving the scheme ceased to be a "leaving employer". It was noted there could be a gap between the date the FAA took effect and the date the employer actually ceased to employ any active members of the scheme. The regulations have now been amended so that in all cases the leaving employer must have ceased to employ any active members of the scheme before the FAA can take effect. This is reflected in the amendments made by **new regulation 11** to **existing regulation 9**, which provide that a leaving employer ceases to be a "former employer" when the FAA takes effect.

84. **Terminology - "replacement employer"** In the regulations issued for consultation, the term "staying employer" was used to describe the employer who takes over the liabilities of the leaving employer. This term has now been changed to "replacement employer".

85. **Non-participating bodies** A number of respondents wanted the requirement to be broadened so that the FAA could be used to apportion liabilities to a non-participating body. The requirement in the draft regulations was that a replacement employer must be an employer who employs active members of the scheme. Respondents argued that in a corporate group the parent company would usually be the strongest but may not be an active participant in the pension scheme. Respondents said that allowing a non-participating body to become a replacement employer would enhance the covenant of the pension scheme. It was noted that non-participating bodies could become guarantors under withdrawal arrangements, and respondents suggested there was a read across to FAAs.

86. Extending the FAA requirements to allow liabilities to be apportioned to a non-participating body would pose some difficult issues. Not the least would be how to extend the employer debt requirements so that a debt could be triggered against a body which was not a statutory employer. There is a wider context to this discussion which is that the issue of who should be counted as an "employer" was considered in the *Pilots*[7] case. Now that the appeals have been withdrawn in that case, the Government will have to consider the implications of the judgment for all occupational schemes.

[7] PNPF Trust Company Limited v Taylor and others [2010] EWHC 1573 (Ch).

87. **Multi-employer scheme** The definition of “replacement employer” includes a condition that they are employers in relation to a multi-employer scheme. Some respondents questioned whether this was necessary. In particular a case was cited where there were only two employers in the scheme. If the two employers wanted to enter into an FAA – with one being the leaving employer and the other the replacement employer – there was possibly an issue as to whether the employer remaining in the scheme could be a replacement employer because it would no longer be a multi employer scheme.

88. The requirement in the regulation is that the replacement employer, on the date the FAA takes effect, is an employer in relation to the same multi employer scheme as the leaving employer. This will be the case for most FAAs and so the requirement will be met.

NEW REGULATION 11 [Amendment of regulation 9 of the Employer Debt Regulations]

89. A new paragraph (3)(e) is inserted into **existing regulation 9**, providing for cases in which the former employer is a leaving employer in a frozen scheme in respect of whom a flexible apportionment arrangement has taken effect.

90. The amendments made to **new regulation 11(3)**, which introduces a new paragraph (14B), are consequential on other changes made in the regulations.

NEW REGULATION 13 [Amendment of Schedule 1B to the Employer Debt Regulations]

91. This regulation amends Schedule 1B to the Employer Debt Regulations to provide that where an FAA takes effect it is a notifiable event. This ensures that the Pensions Regulator is made aware of the FAA.

Other issues

Introduction

1. In the consultation, respondents took the opportunity to raise other concerns with Government about the employer debt requirements. These issues are considered in this section.

"Active member"

2. A number of respondents raised concerns about the definition of "active member" contained in section 124 of the Pensions Act 1995. Respondents wanted clarity as to whether "life assurance only" members and deferred members with a final salary link counted as active members for the purposes of the employer debt requirements.

3. The responses were primarily concerned about the interpretation of "active member" in the employer debt requirements. However "active member" is a term used widely throughout pensions legislation. Any amendment would need to take account of knock-on effects elsewhere in legislation. It would not be appropriate to amend the definition of "active member" only in relation to employer debt – that would raise questions about the interpretation of the term elsewhere. An amendment would benefit a relatively small group of employers but for the great majority it would cause uncertainty and extra costs in adviser fees etc.

4. The Government is not therefore minded to amend the definition in these regulations. Schemes and employers have been taking their own legal advice on this issue and, in the Government's view, that would seem to be the best way forward.

"Bridge" case

5. The judgment in the *Bridge* case[8] has now been handed down by the Supreme Court. The case concerns the definition of money purchase benefits. Respondents were aware that the Government was working on legislation to address the impact of the decision and wanted further information on what was planned.

6. Since the consultation finished, the Pensions Act 2011 has received Royal Assent. Section 29 of the Pensions Act 2011 amends the definition of "money purchase benefits". Sections 30 – 33 contain provisions for transitional arrangements and regulation making powers. The Explanatory Notes for the Act contain more information about these provisions.

Non-associated employers

7. A number of issues were raised about the effect of the employer debt requirements on non-associated employers. These are considered in the headings (a) – (c) below.

[8] Bridge Trustees Ltd vs Houldsworth and another.

8. ***(a) Employers in charitable and voluntary sectors*** Some respondents raised concerns about non-associated employers, particularly not-for-profit and charitable employers. These employers would not be assisted by many of the easements available for dealing with an employer debt. Where an employment-cessation event occurred to such an employer the only options were to pay the debt or to use the period of grace. As many of these employers could not pay an employer debt, they had to continue to participate in the scheme in order to avoid one triggering. One respondent suggested that to help these employers, no debt should trigger on ceasing to employ an active member where the employer continued to meet its scheme funding obligations.

9. The Government recognises that some non-associated employers can face problems with an employer debt. The extension to the period of grace, which is provided for by these regulations, was prompted by representations from such a group. However amending the employer debt requirements so that no debt is payable where scheme funding obligations continue to be met would be a much bigger step and would need to be carefully considered. For example, member protection would need to be considered carefully. This would be a change that would go much wider than the subject matter of these regulations and the Government would want to carry out a further consultation.

10. ***(b) "Pilots" case*** A couple of respondents expressed concern about the effect on the UK's ports of the judgment in the *Pilots* case. The judgment was about the employer debt responsibilities of harbour authorities in their role as employers of pilots and self employed pilots. The employers are non-associated employers.

11. Now that the appeals have been withdrawn in the *Pilots* case, the Government will have to consider the implications of the judgment for all occupational schemes.

12. ***(c) "MNOPF"*** Representations were made about the position of non-associated employers participating in the Merchant Navy Officers Pension Scheme and the large amounts of employer debt that could trigger on the occurrence of an employment-cessation event. The respondent argued that as the High Court had decided, in 2005, that all the employers in the scheme, whether or not they employed active members, were liable to fund the scheme, they should be exempted from the employer debt requirements.

13. Introducing special arrangements for a particular named scheme would go well beyond the scope of the consultation on these regulations.

Technical issues

14. A number of comments were made by respondents about technical aspects of the Employer Debt Regulations. These are considered under headings (a) – (b) below.

15. ***(a) Consolidation*** One respondent said that the Employer Debt Regulations were now quite difficult to use because of the number of amendments. They suggested they should be consolidated.

16. The Government accepts that some pensions legislation would benefit from consolidation in due course. However most users of pensions legislation are pensions professionals who will have access to their own online resource materials. In addition the Department for Work and Pensions publishes the "Blue Volumes" which can be accessed by members of the public. The Blue Volumes contain the legislation for which the Department is responsible. The legislation is presented in a consolidated form and is updated regularly. The weblink is http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/pdf/c_0031.pdf

17. ***(b) Technical amendments*** Respondents said there was a need for some technical amendments to be made to the regulations in order to improve the way they worked. A number of these had been flagged up in earlier consultations.

18. In the consultation document, the Government said that its approach was to control and reduce the burden of regulation. As such, a strong case would have to be made for any new regulation, based on costs and benefits. A number of the proposed technical amendments would entail changes in policy. Whilst respondents say the amendments would save money, it is not clear that any savings would outweigh the costs on others of new regulation. For example, as discussed in the chapter "Commentary on regulations", a number of respondents proposed amendments to the requirements for scheme apportionment arrangements. But as noted in the chapter, there are different views on how the arrangements work. Reconciling these different views would be difficult and, for some groups, there would be costs. In these regulations, the focus has therefore been on the flexible apportionment arrangement, to make sure that it delivers what respondents and the pensions industry have said they want.

Wider review

19. Some respondents called for a wider review of the employer debt requirements. One respondent called for the requirements to be focussed on the corporate group, rather than on employers within that group. Another respondent commented that as there were now a large number of options for dealing with an employer debt, they should be reviewed to see if they were all still necessary.

20. There are no immediate plans for a wider review.

Annex A: List of respondents to the consultation

Actuarial Profession
Aon Hewitt
Association of Consulting Actuaries
Association of Pension Lawyers
Baker & McKenzie
Baptist Union of Great Britain
BP
British Steel Pension Scheme
Calmac Pension Fund
Capita Hartshead
CBI
Charity Employers Forum at the Institute of Chartered Accountants of Scotland
Charles Russell LLP
Church of England Pensions Board
Department of Enterprise, Trade and Investment, N. Ireland
Eversheds
Freshfields
Harwich Haven Authority
Herbert Smith LLP
Hogan Lovells LLP
Hymans Robertson LLP
ICAEW
ICI Pension Fund
Irish Continental Group plc
Law Society of Scotland
Linklaters
Lloyds Banking Group
Mercer
Merchant Navy Officers Pension Fund
NAPF
Norton Rose LLP
Orkney Islands Council
Pension Protection Fund
Pensions Management Institute
Pensions Ombudsman
Pensions Regulator
Pensions Trust
Port of London Authority
RPMI
Sackers

SAUL Trustee Company
Society of Pension Consultants
Spence and Partners
Towers Watson
Travers Smith
TUC
Universities Superannuation Pension Scheme Ltd
Wragge & Co LLP

Department for Work and Pensions

December 2011

ISBN 978-1-84947-921-9